

ALERT

Media Bureau Issues JSA/SSA Processing Guidance

March 14, 2014

Citing a recent uptick in the number of proposed television transactions that include same-market sharing arrangements, the Federal Communications Commission's (FCC or Commission) Media Bureau issued a Public Notice on March 12, 2014, aimed at providing broadcasters with guidance as to how the Bureau will process applications for proposed transactions that couple sharing arrangements with contingent financial interests. Specifically, the Media Bureau stated that in reviewing assignment and transfer applications going forward—including those currently before the agency—the Bureau will "closely scrutinize" any application proposing that two or more same-market stations will:

(1) Enter into an arrangement to share facilities, employees, and/or services or to jointly acquire programming or sell advertising, including a Joint Sales Agreement (JSA), a Local Marketing Agreement (LMA), or any other agreement or arrangement (written or oral) that would have the same practical operational or financial effect as any of these agreements,

and

(2) Enter into an option, right of first refusal, put/call arrangement, or other similar contingent interest, or a loan guarantee.

Although the Media Bureau will continue to evaluate each transaction individually for consistency with the statutory "public interest, convenience, and necessity" standard, the Bureau emphasized that applicants "must provide sufficient information and documentation" to:

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- *fully* describe the proposed transaction, including any side agreements;
- establish that it is an arm's-length transaction; and
- establish that the transaction would not impair the licensee's control over station operations and programming, result in attribution of the relationship, or be otherwise contrary to the public interest.

The Public Notice did not address the types of "information and documentation" sufficient to make this showing. The Bureau did, however, specify two circumstances in which it would closely scrutinize a proposed transaction. The first is a transaction in which a proposed assignee/transferee shares the same lending institution as an in-market broadcaster with which it has a sharing arrangement, and where (i) a portion of the purchase price will be financed by that lending facility, and (ii) the loan is not made at arm's-length. The second circumstance is a transaction "where an applicant proposes to sell license assets and non-license assets of a station to different parties and the facts available to the Media Bureau seem to suggest that the purchase prices for the license assets and the non-license assets do not reflect their fair market values and the transaction is not truly at arm's-length."

In a statement, FCC Commissioner Ajit Pai harshly criticized the Public Notice, calling the Media Bureau's announcement "a new policy" unsupported by precedent or Commission vote. Commissioner Michael O'Rielly echoed Commissioner Pai's concerns, stating that "the item appears to set forth a new policy and, therefore, should have been voted by the Commission, rather than on delegated authority." In a press release, the National Association of Broadcasters (NAB) expressed appreciation for Commissioners Pai and O'Rielly's "strong statements," adding that the Notice "raises very serious procedural and substantive concerns." NAB went on to state that "in a world of massive consolidation by pay TV behemoths, the FCC seems unduly focused on sharing arrangements by two TV stations offering programming FOR FREE in markets like Topeka and Tupelo."

The Bureau's Public Notice comes just weeks before the Commission's March 31, 2014 Open Meeting, where it is scheduled to take-up media ownership rules more broadly.