IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF BROADCASTERS, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	Case No. 14-1072

NATIONAL ASSOCIATION OF BROADCASTERS' OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

The motion to dismiss by the Federal Communications Commission ("Commission") should be denied because the document entitled *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, Public Notice, 2014 WL 988647 (Mar. 12, 2014) ("Public Notice"), operates as a set of final rules subject to direct judicial review. *See* 47 U.S.C. § 402(a); *see also* 28 U.S.C. § 2342(1). The Commission's insistence that the Public Notice is not "final" is inconsistent with public statements of two Commissioners, the Commission's subsequent indication that it will permit the Public Notice to stand,[1] and the Commission's failure to respond to the repeated requests of the National Association of Broadcasters ("NAB") that the Public Notice be withdrawn. *See* Mot. Exs. A & B.

Because the Public Notice has the legal status of a rulemaking decision, and the Commission has made clear that it will not modify or withdraw it, Section

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[1] *2014 Quadrennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review–Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership in the Broadcasting Industry; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Further Notice of Proposed Rulemaking & Report and Order, FCC No. 14-28, 2014 WL 1466887 (rel. Apr. 15, 2014) ("*April 15 Order*"). A synopsis thereof was published in the Federal Register on May 20, 2014. 79 Fed. Reg. 28996.

155(c)(7)'s exhaustion requirement does not apply. *See* 47 U.S.C. § 155(c)(7). Accordingly, the Public Notice can be reviewed by this Court at this time.

Importantly, NAB's merits arguments will focus on the proposition that the new substantive requirements for the evaluation of certain television broadcast transactions announced in the Public Notice (including a "strict scrutiny" standard of review) constitute *de facto* rules because they are plainly intended to (and do) operate as binding legal norms, and that their adoption thus violated the notice and comment requirement of the Administrative Procedure Act—as two Commissioners observed. *See Statement of FCC Commissioner Ajit Pai on the Media Bureau's New Guidance on Sharing Arrangements and Contingent Interests* (Mar. 12, 2014) ("Pai Statement") (Exhibit A); *Statement of Commissioner Michael O'Rielly on the Media Bureau's New Guidance on Sharing Arrangements and Contingent Interests* (Mar. 12, 2014) ("O'Rielly Statement") (Exhibit B). If NAB's characterization of the Public Notice as a rulemaking is correct, then it has a right to direct review under Section 402(a) *now*. That substantive argument should be fully aired and resolved at the merits stage, not on a motion to dismiss.

Alternatively, if this Court finds that Section 155(c)(7) applies here, it should hold that NAB substantially complied with that requirement by filing two letters with the Commission detailing the defects in the Public Notice.

In either event, this Court possesses jurisdiction to hear this appeal. To the extent there is any doubt about that, the Court should carry the motion to dismiss with the case, as the question whether the Public Notice's new requirements constitute new rules is inextricably intertwined with NAB's merits arguments. Otherwise, NAB would be deprived of judicial review of these requirements absent a member's willingness to refuse to follow the Public Notice and potentially risk an enforcement action; and the Commission would be rewarded for its procedural sleight of hand.

ARGUMENT

This is a unique case, not only with respect to the glaring substantive errors in the Public Notice but due to the procedural irregularities that accompanied and followed the Public Notice's release. The Commission attempts to profit from its own procedural gamesmanship by contending that the Public Notice is not reviewable because NAB failed to exhaust under 47 U.S.C. § 155(c)(7). That is incorrect. This Court should not permit the Commission to benefit from its "administrative law shell game" by shielding from review an order with significant and costly consequences for broadcasters nationwide. *See AT&T v. FCC*, 978 F.2d 727, 731-32 (D.C. Cir. 1992).

A brief chronology of the facts illuminates the point. On March 12, 2014, Commission staff promulgated *de facto* rules governing television station

transactions proposing sharing agreements with contingent interests, absent notice and comment, under the guise of processing guidance adopted "pursuant to [delegated] authority." Public Notice at *3. On the same day this "processing guidance" was announced, two Commissioners issued statements objecting to this action. Less than 30 days later, on April 10, 2014, NAB sent a letter to the Secretary of the Commission and copied all of the individual Commissioners' legal advisors, identifying the substantive and procedural defects in the Public Notice, explaining the immediate harm to NAB's affected members, and asking that it be withdrawn. *See* Mot. Ex. A.

