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 Case No. 14-1092 (and consolidated cases)

NATIONAL ASSOCIATION OF BROADCASTERS' OPPOSITION TO CONTINGENT MOTION TO CONSOLIDATE

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INTRODUCTION

The "contingent" motion to consolidate Case Nos. 14-1072 and 14-1092 by would-be intervenors Prometheus Radio Project, Office of Communication, Inc. of the United Church of Christ, National Association of Broadcast Employees and Technicians—Communications Workers of America, National Organization for Women Foundation, Media Alliance, Media Council Hawaii, Common Cause, Benton Foundation, and Free Press (collectively, "Prometheus et al." or "Movants") should be dismissed because it is procedurally improper and seeks consolidation of separate challenges to two different actions by the Federal Communications Commission ("Commission").

The motion, which is *explicitly* conditioned on the outcome of the Commission's pending motion to dismiss Case No. 14-1072, is facially premature and procedurally improper because this Court has not yet ruled on the motion to dismiss or even decided Movants' pending motion to intervene in that case. Moreover, the motion for consolidation lacks any valid basis for joining these two actions because they arose from separate agency proceedings, are based on different agency records, and involve distinct legal issues. The fact that the cases involve some of "the same parties," Mot. 2, is an insufficient basis for consolidation in the context of a challenge to agency action by an industry trade association, which may frequently find itself a party to litigation with its regulator

on different topics in different cases. Finally, the motion is a transparent attempt by Movants to use the consolidation process to subvert the right of the National Association of Broadcasters ("NAB") to the forum of its choice by attempting to merge NAB's challenge in Case No. 14-1072 with a different challenge in Case No. 14-1092, for purposes of transferring those consolidated actions to the Third Circuit, as Movants candidly admit they hope to do. For all of these reasons, the motion should be denied.

ARGUMENT

Movants ask this Court to consolidate two challenges to recent—but separate—decisions of the Commission. In the first action, Case No. 14-1072 (the "Public Notice Challenge"), NAB petitioned this Court for review of a Public Notice that adopts a categorical presumption against certain broadcast television transactions involving sharing arrangements and other contingent or other financial interests.[1] *See* Pet. for Review (No. 14-1072). NAB's challenge is based on the Commission's failure to comply with the notice and comment requirements attendant to rulemakings, the absence of substantiating evidence and reasoned explanation for the *Public Notice*'s new legal requirements, the *Public Notice*'s

[1] *Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests*, Public Notice, 2014 WL 988647 (Mar. 12, 2014) ("*Public Notice*").

departure from past Commission practice *sub silentio*, and the Media Bureau's abuse of delegated authority under 47 C.F.R. § 0.283. *Id.* at 3-4.

In the second action, Case No. 14-1092 (the "April 15 Order Challenge"), NAB filed one of four petitions for review of a Commission order released on April 15, 2014—a month after the *Public Notice* was released—in response to the Commission's statutorily required quadrennial review of its broadcast ownership rules.[2] NAB and the other petitioners challenged myriad aspects of the Commission's 200-plus page order, including, *inter alia*, the Commission's failure to comply with the command in Section 202(h) of the Telecommunications Act of 1996 to "determine whether [its broadcast ownership rules] are necessary in the public interest as the result of competition," and "repeal or modify any regulation it determines" is not, Pub. L. No. 104-104, § 202(h), 110 Stat. 111-12; and the Commission's promulgation of a new rule providing that television joint sales agreements ("JSAs") for more than 15% of a television station's weekly

[2] *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; Rule and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Further Notice of Proposed Rulemaking and Order, FCC No. 14-28, 2014 WL 1466887 (rel. Apr. 15, 2014) ("*April 15 Order*"); *see also* 79 Fed. Reg. 28996 (May 20, 2014).

advertising time will be attributable for purposes of applying the Commission's broadcast ownership rules. The petitions for review were consolidated in this Court after it was selected in a lottery pursuant to 28 U.S.C. § 2112(a)(3). *See* Consolidation Order, *In re 2014 Quadrennial Regulatory Review*, MCP No. 122 (J.P.M.L. June 4, 2014).

Prometheus et al. now move this Court to consolidate the Public Notice Challenge and April 15 Order Challenge, alleging that these actions involve the same parties, stem from the same factual background, and raise similar and related legal issues. The motion to consolidate is premature, procedurally improper, and ignores several salient distinctions between the two actions. First, the motion is procedurally deficient because it is expressly "contingent" on this Court's disposition of the Commission's pending motion to dismiss Case No. 14-1072—an action to which the Movants are not even parties. Second, there are significant differences in the actions' procedural histories, administrative records, and the issues and claims raised that make clear they are separate appeals not suitable for consolidated review. Finally, and with all respect, this motion should be denied because it is a transparent attempt at venue gamesmanship designed to deprive NAB of its choice of forum in the Public Notice Challenge. Movants would like to consolidate these cases so that they can try to take the Public Notice Challenge with them to the Third Circuit in the event they are ultimately able to convince this

Court to transfer the April 15 Order Challenge to that circuit. That is not what the consolidation procedure is for.

