

FCC Will Review Foreign Ownership Exceeding 25% in Broadcast Companies on Case-by-Case Basis

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On November 14, 2013, the Federal Communications Commission (FCC or Commission) issued a Declaratory Ruling clarifying its foreign ownership policy for broadcast licensees. Specifically, the Commission stated that it will now consider, on a case-by-case basis, proposals for foreign investment in the parent company of a broadcast licensee in excess of 25%. Prior to the clarification, the Commission applied a *de facto* 25% cap on such investments.

Section 310(b)(4) of the Communications Act limits foreign ownership of U.S.-organized entities that control broadcast and certain other licensees to 25% when the Commission finds the limitation is in the public interest. As we noted previously, the Coalition for Broadcast Investment (CBI) sent a letter to the Commission in August of 2012 requesting that the agency clarify its foreign investment policy as applied to broadcast licensees. Specifically, CBI urged the Commission to confirm that section 310(b)(4) does not *prohibit* investment exceeding 25% in the parent company of a broadcast licensee, but instead authorizes the FCC to exercise discretion in deciding when “the public interest will be served” by allowing such investment. The Commission issued a Public Notice inviting comment on CBI’s request in February 2013, and received broad support from broadcasters, public interest groups, and others for changes to the FCC’s historical approach to foreign investment in the broadcast sector that would increase broadcasters’ access to capital and investment financing.

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The Declaratory Ruling brings foreign investment policies for broadcast licensees more in line with those for other FCC licensees. The Commission liberalized its policies and procedures regarding common carrier licensees more than a decade ago when it authorized foreign investment in excess of the statutory benchmark in order to encourage a “more open and competitive U.S. telecommunications market.” Unlike in the common carrier context, however, the Commission declined to “create a standardized review process” for proposals for foreign investment in broadcast licensees. Instead, each application or petition seeking approval for foreign ownership above the 25% benchmark will “be assessed on its own merits, [to] determine, given the particular circumstances presented in a particular case, whether the public interest would be served by permitting the requested foreign ownership.” Consequently, the Commission will require a petition for declaratory ruling to accompany any application in which the applicant cannot certify compliance with section 310(b)(4). A petition for declaratory ruling must also be submitted where proposed foreign investment in a broadcast licensee’s controlling U.S. parent would exceed the benchmark but would not require the filing of an FCC application or other form.

In a Press Release, the Commission noted that “the ruling potentially removes obstacles to new capital investment, which will support small business, minority, and female broadcast ownership, and spur innovation.” The Commission was careful to point out, however, that it will “continue to work with Executive Branch agencies on issues related to national security, law enforcement, foreign policy, and trade policy in reviewing proposals for broadcast foreign investment.”

In a Statement, Chairman Wheeler emphasized that the Commission is “open to considering” proposals for foreign investment in excess of the 25% benchmark but that “[t]his is far from an indication that we’re going to rubber stamp them.” The Chairman also noted that the Commission “is engaged in an extensive process to assure that spectrum is put to its highest and best use.” Accordingly, he indicated that the FCC will “assess foreign ownership petitions and applications by looking at, among other factors, whether they will help fulfill these goals....” Commissioners Clyburn, Rosenworcel, and Pai also issued statements in support of the Declaratory Ruling. And in his Statement, Commissioner O’Rielly called the Commission’s action “commendable,” but opined that “it doesn’t move the needle enough. It could have been more if it had been accompanied by [a Notice of Proposed Rulemaking] to further reform section 310(b)(4) as it applies to broadcast licensees.”