Five days later, the Commission issued an order adopting new rules for certain joint sales agreements ("JSAs"), which are a type of sharing agreement affected by the Public Notice. *See* April 15 Order at *107-08. In that order, the Commission noted that many JSAs include contingent interests, *see id.* at *108, and that the Media Bureau had promulgated the Public Notice to target sharing agreements with contingent interests, *see id.* at *108 n.1048, but that the Commission would *not* issue additional regulations for sharing agreements because it lacked adequate information to formulate sound policy in this area, *id.* at *114 n.1104; *see also id.* at *102-03.

On May 1, 2014, NAB sent a second letter to the Secretary of the Commission detailing the ways in which the Public Notice's defects were

compounded by the Commission's *April 15 Order* and asking that the Commission direct the Media Bureau to withdraw it. *See* Mot. Ex. B. The Commission ignored both of NAB's requests. On May 12, 2014, NAB filed its petition for review in these proceedings.

Despite the Media Bureau's description of the Public Notice as "guidance," it was plainly designed to operate as a set of binding legal norms for the agency and affected broadcasters, and it was impliedly approved by the Commission, as shown by contemporaneous Commissioner statements and the *April 15 Order*. Judicial review is therefore proper at this time under 47 U.S.C. § 402(a).

I. The Public Notice Is A Final Agency Action Subject To Direct Review Under 47 U.S.C. § 402(a)

This Court has jurisdiction over all final orders by the Commission. 47 U.S.C. § 402(a). And once the Commission passes on an action taken by staff, jurisdiction lies in this Court. *See id.*; *see also* 47 U.S.C. § 405(a) (filing of a petition for reconsideration "shall not be a condition precedent to judicial review" where "the Commission, or designated authority within the Commission, has been afforded [an] opportunity to pass"). The Commission had that opportunity and effectively did so here.

In painting the Public Notice as a non-final agency action subject to exhaustion under Section 155(c)(7), the Commission ignores the circumstances of the Public Notice's release and its own subsequent *April 15 Order*, which made

clear that it would permit the Public Notice to stand. Because the Public Notice bears the Commission's imprimatur, it is final agency action, and NAB was not required to exhaust by filing an application for review with the full Commission.

A. The Public Notice Adopts *De Facto* Final Rules

The Public Notice functions as a set of final rules by adopting a new categorical presumption against certain broadcast television transactions involving sharing arrangements and contingent or other financial interests. Public Notice at *2. This presumption operates as a practical prohibition because the Media Bureau stated that it will apply the presumption when considering applications to transfer control or assign licenses between television broadcasters that are parties to sharing arrangements with contingent interests—and that such review will be "closely scrutinize[d]." *Id*. The Public Notice is deliberately designed to discourage sharing agreements with contingent interests and to pressure regulated entities to withdraw pending applications that involve them. *See id.* at *2-3; Mot. Ex. A at 1-2.

In these respects, the Public Notice announces a new policy that directly contradicts other Commission regulations. *Compare, e.g.*, Public Notice at *2 ("[e]nter[ing] into an option, right of first refusal, put/call arrangement, or other similar contingent interest, or a loan guarantee" will trigger stringent review), *with* 47 C.F.R. § 73.3555 Note 2e ("holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of

conversion to voting interests *shall not be attributed unless and until conversion is effected*" (emphasis added)).

In addition to introducing new substantive requirements that sharply deviate from past Commission policies, the Public Notice imposes immediate costs on television broadcasters, who must withdraw existing applications that do not comply with the new regulatory criteria and restructure pending transactions in order to do so (and to forego such arrangements in the future). And the Public Notice achieves this without the safeguards of a formal rulemaking—as two Commissioners observed. *See* Pai Statement; O'Rielly Statement.

