**Written Statement of William T. Lake**
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**Before the Committee on Energy and Commerce**
**Subcommittee on Communications and Technology**
**U.S. House of Representatives**

**Hearing on Media Ownership in the 21st Century**

**June 11, 2014**

## INTRODUCTION

Good morning Chairman Walden, Ranking Member Eshoo, and Members of the Subcommittee. My name is Bill Lake, and I am Chief of the Media Bureau at the Federal Communications Commission. I am pleased to appear before you today to discuss the Commission's recent actions regarding our broadcast ownership rules.

My testimony today will briefly discuss the actions the Commission took at its March Open Meeting. I will also provide additional context for the guidance that the Media Bureau recently provided to the broadcasting industry regarding how the Bureau will review license transfer applications that involve complex sharing and financial agreements between competing stations.

### 2014 Quadrennial Review Further Notice of Proposed Rulemaking

As you know, the Commission regularly examines its media ownership rules as required by Section 202(h) of the Telecommunications Act of 1996 to determine if they remain necessary in the public interest as the result of competition. On March 31, 2014, the Commission adopted a *Further Notice of Proposed Rulemaking* initiating the 2014 proceeding, building on the record of the ongoing 2010 proceeding.[1]

I recognize that some observers – including some members of the Subcommittee – are concerned that the Commission has yet to complete the 2010 Quadrennial Review. As noted by Chairman Wheeler in March, the inability of the Commission to complete the 2010 review was not due to a lack of effort – the Commission began the proceeding early, in November 2009, an extensive record was compiled, and a proposed order was circulated in 2012, which remained before the Commission for over a year but failed to receive a majority.[2] The *Further Notice* will enable all stakeholders and the public to supplement the record with information about the marketplace realities in 2014, and how these rules serve the public interest. The Chairman has committed to completing both reviews by June 30, 2016.[3]

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[1] *Further Notice of Proposed Rule Making and Report and Order*, MB Docket No. 14-50, FCC 14-28 (adopted Mar. 31, 2014; rel. Apr. 15, 2014).

[2] *See* Statement of Chairman Tom Wheeler, *Broadcast Media Ownership, Diversity and Joint Sales Agreements*, MB Docket Nos. 14-50, 09-182, 07-294, 04-256 (March 31, 2014) at 2.

[3] *Id.*

The *Further Notice* tentatively affirms that media ownership limits remain necessary in the current marketplace despite the prevalence of new electronic media. It acknowledges that the media marketplace is in transition, particularly as a result of broadband Internet. However, it recognizes the vital role that traditional outlets play in the media industry and notes that tens of millions of Americans still do not have broadband access to news and other programming on the Internet.

The *Further Notice* analyzes each media ownership rule individually. Below I briefly describe the specific proposals, as well as other issues raised concerning Shared Services Agreements (SSAs) and the Commission's Diversity proceeding.

Local TV Ownership Rule

The local TV ownership rule limits the number of TV stations an entity can own in a local market – to one in many markets, or two if certain conditions are met. The Commission proposes to retain the existing rule, tentatively concluding that the rule promotes competition and also comports with the Commission's goals of promoting viewpoint diversity, localism, and minority and female ownership.

The proposed rule would allow an entity to own up to two TV stations in the same market if: (1) the digital noise limited service contours of the stations do not overlap; or (2) where there is overlap, at least one of the stations is not ranked among the top-four TV stations in the market and at least eight independently owned TV stations would remain in the market following the combination.

The *Further Notice* proposes to substitute the digital noise limited service contour in place of the analog Grade B contour that was used to delimit a station's service area before the transition to digital TV. It also proposes to retain the provision allowing a waiver for a failed or failing station and asks whether additional waiver criteria should be added.

Local Radio Ownership Rule

The local radio ownership rule specifies the maximum number of commercial radio stations that one entity may own in a market, depending on the size of the market. It also contains separate limits on the total numbers of AM stations and of FM stations that an entity may own in a market.

The Commission proposes to retain the rule without change. It tentatively concludes that the rule promotes competition and also comports with the Commission's goals of promoting viewpoint diversity, localism, and minority and female ownership.

Newspaper/Broadcast Cross-Ownership Rule

The newspaper/broadcast cross-ownership rule prohibits the common ownership of a newspaper and either a television station or a radio station when the coverage area of the station encompasses the newspaper's city of publication.

Consistent with Commission findings in prior proceedings, the *Further Notice* tentatively concludes that a restriction on cross-ownership should be retained to promote viewpoint diversity in local markets. However, consistent with previous Commission holdings upheld by the Third Circuit Court of Appeals, it tentatively finds that the total ban on all newspaper/broadcast cross-ownership is overly broad.

The *Further Notice* seeks comment on whether the part of the rule prohibiting cross-ownership of a newspaper with a radio station should be eliminated. Because viewpoint diversity has been the sole justification for restricting newspaper/radio combinations, and because the record indicates that radio is

not a major source of local news and information, the *Further Notice* seeks comment on whether there is a sufficient basis to support retention of the prohibition.

