

ALERT

FCC Acts to Attribute Television JSAs and Prohibit Joint Retransmission Consent Agreements; Initiates 2014 Quadrennial Ownership Review

March 31, 2014

The Federal Communications Commission (FCC or Commission) today took actions that implicate media ownership and television retransmission consent negotiations. The FCC adopted:

- Orders that will: (1) make television joint sales agreements (JSAs) attributable where a brokering station sells more than 15% of the advertising time for a brokered station; and (2) effectively prohibit top-four television stations in the same market from jointly negotiating retransmission consent agreements;
- A Further Notice of Proposed Rulemaking (FNPRM) that will: (1) incorporate the record from the 2010 media ownership quadrennial review into the 2014 review; (2) propose to extend the rules adopted in the 2006 review, with only minor changes; (3) consider whether to impose reporting requirements pertaining to television shared services agreements (SSAs); and (4) consider whether to adopt a revenue-based eligible entity definition to promote ownership diversity; and
- An FNPRM to consider whether to eliminate or revise the rules for enforcing television network non-duplication and syndicated exclusivity agreements.

The Commission has not yet released the text of any of these items; the summary below is based on the FCC's Open Meeting and subsequent press conference.

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Media
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Media Ownership

Television JSAs and SSAs

Pursuant to the FCC's Order, television JSAs will be attributable under the FCC's media ownership rules where a brokering station sells more than 15% of the advertising time for a brokered station. Broadcasters will have two years to unwind existing JSAs that violate the local television ownership rule under the new attribution standard. As part of the order, the FCC adopted a waiver standard that will presumptively permit JSAs that either do not "confer influence over programming" or that benefit competition, localism, and diversity. According to Commissioner Mignon Clyburn, the waiver standard will favor JSAs that are limited in duration and provide for the brokered station to assume all sales responsibilities at some point in time. Media Bureau Chief Bill Lake indicated that waiver requests will be disfavored where the arrangement involves additional "financial entanglement" between the brokered station and the brokering station. The Media Bureau will have a 90 day "shot clock" for acting on waiver requests; however, it appears that the 90 day period will not begin until the Media Bureau declares that the record with respect to the waiver request is closed.

Quadrennial Ownership Review

The FCC initiated the 2014 quadrennial review of its media ownership rules by incorporating the record from the still-incomplete 2010 quadrennial review into this latest review. The FNPRM for the 2014 quadrennial review recommends retaining the FCC's existing ownership rules virtually intact, although the item requests comment on whether to eliminate the radio-newspaper and radio-television cross-ownership rules. Specifically, the FCC proposes to:

- Retain the local television ownership rule, with a minor modification to measure overlap based on a television station's digital contour;
- Retain the local radio ownership rule in its current form;
- Retain the newspaper-television cross-ownership rule, with a minor modification to measure overlap based on a television station's digital contour; and
- Retain the dual network rule, which prohibits joint-ownership of the top-four broadcast networks.

In addition, the FNPRM seeks comment on whether to eliminate the newspaper-radio and radio-television cross-ownership rules.

The FNPRM also proposes to reinstate the revenue-based test for determining which entities are eligible to take advantage of certain policies designed to promote diverse ownership of broadcast stations, including ownership by minorities and women. The FNPRM tentatively concludes that, although promoting ownership diversity is a compelling government interest, the record does not at this time support a racial or ethnic origin classification for eligible entities.

The media ownership item, which includes the JSA item and the Quadrennial Review, was adopted by 3-2 vote, with the two Republican Commissioners dissenting. Both Commissioners Ajit Pai and Michael O’Rielly called the FCC’s decision to address only JSAs at this time, while postponing the remainder of the 2010 quadrennial review, “arbitrary and capricious,” with Commissioner Pai going so far as to say that he hopes the judiciary “will at long last restore sanity” to the media ownership rules. Commissioner Clyburn, who some broadcasters considered the swing vote on the JSA issue, said the Commission’s review of JSAs unmasked “glaring abuses” where the brokered station is “little more than an orphan of the [brokering station].”

Retransmission Consent

The FCC declared it a violation of the “good faith negotiation” requirement for two or more top-four television stations in the same market, which are not commonly owned, to negotiate jointly for retransmission consent. The Order will not affect joint retransmission consent negotiations where one party is not among the top-four stations in a market.

Additionally, the Commission adopted an FNPRM asking whether to eliminate or modify the rules that provide an enforcement mechanism for privately-negotiated network non-duplication and syndicated exclusivity agreements.

The retransmission consent item was adopted by a 5-0 vote. Commissioner Jessica Rosenworcel signaled that she is under “no illusion” that retransmission consent fees are the main driver of higher cable rates, but said that this action is a starting point. The two Republican Commissioners, meanwhile, declared that their votes are not indicative of their positions on network non-duplication and syndicated exclusivity. In that regard, Commissioner Pai urged commenters to focus on whether the compulsory copyright would render private enforcement of network non-duplication and syndicated exclusivity rights unworkable.

We will provide additional information once the FCC releases the full text of these items.