Because the Public Notice introduces a new regulatory policy with significant legal consequences for a class of regulated parties, it is properly characterized as a rulemaking decision that should not have been adopted pursuant to the Media Bureau's delegated authority, *see* 47 C.F.R. § 0.283, or without notice and comment, and is subject to direct judicial review under 47 U.S.C. § 402(a). *See, e.g.*, *Sprint Corp v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) ("an amendment to a legislative rule must itself be legislative"); *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93 (D.C. Cir. 1986) (agency's "informal" guidelines were final agency action subject to judicial review). On this understanding of the Public Notice, the exhaustion requirement in Section 155(c)(7) does not apply.

B. The Commission Impliedly Approved The Public Notice

The Commission attempts to avoid this result by arguing that the Public Notice is not reviewable because it was not promulgated or reviewed by the Commission under 47 U.S.C. § 155(c)(7). *See* Mot. at 1. This argument misses the point and obscures Commission actions impliedly approving the Public Notice.

First, the Commissioners clearly had the opportunity to consider the Public Notice, and express their approval or disapproval, at the time of its issuance. On the day the Media Bureau released the Public Notice, Commissioners Pai and O'Rielly issued written statements detailing their objections to the Public Notice's substance and its procedural defects. Commissioner Pai's statement in particular shows that he and his fellow Commissioners had the chance to address this impending action and to ask the Media Bureau specific questions about it before the Public Notice was released.[2] That the three other Commissioners choose not to object demonstrates their approval of the Public Notice and the manner in which it was issued.

The Commission had another opportunity to pass on the Public Notice in its *April 15 Order*. That Order introduced an official new rule for a particular kind of sharing arrangement, providing that certain JSAs will be attributable for purposes

[2] Pai Statement at 1. Commissioner Pai's statement confirms NAB's understanding that Commissioners receive at least 48 hours advance notice of public notices like this.

of applying the Commission's broadcast ownership rules. *See* April 15 Order at *107-08. The Commission also expressly observed that "television JSAs are often executed in conjunction with an option, right of first refusal, put/call arrangement, or other similar contingent interest, or a loan guarantee," and cited the Public Notice, noting that the Media Bureau had released it "'to provide guidance concerning the Bureau's processing of applications seeking Commission approval of proposed transactions that involve combinations of sharing arrangements and contingent or financial interests.'" *Id.* at *108 & n.1048 (quoting and citing Public Notice at *1); *see also id.* at *100 n.997 (noting that 20 of 22 evaluated transactions involving JSAs "included some type of contingent interest agreement").

In the *April 15 Order*, the Commission had ample opportunity to say *something* about the Public Notice, including indicating its disapproval or at least clarifying the Public Notice's non-binding status. In fact, Commissioners Pai and O'Rielly—who objected to the Public Notice—dissented from the *April 15 Order*, while the three Commissioners who allowed the Public Notice to proceed without objection voted to *approve* the *April 15 Order without* revisiting the substance of the Public Notice or addressing NAB's April 10 objections to it. By failing to do so, while at the same time explicitly adopting a separate *de jure* rule that covers other sharing agreements (JSAs), the Commission made clear that the Public

Notice would control the processing of applications involving all sharing agreements with contingent interests and impliedly approved the new requirements announced therein.

The Public Notice has significant legal effects on regulated parties. Because the Commission has made clear—through its actions when the Public Notice was released, its treatment of the Public Notice in the *April 15 Order*, and its failure to respond to NAB's stated objections—that it has no intention of modifying or withdrawing the Public Notice, it is "final" for purposes of judicial review. *See Daniels v. Union Pac. R. Co.*, 530 F.3d 936, 940 n.9 (D.C. Cir. 2008) ("finality refers to the conclusion of activity by the agency") (internal quotation marks omitted); *see also Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (agency action is "final" and reviewable if it "mark[s] the consummation of the agency's decisionmaking process" and is one by which "rights or obligations have been determined," or from which "legal consequences will flow") (internal quotation marks omitted); *FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980) (agency action is final if it is "definitive" and has a "direct and immediate . . . effect on the day-to-day business" of the party challenging it) (internal quotation marks omitted).

In sum, because the various Commission actions described above marked the Public Notice with the agency's imprimatur, NAB was not required to exhaust by filing an application for review under 47 U.S.C. § 155(c)(7). *See* April 15

Order at *108 n.1048. Accordingly, this Court has jurisdiction to review the contents of the Public Notice under 47 U.S.C. § 402(a).