I. Movants' Contingent Motion To Consolidate Is Procedurally Improper.

The motion to consolidate should be dismissed because it is procedurally improper and premature. As a preliminary matter, Prometheus et al. are not, as they insist, "parties to all proceedings" that they seek to consolidate. Mot. 9. Although they have moved to intervene in the Public Notice Challenge, *see* Mot. for Leave to Intervene (No. 14-1072), this Court has not yet granted that motion. *Cf.* United States Court of Appeals for the District of Columbia Circuit, Handbook of Practice & Internal Procedures pt. V.A, at 23 ("Handbook of Practice & Internal Procedures") (consolidation appropriate "on motion of the *parties*") (emphasis added); *see also White v. Texas Am. Bank/Galleria, N.A.*, 958 F.2d 80, 83 (5th Cir. 1992) (where motion for intervention had not yet been granted, movant was not yet party to suit).[3]

Moreover, the motion to consolidate is procedurally infirm because it is self-consciously "contingent" on this Court's disposition of the Commission's pending motion to dismiss the Public Notice Challenge. *See* Mot. 1-2 (seeking consolidation only "*in the event that this Court does not dismiss* No. 14-1072")

[3] Indeed, it is unclear whether Prometheus et al. have established the elements of Article III standing necessary for intervention, as they are not (and do not claim to be) parties to any application covered by the *Public Notice*.

(emphasis added). As discussed below, there would be no gain in judicial efficiency by joining the discrete Public Notice Challenge with the multi-faceted, multi-party, complex April 15 Order Challenge. And this is especially true if this Court were to consolidate the actions before resolving the Commission's potentially case-dispositive motion: If the motion to dismiss were granted, the Court would then have to vacate any previously entered consolidation order. *See, e.g.*, *Williams Field Servs. Grp. Inc. v. FERC*, 1998 WL 704383, at *1 (D.C. Cir. Sept. 15, 1998); *Sprint Commc'ns, L.P. v. Cox Commc'ns, Inc.*, 2012 WL 1825222, at *1 (D. Kan. May 18, 2012) ("Due to the pending motions to dismiss and transfer in this case, the Court finds that judicial economy would not be served by consolidation at this time . . . .").

If this Court does not dismiss the instant motion as procedurally improper, it should, at a minimum, hold the motion in abeyance pending resolution of the motion to dismiss. Although NAB strongly opposes dismissal of the Public Notice Challenge, it recognizes that such action would render the consolidation motion moot. *See, e.g.*, *Cal. Elec. Oversight Bd. v. FERC*, 2003 WL 1527826, at *1 (D.C. Cir. Mar. 20, 2003) (dismissing motion to consolidate as moot after granting motion to dismiss); *Iowa Grant Co. v. Commodity Futures Trading Comm'n*, 1999 WL 504922, at *1 (D.C. Cir. June 9, 1999) (same). Holding the consolidation motion in abeyance pending resolution of the Commission's motion to dismiss

would serve judicial economy by avoiding expenditure of judicial resources on a "contingent" motion that may become irrelevant.

II. Consolidation Is Inappropriate Because The April 15 Order Challenge and the Public Notice Challenge Are Based On Different Agency Proceedings With Independent Administrative Records And Present Distinct Legal Issues.

If the Court proceeds to the merits of the motion at this time despite its procedural infirmities, it should deny consolidation. Prometheus et al. claim that consolidation is appropriate because "[the] cases present similar and related factual and legal issues." Mot. 11. Not so. Indeed, the cases Movants seek to join arise from two different agency proceedings, are based on different records, and suffer from distinct legal errors.

As Movants note, this Court may consolidate cases "involving essentially the same parties or the same, similar, or related issues." Handbook of Practice & Internal Procedures pt. V.A, at 23 (quoted at Mot. 9). Yet as discussed above, these actions do not involve essentially the same *parties* because Prometheus et al. have not been granted intervenor status in the Public Notice Challenge, and additional entities have challenged the *April 15 Order*. Furthermore, even if these cases did involve essentially the same parties, that is an insufficient basis for consolidation in the context, as here, of a challenge to agency action by an industry trade association, which may frequently find itself a party to litigation with its regulator on different topics in different cases.

There is likewise no merit to Movants' primary argument that the issues in the separate actions are similar or related. That argument is premised on the claim that the *Public Notice* was promulgated as part of the same agency proceeding that culminated in the *April 15 Order*, and that both involved "the Commission's attempts to fix the same problem." Mot. 9. But Movants' theory is flawed in no fewer than three respects.

