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114TH CONGRESS, 2d Session | SENATE | REPORT 114–426

A BILL TO EXEMPT APPLICATION OF JSA ATTRIBUTION RULE IN CASE OF EXISTING AGREEMENTS

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1182

together with

MINORITY VIEWS

DECEMBER 20, 2016.—Ordered to be printed

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Mr. THUNE, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1182]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1182), to exempt application of JSA attribution rule in case of existing agreements, having considered the same, reports favorably thereon without an amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of S. 1182 is to grandfather those same-market television station Joint Sales Agreements (JSAs) that were in effect as of June 19, 2014, which is the effective date of a rule adopted by the Federal Communications Commission (FCC) requiring the attribution of JSAs between television stations in the same market. The bill would preclude a finding by the FCC that parties to such agreements are in violation of the FCC's broadcast media ownership rules.

BACKGROUND AND NEEDS

A JSA is an agreement with a licensee of a broadcast station that authorizes a third-party broker (typically another broadcast station owner) to sell some or all of the advertising time for the brokered station in return for a percentage of the advertising revenues. Both radio stations and television stations make use of JSAs. JSAs generally allow the third-party broker to hire a sales force for the brokered station, set advertising prices, and make other decisions regarding the sale of advertising time, subject to a preemptive right of refusal for the advertisements by the licensee. JSAs primarily affect the sale of advertising time, and do not impact a station's programming, personnel, finances, physical facilities, or other core operations. In some cases, JSAs may include collateral sharing agreements between brokers and licensees that deal with issues other than advertising time.

The FCC has adopted media ownership attribution rules for broadcast stations, which define what media ownership business interests are counted when applying the FCC's broadcast media ownership rules. According to the FCC, the attribution rules are intended to identify interests in licensees which give the holders a degree of influence or control such that the holder could have a "realistic potential" to affect the licensee's programming decisions or other core operating functions.

In March 2014, the FCC amended its media ownership rules to implement new attribution requirements for JSAs between television stations in the same market. The FCC concluded that a broker could plausibly exert significant influence over a brokered station due to its ability to control the brokered station's advertising revenue, its principal source of income. Under the rule change adopted by the FCC, where a party with a "cognizable interest" in one station sells more than 15 percent of the advertising time per week of a second, same-market station, the broker must attribute its interest in the brokered station under the FCC's media ownership rules. For television station JSAs where attribution results in a violation of the media ownership rules, the FCC gave parties 2 years to terminate their agreements or otherwise come into compliance.

The Committee has received testimony outlining the negative impact of applying an attribution requirement to existing JSAs. Notably, parties have observed that absent the efficiencies resulting from such agreements, it may be cost prohibitive to create local programming, especially in small and mid-sized markets. In March 2013, for example, FCC Commissioner Ajit Pai testified before the Committee and stated that:

> As broadcasters' share of the advertising market has shrunk in the digital age, television stations must be able to enter into innovative arrangements in order to operate efficiently. JSAs and SSAs [(shared service agreements)] allow stations to save costs and to provide the services that we should want television broadcasters to offer. For stations in smaller markets . . . the choice isn't between JSAs or having both television stations operate independent news departments. Rather, the real choice is between JSAs and having at most one television station continue to provide news programming while the other does not. If the FCC effectively prohibits these agreements, fewer stations in small-town America will offer news programming, and they will invest less in newsgathering.[1]

[1] U.S. Congress, Senate Committee on Commerce, Science and Transportation, Oversight of the Federal Communications Commission, hearings, 113th Congress, 1st session, S. Hrg. 113-132, (Washington, DC: GPO, 2014), p.33.

In March 2014, Commissioner Pai offered similar testimony before the Subcommittee on Financial Services and General Government Appropriations of the Committee on Appropriations of the Senate and the Subcommittee on Financial Services and General Government Appropriations of the Committee on Appropriations of the House of Representatives.