C. Whether The Public Notice Is Reviewable Under 47 U.S.C. § 402(a) Should Be Determined At The Merits Stage

In making jurisdictional determinations, it is well established that this Court may evaluate the underlying agency action on the merits if it finds that such analysis is necessary to determine jurisdiction. In *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546-48 (D.C. Cir. 1958), for example, this Court addressed a pre-enforcement challenge to a 1955 rule that was filed after a 1958 order denying a request to further postpone the effective date of the rule. Because the Court's jurisdiction turned on the validity of the order, which depended on the validity of the underlying rule, the Court held that it could examine the merits of the rule to determine whether the Court had jurisdiction under Section 402(a) or 402(b)—even though the time for direct judicial review of the underlying rule had "long since passed." *Id.* at 546; *see also Amgen, Inc. v. Smith*, 357 F.3d 103, 113 (D.C. Cir. 2004) (where "determination of whether the court has jurisdiction is intertwined" with merits of the petition, "the court must address the merits to the extent necessary" to resolve jurisdiction); *COMSAT Corp. v. FCC*, 114 F.3d 223, 226-27 (D.C. Cir. 1997) (same). Notably, in all of these cases, this Court considered the jurisdictional question at the merits stage, on the fully informed basis of complete briefing and argument.

The same principle applies here. NAB intends to argue that the Public Notice announces final rules, and consequently that it was impermissible for the Commission to pass it off as mere staff guidance, rather than following the statutorily prescribed notice and comment procedures. Pet. at 3. Because Section 155(c)(7)'s exhaustion requirement does not apply to rules reviewable under 47 U.S.C. § 402(a), the question of jurisdiction is "intertwined" with the merits of NAB's argument, and this Court should address these merits questions to the extent necessary to resolve jurisdiction. The alternative would be to accept at face value, on a case-dispositive motion, the Commission's account of the action at issue, an approach this Court has squarely rejected. *See Amgen*, 357 F.3d at 113 (merits inquiry to assess jurisdiction avoids giving agency power to determine availability of judicial review based on characterization of its own action).

Thus, even if this Court were ultimately to find that it lacks jurisdiction based on full consideration of this matter, it would be improper to dismiss NAB's petition before full briefing and argument on the merits. *See, e.g.*, *Ass'n of Am. Physicians & Surgeons, Inc. v. FDA*, 2003 WL 21384604, at *1 (D.C. Cir. May 28, 2003) (deferring resolution of motion to dismiss to merits stage).

II. Insofar As Exhaustion May Have Been Required Under Section 155(c)(7), That Requirement Was Satisfied By NAB's Filings With The Commission

Even if Section 155(c)(7)'s exhaustion requirement applied here, the requirement was satisfied because the Commission had notice and a fair opportunity to consider the Public Notice when it was released, in the *April 15 Order*, and in response to NAB's requests that the Public Notice be withdrawn.

As the Commission concedes, NAB sent two letters to the Secretary of the Commission detailing the Public Notice's substantive and procedural infirmities and asking that it be withdrawn. NAB's April 10, 2014 letter was sent within the thirty-day period for an application for review of the Public Notice. *See* Mot. Ex. A; *see also* 47 C.F.R. § 1.115(d). Although the Commission purports to dismiss NAB's April 10 request on the ground that it requested that the *Bureau* withdraw the Public Notice, Mot. Ex. A at 4, NAB's request was expressly addressed to the Secretary of the Commission, copied all of the Commissioners' legal advisors and carefully set forth the key problems with the Public Notice, *see id.* Ex. A.

NAB's second request was likewise addressed to the Commission and copied all Commissioners. Moreover, it explicitly requested that the *Commission* direct the Bureau to withdraw the Public Notice by May 8, 2014, four days before the window to appeal the Public Notice was set to expire. *See id.* Ex. B; *see also* 47 U.S.C. § 402(a); 28 U.S.C. § 2342. And given that its purpose was to explain

how the *April 15 Order* "compounded" the previously-described problems with the Public Notice, Mot. Ex. B, it could not possibly have been filed on or *before* April 11, *see* Mot. at 5.[3] As the Commission notes in its motion, NAB received no response to these communications.

