ALERT

FCC Releases Report and Order Making Television Joint Sales Agreements Attributable; Proposes Disclosure Requirement for Shared Service Agreements

April 17, 2014

On April 15, 2014, the Federal Communications Commission (FCC or Commission) released the text of its Report and Order making certain television joint sales agreements (JSAs) attributable under the FCC's media ownership rules and announcing the standard upon which it will evaluate requests for waiver of the new JSA attribution standard. Additionally, in its accompanying Further Notice of Proposed Rulemaking (FNPRM) on media ownership, the Commission proposed requiring broadcasters to disclose information about a broad array of shared service agreements (SSAs).[1] The FCC adopted the Report and Order and FNPRM by a 3-2 vote on March 31, 2014, with Republican-appointed Commissioners Michael O'Rielly and Ajit Pai strongly dissenting.

Attribution of Television JSAs

The FCC has been considering for more than a decade whether television JSAs should be attributable under its media ownership rules. Under a JSA, one television station (the brokering station) is authorized to sell some or all of the advertising on another television station (the brokered station). In its 2002 Biennial Review Order, the Commission determined that JSAs between same market radio stations should be attributable, but declined to extend this finding to television JSAs, which had not been included in the Biennial Review Notice of Proposed Rulemaking. In a separate proceeding initiated in 2004, the FCC issued a subsequent NPRM in which it asked whether television JSAs should be attributable (TV JSA NPRM). The FCC took

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no action until 2010, when it asked in the NPRM for its quadrennial media ownership review (2010 Quadrennial NPRM) whether certain agreements relating to programming and/or operation of broadcast stations should be attributable. In the meantime, the Media Bureau has approved numerous transactions that included JSAs, generally applying a "70/30" guideline under which JSAs were permissible if the licensee retained at least 70% of the cash flow from the sale of advertising on the brokered station.

Observing "an increase in the prevalence of television JSAs" over time, particularly in transactions involving television stations, the agency concluded in the recent Report and Order that "television JSAs convey sufficient influence to warrant attribution." Accordingly, as has been the case for radio JSAs, television JSAs that account for more than 15% of the weekly advertising time for the brokered station will count toward the ownership totals of a same-market brokering station. Common ownership of a national advertising representation firm will not be attributable under the new standard.

Parties to existing JSAs that will become attributable under the Report and Order will be required to file copies of their JSAs within 30 days after the Order becomes effective. If attribution of an existing same-market television JSA brings a party out of compliance with the FCC's local television ownership rules, the parties will have two years to restructure or modify the JSA or to otherwise come into compliance with the rule. Broadcasters entering into a new attributable JSA, meanwhile, will be required to file a copy of the JSA with the FCC within 30 days of its execution.

Importantly, the Report and Order does not address whether television broadcasters should receive relief from the local television ownership rule. The majority stated that "the asserted public interest benefits of common ownership, operation, or control of stations in the same local market" is a separate issue, which it reserved for further consideration in the 2014 Quadrennial Review (which tentatively proposes to preserve the existing limits). Commissioners Pai and O'Rielly derided the Commission for addressing the JSA issue in isolation while allowing the quadrennial ownership review to languish, with Commissioner Pai calling the majority's approach "a classic bait-and-switch tactic" and "the epitome of arbitrary and capricious decision-making."

Although it does not address the merits of common ownership as a general matter, the Report and Order offers as an alternative the possibility of granting waivers where attribution of a JSA would not serve the public interest. The Report and Order is devoid of specific guidance on how the Commission will evaluate waiver requests, instead indicating that the agency will evaluate waiver requests based on the "totality of the circumstances," with a focus on: "(i) specific facts that show a lack of incentive or ability for the broker station to influence the brokered station's programming or operations, and (ii) specific facts that demonstrate that the brokered station has the incentive and ability to maintain independent operations and programming decisions that are not influenced by the broker station and the incentive and ability to exclude the broker station from exerting influence over programming and operations." The Report and Order notes that "a JSA that is limited in scope (*i.e.*, percentage of station's advertising sales) and duration . . . is more likely to be successful than an open-ended request." Finally, the Report and Order notes that the FCC will consider whether application of the local ownership rule "would adversely affect competition, diversity, and localism."