Likewise, when testifying before the Subcommittee on Communications and Technology of the Committee of Energy and Commerce of the House of Representatives, in June 2014, the National Association of Broadcasters noted that a JSA between television stations in Wichita, Kansas, led to the State's first Spanish language news broadcast. That broadcaster has asserted that, without the ability to enter into the JSA, it could no longer afford to provide the broadcast.

S. 1182 would provide an exemption for those television station JSAs already in force on the date that the FCC's attribution rule takes effect, thereby mitigating concerns about the rule's retroactive impact. Thus, S. 1182 would enable parties to such JSAs to continue taking advantage of the efficiencies and reduced costs they provide, in turn allowing stations to upgrade their technical capabilities, purchase and produce a wider variety of programming, and encourage viewpoint diversity in programming.

Summary of Provisions

S. 1182 would grandfather existing JSAs between television stations in the same market as of the effective date of the FCC requirement deeming JSAs to be attributable interests under the FCC's media ownership rules. As a result, same-market television JSAs in effect on June 19, 2014, would not be attributable interests under the FCC's media ownership rules.

The Committee does not intend for this provision to overturn or affect the recent prohibition on joint retransmission consent agreements enacted under section 103(a) of the STELA Reauthorization Act of 2014 (P.L. 113–200; 128 Stat. 2059, 2062; STELAR). Congress enacted STELAR on December 4, 2014, which included an amendment to section 325(b)(3)(C) of the Communications Act of 1934 (47 U.S.C. 325(b)(3)(C)), prohibiting joint retransmission consent negotiations unless the broadcast stations seeking to jointly negotiate are under "direct or indirect common de jure control." JSAs do not create de jure common control. While S. 1182 would permit certain television stations to continue operating under existing JSAs, the Committee intends that stations in grandfathered JSAs would remain subject to the ban on joint retransmission consent negotiations as set forth in STELAR.

Legislative History

S. 1182, a bill to exempt application of JSA attribution rule in case of existing agreements, was introduced by Senator Roy Blunt, Senator Charles Schumer, Senator Tim Scott, and Senator Barbara Mikulski on May 4, 2015, and referred to the Committee on Commerce, Science, and Transportation of the Senate. The bill is also cosponsored by Senator Cory Gardner, Senator Ron Johnson, Senator Roger Wicker, Senator Benjamin Cardin, Senator Richard Durbin, and Senator Kirsten Gillibrand.

On June 25, 2015, the Committee considered the bill in an open Executive Session. The Committee, by a rollcall vote, ordered S. 1182 to be reported without amendment.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 1182—A bill to exempt application of JSA attribution rule in case of existing agreements

Under S. 1182, joint sales agreements (JSAs) entered into before June 19, 2014, would be exempt from provisions of a rule limiting those agreements that was adopted by the Federal Communications Commission (FCC) earlier in that year. A JSA is an agreement between one television broadcast station that sells advertising time on behalf of a competing station (the other party in the agreement) in the same market. In 2014, the FCC adopted a rule that would treat JSAs allowing one station to sell 15 percent or more of the weekly advertising time of a competing station as establishing an ownership interest. Under current law, FCC rules limit local television ownership to one station in many local markets across the country, or two, if certain conditions are met.

Based on information from the FCC, CBO estimates that implementing S. 1182 would have an insignificant effect on the agency's costs. The FCC is authorized to collect fees sufficient to offset its operating costs each year; therefore, we estimate that the net effect on discretionary spending would be negligible, assuming appropriation action consistent with that authority. Enacting S. 1182 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 1182 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Susan Willie. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Regulatory Impact

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

The number of persons covered by S. 1182 should be consistent with the current levels of individuals impacted under the provisions of law that are addressed in the bill.

ECONOMIC IMPACT

S. 1182 would not have an adverse impact on the Nation's economy.

PRIVACY

S. 1182 would have no impact on the personal privacy of U.S. citizens.

PAPERWORK

S. 1182 would not significantly increase paperwork requirements for individuals and businesses.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Exemption of application of JSA Attribution Rule for existing agreements.

Section 1 would grandfather same-market television station JSAs that were in effect as of June 19, 2014, which is the effective date of the JSA attribution requirement adopted by the FCC in March 2014. Consequently, the FCC may not find that parties to such agreements are in violation of the FCC's media ownership rules based on interests attributed to them under the March 2014 requirement.