That these requests did not cite 47 C.F.R. § 1.115 or use the magic words "application for review" is irrelevant. Mot. at 4. To apply such a requirement would exalt form over substance. *See City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1163 (D.C. Cir. 1987) (recognizing "salutary, commonsense notion that the exhaustion doctrine is to be applied flexibly"). Both of NAB's letters functionally complied with the requirements for an application for review, assuming they applied, because NAB stated the issues for reconsideration, explained the bases on which the Public Notice should be withdrawn, stated with particularity the defects in the Public Notice, and asked for a specific form of relief. *See* 47 C.F.R. § 1.115(b)(1)-(4). Furthermore, in sending two requests to the Commission, NAB fulfilled the purpose of the exhaustion requirements by alerting the Commission to defects in the Public Notice and affording the

[3] Thus, this letter "filled in the blanks" of NAB's April 10 letter in light of the substance of the subsequent order. *Youssef v. Holder*, 881 F. Supp. 2d 93, 102-03 (D.D.C. 2012) (party "met [the] minimum threshold" for exhaustion where timely, but incomplete, administrative filing was "clarif[ied]" by subsequent materials submitted outside original filing window). Because the Commission let the Public Notice stand in the *April 15 Order*, and NAB's second communication was written in response thereto, it should not be treated as untimely for purposes of exhaustion.

Commission multiple opportunities to modify or withdraw it. *See Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 681 (D.C. Cir. 1983) (observing that this Court's case law construes a similar statutory exhaustion requirement to require complainants "to give the FCC a fair opportunity to pass on a legal or factual argument" (internal quotation marks omitted)). Moreover, the Commission had a "fair opportunity" to address the deficiencies in the Public Notice when the two objecting Commissioners pointed them out. *Cf. Elec. Power Supply Ass'n v. FERC*, 2014 WL 2142113, at *6 (D.C. Cir. May 23, 2014) (Commission must respond to arguments of dissenting Commissioners). This Court should therefore hold that any exhaustion requirement under Section 155(c)(7) has been satisfied.

III. Even If Exhaustion Were Required, It Would Have Been Futile For NAB To Seek Formal Commission Review

Insofar as this Court is inclined to conclude that Section 155(c)(7) required exhaustion and that NAB's requests for agency action did not satisfy this standard, the Public Notice is reviewable under the futility exception to the exhaustion doctrine because any formal appeal to the Commission would have been futile.

This Court has repeatedly recognized that Congress incorporated "the traditionally recognized exceptions to the exhaustion doctrine," *Globalstar, Inc. v. FCC*, 564 F.3d 476, 484 (D.C. Cir. 2009) (internal quotation marks omitted), in the primary statutory exhaustion requirement in the Communications Act, *see* 47

U.S.C. § 405(a) (requiring petition for reconsideration as "a condition precedent to judicial review . . . where the party seeking such review . . . relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass"); *see also Chadmoore Commc'ns, Inc. v. FCC*, 113 F.3d 235, 239 (D.C. Cir. 1997); *Washington Ass'n for Television and Children*, 712 F.2d at 681-82. Similar provisions in the same statute should be interpreted consistently. *See Citizens to Save Spencer Cnty. v. EPA*, 600 F.2d 844, 870 (D.C. Cir. 1979); *see also Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). Given that this Court has long recognized exceptions to Section 405(a)—and there is no textual indication that Congress intended different results for similar exhaustion provisions—it is appropriate to recognize the same exceptions to Section 155(c)(7).

Among "the traditionally recognized exceptions to the exhaustion doctrine," *Globalstar*, 564 F.3d at 484, a futility exception exists where the petitioner can show that the agency "has left no doubt about its position," *Tribune Co. v. FCC*, 133 F.3d 61, 67 (D.C. Cir. 1998). Here, as explained above, there is no question that the Commission's position has "crystallized," its position is "firmly entrenched," *id.*, and it is "wedded to" the substance of the Public Notice, *Omnipoint Corp. v. FCC*, 78 F.3d 620, 635 (D.C. Cir. 1996); *see also Chadmoore*, 113 F.3d at 239-40 (petitioner was not required to exhaust under a statutory

provision in the Communications Act because the Commission's statements in a subsequent rule made clear that reconsideration would have been futile).[4] In light of the Commission's unwavering position on the Public Notice, any formal application for review would have been *pro forma*, *see Etelson v. Office of Personnel Mgmt.*, 684 F.2d 918, 925 (D.C. Cir. 1982), and requiring one would (especially given the lack of any deadline for Commission action on such applications) effectively preclude judicial review of the Public Notice.