First, the agency actions in question were outgrowths of separate proceedings with separate administrative records. Tellingly, Movants do *not* invoke this Court's well-established practice of consolidating "all petitions for review of agency orders entered *in the same administrative proceeding*." Handbook of Practice & Internal Procedures pt. V.A, at 23. (emphasis added). Nor could they, given the materially different processes by which these actions were taken and the records on which they are based.

Specifically, the *April 15 Order* was issued by the Commission pursuant to notice and comment, and was the result of a statutorily mandated review of the Commission's broadcast ownership rules. The *Public Notice*, on the other hand, was issued by the Media Bureau without notice and comment, under the guise of "guidance" for the processing of transfer and licensing applications involving broadcast television sharing transactions with contingent or other financial interests. *See Public Notice* at *1. Likewise, the *April 15 Order* is expressly based

on the record developed during the Commission's 2010 quadrennial ownership review and opens that record for further submissions, *see April 15 Order* at *1, while the *Public Notice*—although acknowledging the Commission's efforts to develop a record in the quadrennial review proceeding, *see Public Notice* at *1 n.3—did not rely on that record, *id.* at *1. Indeed, that these actions are outgrowths of distinct administrative records is reflected in the *April 15 Order* itself, where the Commission repeatedly observed that the quadrennial review record was insufficient to justify extending its JSA rule to other shared service agreements—including the types of agreements that are covered by the *Public Notice*. *See, e.g.*, *April 15 Order* at *102, *114 n.1104. In all of these respects, these actions are inappropriate candidates for consolidation.

Second, the Public Notice Challenge and April 15 Order Challenge involve different legal issues. NAB's petition in the Public Notice Challenge is directed at new substantive requirements for the evaluation of certain applications for the transfer and assignment of television stations, including a "strict scrutiny" standard of review for all television transactions proposing sharing arrangements with contingent interests. Pet. for Review 2 (No. 14-1072). This new rule has important consequences for many television broadcasters, but it is nonetheless a discrete challenge. By contrast, Movants themselves recognize that NAB and the other petitioners in the April 15 Order Challenge "broadly" seek review of the

Commission's various actions and failures to act as part of its most recent quadrennial review of the Commission's broadcast ownership rules, including its radio rules and cross-ownership rules. Mot. 2. The fact that four sets of petitioners challenged the *April 15 Order*, whereas only NAB sought review of the *Public Notice*, suggests that the two decisions raise different concerns for actors across the industry. As discussed above, moreover, the *Public Notice* and the *April 15 Order* suffer from very different legal problems. *See supra* pp. 2-3.

To be sure, there may be some overlap between the *April 15 Order* and the *Public Notice* in the broad sense that both address broadcast television sharing arrangements, but mere overlapping subject matter is insufficient to justify consolidating challenges to rules adopted in separate proceedings that impose distinct legal obligations.[4] This motion illustrates the potential absurdity of such a rule, as Prometheus et al. argue that consolidation is necessary "to foster a fully rational review of the agency's media ownership scheme." Mot. 11. Although the *Public Notice* and JSA rule can both be said to relate to the Commission's "media ownership scheme," so would any order dealing with any aspect of the

[4] That the panel that resolves one of these actions may gain familiarity with the general factual backdrop relevant to the other is insufficient justification to transfer a case to this Court, *see Am. Pub. Gas Ass'n v. Fed. Power Comm'n*, 555 F.2d 852, 857 (D.C. Cir. 1976) (per curiam), much less to consolidate two separate actions.

Commission's attribution policies for any media outlets affected by the broadcast ownership rules—radio, television, and newspapers alike. It will almost always be possible to frame the issues in two orders—especially orders from the same agency—at a sufficient level of generality to argue that they are similar or related. This Court has never adopted such an approach to consolidation. Even previous cases challenging different rules arising from the *same* Commission statutory review cycle, for instance, have proceeded separately in this Court. *See, e.g.*, *Sinclair Broad. Grp., Inc. v. FCC*, 284 F.3d 148, 163-66 (D.C. Cir. 2002) (reviewing Commission's treatment of "eight voices test" in local television ownership rule after first statutory review); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1040-45 (D.C. Cir. 2002) (reviewing national television ownership limit after same review). These actions should proceed in a similar fashion.

Third, the different procedural paths and subject matters addressed in each action have necessarily resulted in distinct legal challenges. Although Movants attempt to paint the merits challenges to the two agency actions at issue with the same broad brush on the ground that both concern whether the actions "are arbitrary and capricious or otherwise contrary to law," Mot. 11, that theory of consolidation is overbroad and would sweep in every petition for review citing 5 U.S.C. § 706(2)(A) as a basis for relief. Given the different legal questions

presented in each case, it is not true that resolution by separate panels "would create a substantial risk of inconsistent findings." Mot. 11.

