Disparate Regulation of Television Broadcasters Will Harm Local Communities

*By Jane Mago**

Note from the Editor:

This article is a discussion about the Federal Communication Commission's rules regarding local television ownership. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the author. The Federalist Society seeks to further discussion on media ownership and the FCC. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join this debate, please email us at info@fed-soc.org.

Related Links:

- Testimony of William T. Lake, Media Bureau Chief, Federal Communications Commission before the House Committee on Energy and Commerce, June 11, 2014: http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Lake-CT-Media-Ownership-21st-Century-2014-6-11.pdf
- Brendan Sasso, *FCC to Break Up Big TV Stations*, National Journal, Mar. 31, 2014: http://www.nationaljournal.com/tech/fcc-to-break-up-big-tv-stations-20140331
- *FCC Vote Praised as Saving Jobs, Ownership Diversity*, Maynard Institute for Journalism Education (Mar. 31, 2014): http://mije.org/richardprince/fcc-vote-praised-saving-jobs-ownership-diversity

Television broadcasters face a difficult economic and political environment. Despite undeniable changes in the media marketplace, TV broadcasters are saddled with outdated regulations that do not apply to other video services now syphoning the advertising dollars that sustain free television. Recently, the Federal Communications Commission (FCC or Commission) made this situation even worse when it failed to complete a statutorily required review of its broadcast ownership rules. Instead of completing the review, which is designed to remove unnecessary regulation, the FCC added a new restriction on local television ownership. As a result local stations in small and medium markets will be unable to create economies of scale that allow them to create compelling local content to vie for audience share against largely unregulated competitors.

I. Background

The FCC is required to review and decide every four years whether the broadcast ownership rules "are necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest."[1] Among the rules subject to this review, the local TV ownership rule limits how many television licenses one entity may have in a market. Under the rule, one entity may not have ownership interests in two of the top four rated stations in a market or any two television stations if there would be less than eight independently owned full power television stations left in the market.[2]

The FCC separately defines the activities that amount to an attributable ownership interest. Before its most recent ruling, the FCC did not include "Joint Sales Agreements" (JSAs)[3] as an ownership interest. JSAs allow stations to save money by combining sales forces. Many licensees have entered into JSAs in recent years as a way to compete. And, the FCC has regularly reviewed and allowed licensees to create new JSAs, although it had a proceeding pending since 2004 that asked whether TV JSAs should be attributable. Since 2008 alone, the Commission has approved transactions involving over 71 JSAs in 53 markets. Broadcasters relied upon these approvals in investing financial and human resources into stations and communities via JSAs.

II. The 2014 Ownership Order

On March 31, 2014, the FCC, in a 3-2 party line vote, announced that it would not complete the 2010 Quadrennial Review of the broadcast ownership rules. It instead decided to roll the 2010 review into a new 2014 review that will not be completed until at least mid-2016.[4] NAB and other parties have challenged this decision as a breach of the agency's statutory duty.

Broadcasters are particularly concerned about the FCC's failure because, while it refused to update the underlying rules in light of market conditions, the Commission chose to restrict TV broadcasters even more by requiring the stations to count an ownership interest in another station if it sells more than 15% of that station's advertising time. And, the Commission went even further by applying the new rule retroactively and refusing to grandfather existing JSAs. The FCC said that existing JSAs must unwind within two years, even if the agency had approved them and broadcasters had relied upon the approval to invest significant amounts of capital.

The FCC assumed that TV JSAs create undue influence or control of the brokered station and enable the station selling the advertising to affect programming choices. Broadcasters actively disputed those assertions. The Commission said it would allow stations to apply for a waiver if they could show a lack of influence. But, a waiver requires a high showing to overcome

**Jane Mago is Executive Vice President and General Counsel for the National Association of Broadcasters*

"policy concerns."[5] Given the difficult standard, waivers are unlikely to be granted.

III. The FCC's Order is Arbitrary and Capricious

The FCC's decision to modify its treatment of TV JSAs without studying the full context of how a rule change would impact broadcasters is unlawful. Beyond the FCC's failure to comply with its statutory mandate to determine whether its ownership rules remain in the public interest, there are five reasons why its decision to attribute JSAs is arbitrary and capricious.