Even under Section 155(c)(7), "exceptional circumstances" "might warrant application of [an] exception to the requirement that [a petitioner] exhaust available administrative remedies." *White v. FCC*, 1993 WL 460028, at *1 (D.C. Cir. Oct. 27, 1993). Indeed, a case cited by the Commission, *see* Mot. at 6, confirms that this Court will consider exceptions to exhaustion under Section 155(c)(7). *See Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302, 1304 (D.C. Cir. 1997) (petitioner "present[ed] no valid reason" why failure "to exhaust his administrative remedies . . . should be excused"); *see also Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 89 (2d Cir. 2000) (exhaustion requirement in

[4] The Commission's current litigation position only reinforces the point. In maintaining that the time for seeking further administrative review of the Public Notice is expired, and making no indication that the Commission might reconsider the Public Notice in any way, the Commission's Motion erases any doubt that the Public Notice has hardened into binding law.

Section 155(c)(7) not "inflexible").[5]

Because it would have been futile for NAB to file a formal application for Commission review, this Court has jurisdiction to review the Public Notice now.

IV. Acceptance Of The Commission's Theory Of The Public Notice Would Allow The Commission To Evade Judicial Review

This Court has admonished the Commission for attempting to "avoid judicial review" through "a sort of administrative law shell game." *AT&T*, 978 F.2d at 731-32; *see also MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001) (noting that Commission action reflected an interest "in results, not process" and the Commission's "long history" of "raised eyebrow regulation" (citations and internal quotation marks omitted)). The Public Notice involves precisely that kind of procedural gamesmanship. By introducing new rules via the Media Bureau, bypassing notice and comment, and then claiming that the rules are

[5] *Spinelli v. Goss*, 446 F.3d 159 (D.C. Cir. 2006), *see* Mot. at 6, is not to the contrary. *Spinelli* did not involve Section 155 or any other provision of the Communications Act but rather a statute limiting judicial review "to employees 'aggrieved by the final disposition' of their administrative 'complaint.'" *Id.* at 162 (quoting 29 U.S.C. § 794a(a)(1)). There, the only type of agency order properly subject to review *would not exist* where a party failed to pursue administrative remedies—making this Court's conclusion that it could not make "exceptions" to such a statute both unsurprising and irrelevant here. Similarly, *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001), is inapposite because it addressed the exhaustion requirements of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). The Court explicitly limited its holding to the PLRA, and premised its refusal to recognize a futility exception on the fact that the legislative history of the PLRA contained affirmative evidence that Congress did not intend for the traditional exhaustion exceptions to apply. 532 U.S. at 739, 741 n.6.

not final agency action and thus not reviewable, the Public Notice reflects a particularly egregious misuse of process and violation of the Commission's internal regulations concerning delegated authority. *See* Pai Statement at 1-2.

This highly irregular process also resulted in an incoherent substantive regulatory scheme for shared service agreements. The Public Notice "does not cite any Commission (or even Bureau) precedent" and contains no analysis or record support for its professed concerns about sharing arrangements. *Id.* at 1. To the contrary, while it acknowledges that the Commission has "asked a number of questions" about the potential implications of such agreements, Public Notice at *1, those questions *have not yet been answered*. In fact, the *April 15 Order* concludes that the agency *lacks sufficient information* even to propose regulations for shared service agreements generally. *See* April 15 Order at *102-03.