VOTES IN COMMITTEE

Senator Blunt made a motion to adopt the bill. A rollcall vote resulted in 14 yeas and 10 nays. Senate Standing Rule XXVI(7)(a)(3) requires that "[t]he vote of any committee to report a measure or matter shall require the concurrence of a majority of the members of the committee who are present."[2] At the time of the vote, 16 Committee members were present, of which 8 were yeas. Because a concurrence of a majority of present members was not achieved, the motion failed. The yeas and nays were as follows:

YEAS—14	NAYS—10
Mr. Wicker	Mr. Nelson
Mr. Blunt	Ms. Cantwell
Mr. Rubio[1]	Ms. McCaskill[1]
Ms. Ayotte	Ms. Klobuchar
Mr. Cruz	Mr. Blumenthal
Ms. Fischer[1]	Mr. Schatz
Mr. Moran[1]	Mr. Markey
Mr. Sullivan	Mr. Booker
Mr. Johnson[1]	Mr. Udall[1]
Mr. Heller	Mr. Peters
Mr. Gardner	
Mr. Daines[1]	
Mr. Manchin[1]	
Mr. Thune	

[1]By proxy

[2] Standing Rules of the Senate, "Committee Procedure," http:www/rules.senate.gov/public/index.cfm?p=RuleXXVI.

Chairman Thune made a motion to reconsider the vote by which the Blunt motion failed. A rollcall vote resulted in 14 yeas and 10 nays. At the time of the vote, 16 committee members were present, of which 10 were yeas. Because a concurrence of a majority of present members was achieved, the bill was ordered to be reported favorably without amendment. The yeas and nays were as follows:

YEAS—14

Mr. Wicker
Mr. Blunt
Mr. Rubio[1]
Ms. Ayotte
Mr. Cruz
Ms. Fischer
Mr. Moran[1]
Mr. Sullivan
Mr. Johnson[1]
Mr. Heller
Mr. Gardner
Mr. Daines
Mr. Manchin[1]
Mr. Thune

NAYS—10

Mr. Nelson
Ms. Cantwell
Ms. McCaskill[1]
Ms. Klobuchar
Mr. Blumenthal[1]
Mr. Schatz
Mr. Markey
Mr. Booker
Mr. Udall[1]
Mr. Peters[1]

[1]By proxy

MINORITY VIEWS OF SENATOR NELSON

S. 1182 would undermine a carefully crafted Federal Communications Commission (FCC) proposal to address when and how Joint Sales Agreements (JSAs) may be used by local broadcast television stations. The FCC developed this new policy after seeking significant public comment and with the understanding that comes from expertise in application of the FCC's media ownership rules to these complex agreements. I do not support the effort in S. 1182 to unwind this careful balance reached after years of work by the agency. I also believe that the substance of S. 1182 is flawed, offering a permanent exemption for existing JSAs rather than a more targeted approach that places reasonable limits on the grandfathering process.

JSAs are complex arrangements that allow one TV station (usually owned by a large ownership group) to sell the advertising time of a separately-owned TV station. As noted by the FCC, these agreements also are often linked to other shared services agreements that impact other aspects of the operations of the TV station - creating significant operational ties between the two stations. The FCC has found that JSAs often involve the brokerage of significant advertising time up to, in some cases, 100 percent of the ad time of the second station. The agreements also often are of substantial duration - five years or more is common, with provisions that automatically renew the agreement for additional terms unless one of the stations elects to cancel the contract. Various reports suggest that the use of JSAs by the television broadcast industry has grown substantially, though a report by the Government Accountability Office concluded that it is hard to measure the impact of such agreements (along with shared services agreements) on the industry because they are confidential.