The *Further Notice* tentatively concludes that the Commission should continue to ban combinations of newspapers and TV stations. It proposes to update the restriction to account for the digital TV transition. Instead of using a TV station's analog Grade A contour to determine the geographic scope of the ban, the *Further Notice* proposes to prohibit common ownership when the newspaper and the TV station are in the same market and the digital principal community contour of the TV station encompasses the community in which the newspaper is published.

The Commission seeks comment on whether to incorporate waiver standards into the rule. The Commission could consider waiver requests on a purely case-by-case basis or create a presumptive waiver standard that could, for example, favor newspaper/television combinations in the top 20 DMAs if the TV station is not ranked among the top four TV stations in the DMA and at least eight independently owned and operated major media voices would remain.

Radio/Television Cross-Ownership Rule

The radio/television cross-ownership rule limits the total combined number of TV and radio stations that can be commonly owned in a market. The *Further Notice* asks whether the rule continues to be necessary to promote viewpoint diversity, again because radio does not appear to be a major source of local news and information. The *Further Notice* also asks whether the rule provides meaningful additional restrictions on consolidation given the restrictions contained in the local television and radio rules separately.

Dual Network Rule

The dual network rule prohibits common ownership of two of the top-four broadcast networks, namely ABC, CBS, NBC, and Fox. The Commission proposes to retain the rule without change.

Shared Services Agreements

In addition to the proposals on existing media ownership rules, as part of the *Further Notice*, the Commission sought to improve its understanding of – and increase transparency surrounding – the sharing of services between independently owned TV stations. While the Commission understands that SSAs can encompass the sharing of a wide range of resources – such as studio facilities, news helicopters, or back office functions – the agreements are not currently required to be disclosed to the Commission or the public.

The lack of information regarding SSAs makes it difficult for the Commission to know what impact these agreements may have on the Commission's policies. We address this need by proposing adoption of (1) a broad definition of SSAs to identify all types of resource sharing and service agreements; and (2) a requirement that SSAs be disclosed, in order to better inform the Commission and the public. The *Further Notice* invites comment on the proposed definition and whether and how best to disclose SSAs.

Diversity

The final piece of the *Further Notice* addresses diversity issues. The Commission has a longstanding goal of promoting diversity in broadcast ownership, including by minorities and women. In 2008, the Commission adopted rules to promote diversity. The Third Circuit Court of Appeals vacated

those rules, holding that the Commission had not shown a nexus between the revenue-based eligible entity definition that it adopted and increasing minority and female ownership. After the decision, the Commission suspended the rules and sought comment on whether to reinstate the eligible entity definition or adopt a different definition. The *Further Notice* tentatively recommends reinstating the revenue-based eligible entity definition, on the basis that the rules that afford favorable regulatory treatment based on that definition would support new entry into the broadcast industry by small businesses.

Additionally, pursuant to the Third Circuit's direction, the *Further Notice* seeks additional comment on whether the Commission can or should adopt race- or gender-conscious eligibility classifications. The *Further Notice* discusses the high constitutional threshold for such classifications, and it tentatively concludes that promoting viewpoint diversity is a compelling government interest. But it also tentatively concludes that the current record does not satisfy the prevailing legal standard for adopting a racial or gender classification.

**Report and Order on Television Joint Sales Agreements**

Along with the *Further Notice* discussed above, the Commission also adopted at the March meeting a *Report and Order* regarding TV Joint Sales Agreements (JSAs). JSAs are another type of agreement between stations, but – unlike SSAs – they are well-known to the Commission (JSAs are required to be placed in a station's public file.) A JSA is an agreement under which one station sells advertising time on behalf of another station. The Commission has long recognized its duty to identify those interests that give holders a realistic potential to unduly influence or control programming decisions or other core operations of the licensee. Where the Commission finds such potential influence or control, it "attributes" the interest, which means that the interest is treated as ownership for purposes of the Commission's media ownership rules.

The Commission reached a tentative conclusion in 2004 that it should attribute same-market TV JSAs that encompass more than 15 percent of a station's advertising sales, just as it had done in 2003 with respect to radio JSAs. It sought additional comment on possible attribution of TV JSAs, among other issues, in the 2010 Quadrennial Review. Based on the record developed, and in light of the growing prevalence of TV JSAs – virtually always for 100 percent of advertising sales – in transactions submitted to the Commission for review and approval, the Commission concluded that it should act on the proposal it had made in 2004 to attribute TV JSAs on the same basis as radio JSAs.