Because of the Public Notice's serious defects and practical effects, judicial review at this time is critical. The Commission's proposed alternative—that individual broadcasters wait to file as-applied challenges relating to specific applications (*see* Mot. at 6 n.1)—is illusory. The Public Notice exerts pressure on broadcasters to withdraw pending applications and restructure existing and future station transactions. *Cf.* Public Notice at *2 ("applicants must submit all . . . documentation . . . relevant to the Commission's review . . . as described in this Public Notice" or "consideration of the application will be delayed"). As this

Court has explained, it would "be flatly imprudent [for a regulated entity] to ignore any one of the factors it knows may trigger intense review." *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353 (D.C. Cir. 1998). Not only are broadcasters forced to comply with these unlawful new standards, but modifying pending applications and restructuring agreements creates additional, independently cognizable harm. The only alternative is to refuse to comply with the Public Notice and invite denial of an application or, worse, an enforcement action—an extreme scenario that broadcasters should not have to undertake to hold the Commission accountable.

Refusing to call a spade a spade—or in this case, a final rule a final rule—cannot change reality. The Public Notice is an administrative sleight of hand that subjects covered parties to new rules with important and costly legal consequences, rules that the agency has impliedly approved by acknowledging them in the *April 15 Order* and repeatedly making clear it has no intention of withdrawing or changing them. This Court should address NAB's challenge on the merits pursuant to 47 U.S.C. § 402(a).

CONCLUSION

For the foregoing reasons, NAB respectfully requests that this Court deny the Commission's Motion to Dismiss or, in the alternative, carry the motion to dismiss with the case.

Dated: June 12, 2014

Respectfully submitted,

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EXHIBIT A

NEWS

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TTY: (888) 835-5322

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action.
***See MCI v. FCC*, 515 F.2d 385 (D.C. Cir. 1974).**

FOR IMMEDIATE RELEASE
March 12, 2014

CONTACT:
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STATEMENT OF FCC COMMISSIONER AJIT PAI
ON THE MEDIA BUREAU'S NEW GUIDANCE
ON SHARING ARRANGEMENTS AND CONTINGENT INTERESTS

Today, the Media Bureau warns broadcasters that it "will closely scrutinize" any transaction that involves both a sharing agreement and a contingent financial interest.[1] When I objected, I was told that the Public Notice merely clarified existing Commission policy. It does not.

How so? The Public Notice does not cite any Commission (or even Bureau) precedent involving both a sharing agreement and a contingent financial interest. And for good reason. In response to a request from my office, the Bureau was unable to cite any order where the Commission or the Bureau denied a license transfer because the transaction involved both a sharing agreement and a contingent financial interest. To the contrary, the Bureau has issued numerous orders approving such transfers. Indeed, just three months ago, the Bureau explained: "The Commission has approved applications for consent to television station transactions involving a combination of joint sales agreements, other types of shared services agreements, options, and similar contingent interests and guarantees of third-party debt financing, and has found these cooperative arrangements not to rise to the level of an attributable interest."[2] It is impossible to square what was said then with what is being said now.

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[1] *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, Public Notice, DA 14-330, at 2 (Med. Bur. Mar. 12, 2014).

[2] *Applications for Consent to Transfer of Control from Shareholders of Belo Corp. to Gannett Co., Inc., Applications For Consent to Assignment of Licenses from Subsidiaries of Belo Corp. to Subsidiaries of Sander Media, LLC and Tucker Operating Co., LLC*, MB Docket No. 13-189, File Nos. BTCCDT - 20130619AAY *et seq.*, Memorandum Opinion and Order, 28 FCC Rcd 16867, 16878, para. 27 (Med. Bur. Dec. 20, 2013); *see also, e.g.*, *Applications of Local TV Holdings, LLC, Transferor & Tribune Broad. Co. II, LLC, Transferee & Dreamcatcher Broad., LLC, Transferee For Consent to Transfer of Control of Certain Licensee Subsidiaries of Local TV Holdings, LLC*, MB Docket No. 13-190, File Nos. BTCCDT-20130715AER *et al.*, File Nos. BTCCDT-20130715AGP *et al.*, Memorandum Opinion and Order, 28 FCC Rcd 16850, 16857, para. 17 (Med. Bur. 2013) (noting, where a shared service agreement (SSA), lease, and option were at issue, that the agreements were "fully compliant with our precedent and [did] not implicate our attribution rules"); *J. Stewart Bryan III & Media Gen. Commc'ns Holdings, LLC (Transferor), Shareholders of New Young Broadcasting Holding Company, Inc., and Its Subsidiaries (Transferor) and Post-Merger Shareholders of Media General, Inc. (Transferee) For Consent to Transfer Control of Licenses*, MB Docket No. 13-191, File No. BTCCDT-20130703ABQ *et al.*, Memorandum Opinion and Order, 28 FCC Rcd 15509 (Med. Bur. 2013) (approving transfer where SSA, joint sales agreement (JSA), and loan guarantee were at issue); *Saga Broad., LLC c/o Gary S. Smithwick, Esq. H3 Commc'ns, LLC c/o David Tillotson, Esq.*, File No. BALCDT - 20120501ACQ, Facility ID No. 25236, Letter, 28 FCC Rcd 399 (Med. Bur. 2013) (approving transfer where SSA and loan guarantee were at issue); *Sagamorehill of Corpus Christi Licenses, LLC c/o Todd Stansbury, Esq. Eagle Creek Broad. of Corpus Christi, LLC c/o Dennis Corbett, Esq. Channel 3 of Corpus Christi,*