In short, separate proceedings, separate records, separate subject matter, and separate legal arguments belie Movants' contentions that consolidated treatment is appropriate for the Public Notice Challenge and the April 15 Order Challenge.

III. The Motion Improperly Seeks To Use Consolidation As A Tool For Venue Gamesmanship.

Finally, the motion to consolidate should be denied because it reflects a transparent attempt to engage in venue gamesmanship. Movants themselves make clear that their motion to consolidate is strategically tied to their motion to transfer the April 15 Order Challenge to the Third Circuit. Mot. 3 ("Prometheus et al. will soon file a Motion to Transfer the consolidated cases to the United States Court of Appeals for the Third Circuit . . . ."); *see also* Mot. to Transfer Cases to the U.S. Court of Appeals for the Third Circuit 1 (June 19, 2014) (No. 14-1090) (moving to transfer the consolidated challenges to the *April 15 Order* and "any other cases that may be consolidated with these cases"). Movants represent in their motion to consolidate that their theory for seeking transfer is that the Third Circuit should hear the entirety of the parties' challenges to the *April 15 Order* because that court retained jurisdiction over some aspects of a consolidated challenge to the Commission's *2006* quadrennial review of its ownership rules. *See* Mot. 3. Notably, nothing about this theory for transfer—which NAB intends to challenge

with respect to the April 15 Order Challenge—applies to the Public Notice Challenge. As Movants candidly admit, the Third Circuit purported to retain jurisdiction over *remanded* issues after its review of the 2006 proceedings, "including the newspaper/broadcast cross-ownership remand and the diversity order remand." *Id.*; *see also Prometheus Radio Project v. FCC*, 652 F.3d 431, 472 (3d Cir. 2011). The *Public Notice*, however, involves a categorical presumption against certain television transactions proposing sharing arrangements with contingent or other financial interests, *see* Pet. for Review 2 (No. 14-1072), and does not relate to any of these remanded issues.

As such, the issues involved in the Public Notice Challenge indisputably fall outside the Third Circuit's jurisdiction. Nevertheless, by filing this "contingent" motion while still non-parties—before they even filed their transfer motion—it is apparent that Movants' endgame is not simply consolidation, but consolidated treatment of these actions *in another circuit*. Indeed, although Movants rely on this Court's internal practice manual for the standards for consolidation, Mot. 9, the motion never suggests that consolidation would promote efficient resolution of these actions in *this* Court.

Movants' transfer motion in the April 15 Order Challenge was filed pursuant to the transfer standards set out in the multidistrict litigation statute. *See* 28 U.S.C. § 2112(a)(5) (court chosen to hear consolidated actions "may thereafter transfer all

the proceedings . . . to any other court of appeals" "[f]or the convenience of the parties in the interest of justice"). Although these provisions ordinarily would not apply to the Public Notice Challenge, Movants apparently hope to bolt this case on to the April 15 Order Challenge for purposes of venue: If this Court were to consolidate the actions now, and Movants ultimately were to persuade the Court to transfer the April 15 Order Challenge to the Third Circuit, then Movants would effectively have transformed this procedural consolidation motion into a dispositive transfer motion. *See* Handbook of Practice & Internal Procedures, pt. VII.A, at 28.

Simply put, granting consolidation for purposes of facilitating Movants' transfer interests would be inappropriate given the multiple degrees of separation between the Public Notice Challenge and the Third Circuit's limited remand regarding the Commission's 2006 quadrennial review. Indeed, such a result would significantly undermine NAB's right, as petitioner and a party significantly aggrieved by the *Public Notice*, to venue in the circuit of its choice. *See, e.g.*, *Liquor Salesmen's Union Local 2 of State of N.Y. v. NLRB*, 664 F.2d 1200, 1204 (D.C. Cir. 1981) (when reviewing agency orders, "the courts of appeals have placed special emphasis on the choice of forum of the truly aggrieved party"); *ITT World Commc'ns, Inc. v. F.C.C.*, 621 F.2d 1201, 1208 (2d Cir. 1980) ("It is a well recognized principle that the interests of justice favor placing the adjudication in

the forum chosen by the party that is significantly aggrieved by the agency decision."). Regardless of the merits of Movants' transfer motion with respect to the April 15 Order Challenge, this Court should not permit Movants' procedural machinations to deprive NAB of the right to have the Public Notice Challenge resolved by this Court.

CONCLUSION

For the foregoing reasons, NAB respectfully requests that this Court deny the Contingent Motion to Consolidate or, alternatively, hold it in abeyance pending this Court's disposition of the Commission's Motion to Dismiss Case No. 14-1072.

Dated: June 19, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2014, I caused a copy of the foregoing Opposition to Contingent Motion to Consolidate 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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