A. The Record Does Not Support The FCC's Contention that JSAs are Harmful or Lead to Influence Over a Brokered Station

The FCC's Order asserts that JSAs "provide incentives for joint operation that are similar to those created by common ownership."[6] Largely ignoring broadcasters' showings that JSAs do not create influence, the FCC simply states that a broker "can potentially" influence a brokered station's programming.[7] The Order, however, lacks any specific examples of this "influence" and relies solely upon speculation that a JSA "may" result in influence. Instead it places the burden on the broadcaster to prove a negative.

The FCC also supports its decision to attribute TV JSAs on a prior decision that radio station JSAs should be attributed. TV station and radio station JSAs, however, involve different services, differ greatly in substance, and should no more inform FCC policy than would a transaction involving wireless providers.

The FCC cannot point to any market failure to justify its new regulation. Indeed, under a cost-benefit review, any possible benefit from banning JSAs to protect against the potential for influence is outweighed by the negative impacts that broadcasters showed will result from the ban on local audiences. Efficiencies created by JSAs enabled stations to create news and other local programming that they could not afford to provide otherwise. The ban will increase operating costs and reduce possible services.

Paradoxically, the FCC rejected broadcasters' arguments that without JSAs certain television stations would not survive in competitive markets by stating, "arguments that television stations need JSAs to survive in a competitive television market are properly addressed in the context of setting the applicable ownership limits rather than in deciding whether television JSAs confer influence such that they should be attributed in the first place."[8] The problem with this argument is that the Commission refused to review the applicable ownership limits. This is plainly arbitrary and capricious.

Indeed, the real world has proven broadcasters correct. Stations that could not survive without a JSA have already started to go off the air.[9] The FCC cannot properly claim that stations can survive on their own and refuse to consider appropriate waivers or rational rules.

B. The Record Contains Similar Information Regarding JSAs and SSAs, Yet the FCC Treats Them Differently

Another example of the Order's arbitrary nature is the FCC's decision on JSAs as compared to Shared Services Agreements (SSAs).[10] The record regarding SSAs and JSAs is similar. Both records lack evidence to support FCC action. Indeed, if anything, the JSA record included additional evidence from broadcasters showing the value of JSAs and explaining their benefit to the public. Yet, while the FCC determined it lacked an appropriate record to act regarding SSAs, it effectively banned JSAs.

The Commission properly declined to ban SSAs.[11] It is difficult to reconcile the FCC's decision to act differently on JSAs and SSAs under an arbitrary and capricious standard.

C. The Record is Full of Evidence of the Public Benefits of JSAs

There is a significant amount of data on the benefits of JSAs. As noted above, the FCC has reviewed and approved broadcast transactions involving 71 JSAs since 2008.[12] If JSAs result in serious market harms, the FCC has at least 71 recent examples to use to prove its point. However, it did not, or could not.

In fact, broadcasters filled the record with examples of broadcast stations that were struggling or failing, broadcasters that could not afford to produce local content prior to a JSA, and minority broadcasters that were able to survive only with a JSA.[13] JSAs were the sole reason that these stations were able to produce new local content, going so far as creating new newsrooms and broadcasting hours of new local news. The FCC overlooked this evidence.[14]

The real harm in these broadcast markets is FCC-created. The JSA Order eliminates broadcaster regulatory certainty. When combined with the recently released Public Notice providing "guidance" concerning processing of television applications,[15] the FCC has now created a significant impediment against broadcaster assignment transactions and harmed access to capital. Wall Street is skeptical to invest when it cannot reasonably predict how or when the FCC will act.[16]

D. The FCC Has Created a Catch-22 That Ensures JSAs Will Be Unwound Before the FCC Completes a Statutorily-Required Review of the Broadcast Ownership Rules

Even if we accepted the argument that the FCC did not have sufficient information in the record to complete its statutorily required review of the broadcast ownership rules, another problem is that the FCC has eliminated any opportunity to remedy its JSA decision. According to the Chairman of the FCC, Tom Wheeler, the FCC's goal to complete its "2010 ownership review" is June 2016. Nonetheless, the FCC is requiring entities that currently rely upon JSAs to unwind them within two years.[17] This deadline is before mid-2016. The effect is a "Catch-22" where the agency will assume the validity of the underlying rule so that existing JSAs have no opportunity to continue. The damage will be done, and final. Broadcasters' ability to provide local news, sports, entertainment, and emergency information will suffer. Consumers are going to lose the benefits that JSAs have allowed broadcasters to provide.

