LMA's, TV-style

Staff Decision Sheds Light On Shared-Services Arrangements

By: Steve Lovelady
703-812-0517
lovelady@fhhlaw.com

While FCC Commissioners traipse around the country to a seemingly endless series of media consolidation fora and slog their way through reams of scholarly research studies, the FCC Media Bureau's staff has to deal with nitty-gritty interpretations of the presently existing rules in the real world. In doing so, the Bureau has recently released a couple of decisions clarifying a way in which one television station in a small market can effectively operate another station in the same market. The staff has provided a roadmap for lawyers to follow when preparing a complex matrix of contracts leading to FCC approval of television station duopolies in these markets.

> *The Bureau staff really does examine the arrangements to confirm that the Sidecar has the necessary degree of independence from the competitor, both financially and in management decisions.*

To review, the FCC's current multiple ownership rules for television stations permit an existing station owner to acquire another TV station license in the same DMA ***only*** if: (a) there will still be eight independently-owned TV stations (commercial and non-commercial) remaining in the DMA after the acquisition is completed and (b) at least one of the co-owned stations is not among the top four-ranked in the market.

So what happens when a television station comes up for sale in a DMA that doesn't have enough stations to permit another owner in the market to acquire it? The party to whom the station is worth the most and who is, therefore, willing to pay the highest price is usually one of the other TV station owners in that DMA. This creates a tremendous economic incentive for both this potential buyer and the station's seller to come up with a way to strike a deal which is both consistent with the FCC's rules and consistent with the parties' private economic interests.

Something as simple as having a close family member buy the station is an obvious but not necessarily effective approach, because family members' ownership interests can be attributable under the FCC's rules. But creative contract lawyers (no, that's not an oxymoron) have come up with a way to structure sale transactions so that those deals satisfy the letter of the FCC's rules and yet provide substantially all of same the economic benefits to sellers and in-market buyers as conventional sale transactions.

This approach involves finding an independent third-party (let's call that party the "New Licensee") to buy the station's license and some (but not all) of the station's physical assets. The New Licensee then enters into a set of contracts with the existing in-market station owner, who buys the rest of the station's assets. The in-market station owner (let's call it the "Competitor") is the one who really wanted to buy the for-sale station but couldn't under current FCC rules. The New Licensee is known euphemistically in the trade as a "Sidecar."

The Sidecar and the Competitor enter into a series of agreements. These might include such exotica as:

- a shared services agreement (in which certain routine operating functions are, as you might have guessed, shared – such as accounting, human resources, newsgathering, etc.);
- an advertising representation agreement (self-explanatory);
- an option agreement (under which the Competitor might have a chance to buy the sidecar's interests if the FCC's rules are ever relaxed);
- and leases back and forth for certain assets owned by the other.

(In some cases the Competitor effectively finances the sidecar by guaranteeing loans for the sidecar to get the money necessary to purchase the station licenses and assets.)

These types of arrangements have actually been around for a number of years and the Media Bureau has been giving them a stamp of approval despite much wailing and gnashing of teeth by other station owners in the market who claim the arrangements are shams. From 2004 to this past July (in a decision in which FHH's very own Joe Di Scipio played a central role – way to go, Joe), the FCC has been steadily approving these transactions and refining the rules of the game.

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A word to the wise from Joe Di Scipio

FCC: Buyers Must Sign On To Sellers' Tolling Agreements

Our friends at the FCC have thrown a new twist into the continuing saga of station license renewals, tolling agreements and stations sales.

As we here at *Memo to Clients* Central have previously reported, the FCC has placed holds on a number of license renewals, mainly on the television side – the reason being that complaints (in most cases, complaints involving the broadcast of alleged indecency or VNR's and the like) are pending and the FCC just can't seem to get itself in gear to consider and resolve those complaints. As a result, the subject renewals are languishing in one stack or another at the FCC for years.

Now it is longstanding FCC policy that the Commission will not grant a station sale if a license renewal is pending. So if a licensee stuck in this FCC purgatory happens to want to sell its station, the luckless licensee must first get its renewal granted. Since that would ordinarily require that the Commission address sticky issues like indecency – which the FCC is not currently inclined to do – the licensee finds itself at an impasse.

But wait! The FCC (out of the goodness of its heart) has in recent years been willing to enter into tolling agreements with licensees to "toll" the statute of limitations. The primary benefit the FCC gets out of such agreement is more time to act on pending complaints (usually an additional two-three years). Until recently, once such a tolling agreement was signed by licensee, the renewal application was granted and so was the sale application. Seller and buyer went merrily on their way and all was well in FCC land. While the seller was still under the possible hammer of an FCC fine for the duration of the tolling agreement, at least the station deal could be done and, seriously, what's the likelihood that the Commission is *ever* going to resolve the indecency morass, much less within the two-three years of a tolling deal?

Then, abruptly, without warning, a dark cloud formed over FCC land. The FCC dramatically changed its policy. The FCC now requires that if the seller will no longer be an FCC licensee after the sale, the ***buyer*** must sign onto the tolling agreement and agree to accept any liability if the seller is no longer in existence if and when the FCC ever issues a fine (assuming the tolling

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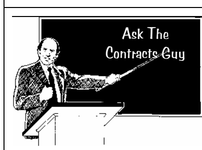

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While it may seem on the surface that the FCC, by approving a fair number of these deals, is loosening the strings, the truth is that the Media Bureau staff really does examine the arrangements in detail to make sure that the Sidecar has the necessary degree of independence from the competitor, both financially and in management decisions. Behind the scenes, many deals have been amended and restructured to meet the Media Bureau's interpretation of the ownership rules before such deals are approved.

In its latest decisions involving these types of transactions, the Bureau emphasized that the payment terms in various contracts between the Sidecar and the Competitor are a fundamental part of the staff's analysis of a proposed transaction. The staff will look for factors such as which party bears the monetary risk of having to make repairs to the station's equipment. The Sidecar entity, as the licensee of the station, must also specifically retain ultimate responsibility for the station's operation, including control over even the Competitor's employees when they are working on behalf of the Sidecar. Finding a Sidecar who has credible experience in owning and operating televisions stations is also a factor that the Bureau staff weighs when evaluating these deals.

For any television station owner in small(ish) DMA's who may be eying a cross-town station that may be for sale – be advised that this is an expensive game in which to play. The legal fees can be very substantial, because both you and your Sidecar entity will need separate teams of lawyers. The number of contracts to paper the deal (almost all of which must be submitted to the FCC for review) is considerably more than the already veritable forest of trees that must be sacrificed for a run-of-the-mill television station acquisition.

And all of the scrutiny at the FCC together with the nearly inevitable objections (and appeals) filed by aggrieved competitors in the market can easily extend the final closing of a transaction of this type by a year or two. It might still be worth it to you, but you should go into this type of transaction with your eyes (and wallet) wide open.