Accordingly, the Commission adopted new rules to treat a TV JSA involving competing stations in the same market as an ownership interest where 15 percent or more of the weekly advertising time of one station is sold by the competing station. It adopted the same 15 percent threshold that is included in the existing radio JSA attribution rules, which provides stations with the ability to achieve cost savings while limiting the brokering station's potential to exert undue influence over the other station. As it did when adopting the radio JSA rule, the Commission provided a two-year transition period starting from the effective date of the rule for parties to amend or terminate any JSAs that would result in a violation of the local TV ownership rule.

Recognizing that there may be some circumstances in which an attributable JSA may be in the public interest, the Commission adopted an expedited process to review requests for waivers. The Media Bureau is tasked with acting on any waiver request within 90 days of the close of the record, provided there are no circumstances requiring additional time for review. I understand that the full Energy and Commerce Committee has favorably reported a STELA Reauthorization bill (H.R. 4572) that would establish a special filing window for the filing of JSA waivers that would provide additional unwinding time, if a waiver was denied by the Commission.

The *Report and Order* was published in the Federal Register on May 20, 2014, making the new TV JSA rules effective on June 19, 2014. The comment periods for the issues raised in the *Further Notice* are currently open, with comments due July 7, 2014, and reply comments due August 4, 2014. I note that several parties filed Petitions for Review and one filed a Petition for a Writ of Mandamus challenging the *Further Notice* and the *Report and Order* in May 2014.[4]

**Processing Guidance Public Notice**

On March 12, 2014, the Media Bureau released a *Public Notice* to provide guidance to the broadcast TV industry on how the Bureau will process pending and future proposed license transfer applications. The Bureau's objective in releasing the *Public Notice* was to provide greater transparency to the industry about concerns that had come to the fore in the Bureau's review of transactions involving combinations of complex sharing and financial arrangements between competing stations.

The Communications Act charges the Commission with the responsibility to determine whether transactions involving assignment or transfer of TV licenses are in the public interest. To carry out that responsibility requires consideration of the full economic effects of a proposed transaction, as the Bureau explicitly reminded the industry in its decision approving the Gannett/Belo transaction in late 2013. The Order stressed that

> Congress' express statutory command is that license transfers must satisfy the 'public interest, convenience, and necessity,' a standard that is always informed by regulatory standards, but which necessarily involves, as our licensing decisions have long noted, the use of a "case-by-case" approach …. [A]pplicants and interested parties should not forget that our public interest mandate encompasses giving careful attention to the economic effects of, and incentives created by, a proposed transaction taken as a whole and its consistency with the Commission's policies under the Act, including our policies in favor of competition, diversity, and localism.[5]

Transactions presented to the Commission for review in recent years have increasingly featured complex combinations of sharing arrangements – including JSAs and SSAs – together with financial ties such as options and loan guarantees linking stations that are asserted to be separately owned. Determining the full economic effects of these complex arrangements requires careful analysis, including review of the agreements and financial documents, to determine whether the arrangements together give one station an undue degree of operational and financial influence over another. The Bureau released the *Public Notice* to apprise industry participants of the fact that review of transactions involving such complex arrangements between competing stations would necessarily be more intensive and potentially more time consuming. As I stated in March when the *Public Notice* was released, parties to future transactions may find that knowledge useful in considering the structure of future deals or the possibility of amendments to pending transactions.[6]

The Bureau continues to review and process all transaction applications before it. Since mid-March, we have granted the sale of 36 full-power stations, representing 12 different deals. Additionally, I

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[4] *Prometheus Radio Project v. FCC*, No. 14-2814 (3rd Cir., filed May 22, 2014); *Howard Stirk Holdings, LLC v. FCC*, No. 14-1090 (D.C. Cir., filed May 30, 2014); *Nexstar Broadcasting, Inc., v. FCC*, No. 14-1091 (D.C. Cir., filed May 30, 2014); *National Association of Broadcasters v. FCC*, No. 14-1092 (D.C. Cir., filed May 30, 2014).

[5] *Shareholders of Belo Corp.*, Memorandum Opinion and Order, DA 13-2423 (MB rel. Dec. 20, 2013), at ¶¶ 29, 30.

[6] *See Statement of William Lake, Chief, Media Bureau on Processing Guidance for Future Proposed Broadcast TV Transactions*, March 12, 2014.

note that the National Association of Broadcasters filed a Petition for Review in the Court of Appeals for the D.C. Circuit on May 12, 2014,[7] and the Commission recently filed its Motion to Dismiss the NAB petition.[8]

**CONCLUSION**

I hope that this statement provides some helpful context for the recent actions by the Commission and the Media Bureau regarding the media ownership rules and the processing of applications for assignment or transfer of TV licenses. Again, thank you for the opportunity to be here today. I will be happy to take any questions you may have.

[7] *National Association of Broadcasters v. FCC*, No. 14-1072 (D.C. Cir., filed May 12, 2014).

[8] Respondent's Motion to Dismiss, *National Association of Broadcasters v. FCC*, No. 14-1072 (D.C. Cir., filed May 30, 2014).