E. The FCC Misapplied Antitrust Policy

Finally, the FCC relies on an outdated antitrust policy to justify its decision. Although bolstered by a Department of Justice letter, the FCC's conclusion that any joint sales of television advertising time is anti-competitive is out of date. The assumption is based on a market that no longer exists. It may once have been true that broadcasters dominated advertising sales. Now, however, broadcasters compete with cable and telephone companies, satellite, and the Internet for both local and nationwide advertising, and viewers. The average consumer spends a significant amount of time watching video via a pay-TV subscription, the Internet, on a mobile phone, tablet, or computer. The FCC and the Department of Justice cannot continue to assume that television broadcasters only compete against other television broadcasters. Other services are continuing to take larger and larger shares of the advertising dollars that support local broadcasting. The FCC must take a realistic view of the 21st century marketplace if it is going to govern in the public interest.

IV. A Better Path

The appropriate path for the FCC is to determine, based on data and hard evidence, whether its broadcast ownership rules are necessary in the public interest as the result of competition. Broadcasters are confident that many of them are not. The market has undergone significant changes since the FCC last completed a review and modified the ownership rules. Only a thorough and comprehensive review of the rules as a whole will ensure that the FCC will fulfill its statutory obligation.

Most importantly, the FCC must remember that JSAs are used to support local programming that would not otherwise exist. Consumers throughout the country rely upon these services. Banning JSAs has the ultimate effect of harming consumers, because without the efficiencies provided by joint arrangements many stations cannot afford to provide the services they do now. It is hard to believe that the FCC's decision is in the public interest.

Endnotes

1 Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) ("Appropriations Act") (amending Sections 202(c) and 202(h) of the 1996 Act). In 2004, Congress revised the then-biennial review requirement to require such reviews quadrennially. See Appropriations Act § 629, 118 Stat. at 100.

2 47 C.F.R. § 73.3555(b).

3 A JSA is an agreement authorizing a broker from one television station to sell some or all of the advertising of another non-commonly owned station.

4 *See 2014 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*, FCC 14-28, (2014) (2014 JSA Order), Statement of Chairman Tom Wheeler ("I have instructed the Media Bureau to complete this review by June 30, 2016").

5 *See* 2014 JSA Order, ¶ 364.

6 *See e.g.*, 2014 JSA Order, ¶ 351.

7 *See* 2014 JSA Order, ¶ 354.

8 *See* 2014 JSA Order, ¶ 356.

9 *See* Statement of Commissioners Ajit Pai and Michael O'Rielly on the Negative Impact of the Decision to Restrict Television Stations' Use of Joint Sales Agreements, rel. May 29, 2014, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-327353A1.pdf. The Commissioners warned that the JSA change would result in less diversity and fewer TV stations. Two months after the Order was adopted Sinclair Broadcasting Corp. turned in three licenses that previously had a buyer, because the potential buyer could not afford to operate the stations without a JSA.

10 An SSA is an agreement between two broadcast stations to share services or resources between two uniquely owned stations, though the stations generally do not share advertising sales.

11 *See* 2014 JSA Order, ¶ 320.

12 *See* Letter from Jane Mago, Executive Vice President and General Counsel, National Association of Broadcasters, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, MB Docket No. 09-182 (Mar. 21, 2014) (NAB Ex Parte).

13 *See*, *e.g.*, Letter from Jennifer Johnson, Covington & Burling LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 09-182 (Feb. 28, 2014). *See also* Letter from James Winston, National Association of Black Owned Broadcasters, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 09-182 (Feb. 27, 2014) (stating that FCC should examine JSAs and SSAs for their potential to promote diversity of ownership).

14 *See* Letter from Jennifer Johnson, Covington & Burling, LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2, MB Docket No. 09-182 (Feb. 19, 2014).

15 *See* Processing of Broadcast Television Applications Proposing Sharing Arrangements and Contingent Interests, 29 FCC Rcd. 2647 (Mar. 12, 2014).

16 *See* NAB Ex Parte.

17 *See* 2014 JSA Order, ¶ 367.