

ALERT

# FCC Grants Rare Waiver of Its Prohibition on Ownership of Top-Four TV Stations

June 21, 2024

On June 18, 2024, the Media Bureau of the Federal Communications Commission (FCC or Commission) released a Memorandum Opinion and Order (Order) granting a rare waiver of its Top-Four Prohibition to allow Marquee Broadcasting West, Inc. (Marquee) to acquire a television station from Gray Television (Gray) that has two top-four rated network affiliated streams. This is the first time the Commission has granted a waiver of the Top-Four Prohibition since it extended the prohibition to cover multicast streams of a single station in the 2018 Quadrennial Review Report and Order (2018 Quadrennial Review Order).

## Background

Under the proposed multi-station transaction, Gray will acquire from Marquee the construction permit for KCBU(TV) in Price, Utah, while Marquee will acquire from Gray the licenses of several television stations in the Cheyenne-Scottsbluff, Casper-Riverton, and Denver designated market areas (DMAs), in addition to related low-power television stations. One of the stations that Marquee will acquire, KGWN-TV (KGWN), holds both the CBS and NBC affiliations for the Cheyenne-Scottsbluff DMA.

The Local Television Ownership Rule restricts broadcasters from owning two television stations in the same DMA unless: (1) the digital noise-limited service contours (NLSCs) do not overlap; or (2) one of the stations is not ranked among the top-four stations in the DMA when the application to acquire or construct stations is filed (the Top-Four Prohibition). In the 2018 Quadrennial Review Order, the FCC expanded the Top-Four Prohibition to prohibit the transfer or assignment of ownership of multiple top-four rated program streams

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## Practice Areas

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serving a single DMA.

The Commission considers requests for waiver of the Top-Four Prohibition on a case-by-case basis, considering potential benefits and harms, including unique market circumstances and potential service disruption to viewers. The Commission also analyzes whether, particularly in small markets, applying the Top-Four Prohibition would reduce the number of programming streams in the market.

While there is precedent for the agency granting a waiver of the Top-Four Prohibition, waivers are rare.

#### ***The Public Interest Benefits of Two Top-Four Streams***

In the Order, the FCC determined that Marquee's acquisition of KGWN with two top-four network affiliations would serve the public interest by fostering the service that Gray's ownership provided in the Cheyenne-Scottsbluff DMA. The FCC noted that KGWN provides the only locally produced television news programming in the market, with Gray airing 17 hours of local news weekly across two network streams in 2023 and 2024.

The Commission reasoned that "splitting up the top-four network affiliations currently on KGWN would likely lead to a reduction in network programming or local news in the Cheyenne-Scottsbluff DMA, which would not serve the public interest." First, the FCC explained that the DMA's small population and large geographic areas make it costly for a broadcaster to serve the market. Second, the Commission noted that broadcasters need multiple facilities to cover the dispersed population centers in the DMA. As a result, the FCC emphasized that the DMA could not support four independent network-affiliated stations as the Local Television Ownership Rule requires.

#### ***Looking Ahead: What the Order Could Mean for Local Broadcasters***

The Order shows that the FCC will waive the prohibition of transferring ownership of a station with multiple top-four streams in a market where the applicants present a compelling public interest showing. In particular, broadcasters facing challenges serving their community in a market that cannot support four independent network-affiliated stations may be well-positioned to apply for a similar Top-Four Prohibition waiver. While the Order does not rule out waivers in other circumstances, the reasoning provided is narrowly tailored.

Wiley's Media Practice has extensive experience counseling local broadcasters on FCC applications and compliance. If you have any questions or would like more information, please contact one of the attorneys listed on this alert.