In a nod to the compelling example of WLOO(TV), which is licensed to historically black Tougaloo College and is a party to a JSA with the same-market Fox affiliate, the Commission explains in a footnote in the Report and Order that "an applicant may be able to demonstrate that a waiver would enable a school, community college, other institution of higher education, or other community support organization or entity to own a station and that the public interest benefits of such ownership outweigh the harms the Commission has identified with common ownership in support of the local television ownership limits."

In his dissent, Commissioner O'Rielly was particularly critical of the waiver approach, noting that because "any factor" can play into whether a waiver is granted, "the process will be inherently uncertain and subjective."

The Report and Order directs the Media Bureau to prioritize waiver requests "necessitated by attribution of JSAs." All waiver requests are subject to a 90 day "shot clock"; however, two factors may undermine the value of the shot clock: (1) it does not commence until the record is "closed"; and (2) the Media Bureau will not be required to abide by the shot clock if there are "circumstances requiring additional time for review." Additionally, the "shot clock" for JSA waiver requests does not appear to apply to all of the transactions that are subject to the processing guidelines that the Media Bureau recently issued on delegated authority. Under those guidelines, the Media Bureau will "closely scrutinize" any application proposing that two or more same-market stations will enter into a JSA or other similar arrangement in conjunction with an option, right of first refusal, put/call arrangement, or other similar contingent interest, or a loan guarantee.

The Commission majority was not persuaded by arguments that it is unfair to attribute television JSAs while permitting multichannel video programming distributors (MVPDs) to engage in similar conduct using local "interconnects." In a footnote, the Report and Order distinguishes local MVPD interconnects, stating that they are not subject to local ownership rules and noting that they were not discussed in either the TV JSA NPRM or the 2010 Quadrennial NPRM. The agency invites interested parties to file a petition for rulemaking if they perceive a problem that would be remedied by attribution of local MVPD interconnects.

Disclosure of Shared Service Agreements

Citing a "lack of information about the content or breadth" of SSAs, the FCC declined to consider the benefits or disadvantages of SSAs, including arrangements that include both JSAs and SSAs. Instead, the Commission included in its FNPRM a proposal to require commercial television stations to disclose their SSAs, indicating that disclosure will allow the agency "to study these agreements and to determine what further regulatory action, if any, it should take with respect to them."

The FNPRM proposes to define SSAs broadly, to include "all types of resource sharing and collaboration that may take place between stations," including: "any agreement or series of agreements, whether written or oral, in which (1) a station, or any individual or entity with an attributable interest in the station, provides any station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to a station that is not under common ownership (as defined by the Commission's attribution rules); or (2) stations that are not under common ownership (as defined by the Commission's attribution rules), or any individuals or entities with an attributable interest in those stations, collaborate to provide or enable the provision of station-related services, including, but not limited to, administrative, technical, sales, and/or programming support, to one or more of the collaborating stations.” These two categories cover both agreements with entities that have an attributable interest in a station and agreements directly between two stations.

The FNPRM seeks comment on whether the definition would encompass all relevant agreements and whether it is too broad. Notably, the FNPRM also seeks comment on whether SSAs entered into outside of a transaction are frequently accompanied by contingent interest agreements (*e.g.*, options, warrants, put/call arrangements, etc.) and, if so, how to "achieve additional transparency" for those agreements.

Regarding disclosure of SSAs, the FNPRM asks whether disclosure is necessary “to enable the Commission and the public to assess the implication of these agreements” or whether there is another way to assess the breadth and prevalence of SSAs and their impact. The FNPRM also inquires about how SSAs should be disclosed, such as online or in the local public file, and whether non-attributable SSAs also must be disclosed (as with local marketing agreements and JSAs). Other options include requiring filing of SSAs with the FCC under the rule governing the filing of certain contracts and creating a new docket on the FCC’s Electronic Comment Filing System (ECFS) website for SSAs. Further, the FNPRM asks about how SSAs may be redacted and whether disclosure should be limited to large markets.

Comments and replies in response to the FNPRM are due, respectively, within 45 and 75 days after publication in the Federal Register.

If you have questions about the new JSA attribution standard or are interested in filing comments regarding disclosure of SSAs, please contact the Wiley Rein attorney who regularly handles your FCC matters or one of the attorneys listed below.

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[1] Also included in the item was a Further Notice of Proposed Rulemaking initiating the 2014 Quadrennial Review of the Commission’s media ownership rules. A summary of the quadrennial portion of the FNPRM is addressed in a separate Client Alert and is available here.