As part of the FCC's proceeding examining the effect of JSAs on its media ownership limitations, the Department of Justice (DoJ) submitted comments for the FCC's consideration. Those comments, filed in February 2014, strongly supported FCC regulation of JSA through media ownership attribution. DoJ's comments indicated that the existence and scope of JSAs have become important factors in DoJ's review of pending TV station transactions. Based on this history, DoJ argued that TV JSAs provide incentives similar to common ownership and should be made attributable under the FCC's media ownership limits. Failure to take this step, according to DoJ, could result in TV stations skirting the FCC's media ownership limits and frustrate competition and diversity in local TV markets.

In March 2014, the FCC declared that certain JSAs operate in such a way so as to violate its longstanding media ownership rules, which limit the number of TV stations one company can own or control in a local market. According to the FCC, some JSAs (specifically, those JSAs that allow a TV station to broker more than 15 percent of the ad time of a second station) effectively gave the larger station operational control (in the FCC's words, "significant influence") over the smaller station through its control over the advertising revenue stream for the smaller station. Specifically, the existence of the JSA gives the station selling the TV ad time the incentive and ability to influence or control the programming and core operational decisions of the other station. The FCC determined that these JSAs amount to attributable ownership interests under the media ownership rules, which rightfully seek to limit consolidation of the media in the hands of a few companies and to preserve localism and diversity in the media landscape.

Importantly, the FCC modeled these limitations on TV JSAs on its existing rules that limit radio station JSAs, and the FCC had signaled almost a decade ago that it was considering limits on TV station JSAs because of their potential to be used to skirt media ownership limits. Even so, the FCC gave companies with existing JSAs two years to come into compliance with its revised rules (Congress further delayed enforcement of JSA rules for another six months, until December 19, 2016). It also established a robust waiver process (with shot clocks) that allows TV stations to make the case to the FCC that certain JSAs that would violate the new rules should nevertheless be preserved because they are in the public interest.

Under S, 1182, all JSAs in place at the time of the FCC's decision would be exempted from the revised rules. I understand the desire expressed by the proponents of the legislation that regardless of the merits of the FCC's decision to limit the use of JSAs by TV stations, the FCC should be careful not to unduly upset settled business arrangements. I also respect the arguments put forth by opponents of the new JSA rules, including TV stations from my home state, that these arrangements help keep TV broadcasting robust. But I cannot support an approach to preserving existing JSA agreements that gives them statutory protections that are unprecedented, and effectively sanctions the ability of TV stations to skirt the FCC's media ownership limitations. In fact, the FCC itself rejected just such an approach in its rulemaking, concluding that a blanket grandfathering of existing agreements "would allow arbitrary and inconsistent changes" to its media ownership rules that do not comply with the public interest.

Any rule exemption like the one proposed in this legislation should be limited in time and scope, and should apply only to the parties who entered into the agreement at the time of grandfathering. Both of these requirements would have placed common-sense limitations on the exemption granted by the bill that comport with past precedent (both in statute and at the FCC). Without these reasonable limitations, S. 1182 effectively places JSAs that existed before the FCC acted above the law. They will be exempted from the FCC's rules in perpetuity, and the signers of those agreements can modify them at will (resulting, potentially, in even more egregious violations of the FCC's media ownership rules). In addition, the existing parties to the deals are free to transfer them at will. At best, the FCC will be able to review the agreement at the time a merger or acquisition is placed in front of the agency for approval pursuant to the requirements of the Communications Act. And I strongly believe that the text of this bill does not prevent such a review consistent with the FCC's obligations to ensure that license transactions are in the public interest. Similarly, S. 1182 does not restrict the ability of the FCC to require the parties to an agreement to modify or terminate a JSA to receive FCC approval for a transaction.

Even more fundamentally, however, I have concerns about Congress rejecting the reasoned decision of the FCC in this case without even letting the rules go into full effect. It appears that at no point has a TV broadcast station actually sought a waiver for its existing JSA. Thus, the FCC was not able to utilize its expertise, based upon the extensive record it had gathered relating to JSAs, to judge what of those agreements may in fact be in the public interest. Rather, there was the proverbial race to the courthouse - or in this case Congress's - door to undermine the agency's approach to judging the value of these agreements.

For these reasons, I oppose S. 1182.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

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