So make no mistake about it: Today's Public Notice announces a new policy. This abuse of delegated authority is all the more unfortunate because it is entirely unnecessary. At our March 31 meeting, the Commission will vote on an item addressing sharing agreements. If the majority of the Commission wanted to turn the screws still further on broadcasters, the substance of today's Public Notice easily could have been included in that item. Instead, our policy has been changed without a Commission vote. That's not the way we should do business.

Inc. c/o Robert B. Jacobi, Esq., File No. BALCT-20080730AKQ, Letter, 25 FCC Rcd 2809 (Med. Bur. 2010) (approving transfer where SSA, JSA, option, studio lease, and loan guarantee were at issue); *Piedmont Television of Springfield License LLC c/o Joseph Di Scipio, Esq., Perkin Media, LLC c/o Dawn M. Sciarrino, Esq., EBC Harrison, Inc. c/o Peter Tannenwald, Esq., Koplar Communications International, Inc. c/o Charles R. Naftalin*, Letter, 22 FCC Rcd 13910 (Med. Bur. 2007) (approving transfer where SSA, JSA, option, studio lease, loan guarantee, and sale of non-license assets were at issue); *Chelsey Broad. Co. of Youngstown, LLC c/o William Fitz, Esq. Parkin Broad. of Youngstown License, LLC c/o Howard M. Liberman, Esq. Elizabeth A. Hammond, Esq. Paula M. Olson*, File No. BALCT-20070205ACH, Letter, 22 FCC Rcd 13905 (Med. Bur. 2007) (approving transfer where SSA, option, and loan guarantee were at issue); *Malara Broad. Grp. of Duluth Licensee LLC c/o Stuart A Shorenstein, Esq., NVG-Duluth II, LLC c/o Elizabeth Hammond, Esq., KQDS Acquisition Corp & WDIO-TV, LLC c/o Marvin Rosenberg, Esq.*, File No. BALCT-20040504ABU, Letter, 19 FCC Rcd 24070 (Med. Bur. 2004) (approving transfer where SSA, JSA, option, lease, and loan guarantee were at issue).

EXHIBIT B

NEWS

Federal Communications Commission
445 12th Street, S.W.
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News Media Information 202 / 418-0500
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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action.
See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).

FOR IMMEDIATE RELEASE:
March 12, 2014

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Statement of Commissioner Michael O'Rielly
on the Media Bureau's New Guidance on
Sharing Arrangements and Contingent Interests

Washington, D.C. – Commissioner Michael O'Rielly issued the following statement today:

"I must disagree with the Media Bureau's Public Notice issued today on both process and substance. On process, the item appears to set forth a new policy and, therefore, should have been voted by the Commission, rather than on delegated authority. Moreover, the issue of delegation is a recurring and troubling one. On substance, this guidance presupposes the media ownership item to be voted later this month and may deter future transactions that could increase local news and other beneficial diverse programming for communities."

-FCC-

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2014, I caused a copy of the foregoing Opposition to the Motion to Dismiss by the Federal Communications Commission to be filed with the Clerk of the Court via the Court's CM/ECF filing system. I further certify that service was accomplished on the parties listed below via the Court's CM/ECF system.

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