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FCC Proposes to Streamline Foreign Ownership Approval Process for Broadcasters, Creating Potential for New Investment Opportunities

October 28, 2015

On October 22, 2015, the Federal Communications Commission (FCC or Commission) issued a Notice of Proposed Rulemaking (NPRM) proposing to simplify the process for broadcast companies to obtain Commission consent to exceed the 25% benchmark set by Section 310 (b)(4) of the Communications Act for foreign investment in their parent companies. The NPRM also seeks comment on the methodology that all companies subject to Section 310(b)(4) must use to determine their aggregate level of foreign ownership.

Extension of Foreign Ownership Streamlining Process to Broadcast Requests

Under Section 310(b)(4), the prior express consent of the FCC must be obtained in order for the aggregate foreign ownership of a U.S. entity that controls a licensee in the broadcast, common carrier, or aeronautical radio services to exceed 25%. Procedurally, the Commission considers whether the public interest would be served by allowing foreign ownership in excess of this benchmark by ruling on petitions for declaratory ruling filed by licensees or their parent companies. Historically, the FCC has freely exercised its discretion to allow indirect foreign ownership in excess of 25% for common carriers, doing so over 150 times, and modifying the policies and procedures for streamlining that process in 2013. However, the Commission has, to date, been less willing to exercise its discretion in the broadcast context. In the wake of the recent Pandora Declaratory Ruling, in which the FCC approved the request of a broadcast radio

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licensee to exceed the 25% indirect foreign ownership benchmark, this NPRM proposes to extend the streamlined foreign ownership rules and procedures that apply to common carriers to the broadcast context, with certain modifications. Through the proposed rules, the Commission aims to promote greater transparency and more predictability, and to reduce regulatory burdens and costs on the broadcast industry. The FCC also notes that the proposed rules will improve broadcasters' access to foreign capital.

Specifically, the Commission proposes to extend (with certain exceptions and modifications) the rules that currently apply to common carrier petitions for declaratory ruling under the foreign ownership rules to broadcasters. The NPRM proposes to allow broadcasters to request:

- "[A]pproval of up to 100% aggregate foreign ownership (voting and/or equity) by unnamed and future foreign investors in the controlling U.S. parent of a broadcast licensee, subject to certain conditions;"
- "[A]pproval for any named foreign investor that proposes to acquire a less than 100% controlling interest to increase the interest to 100% at some time in the future;" and
- "[A]pproval for any non-controlling named foreign investor to increase its voting and/or equity interest up to and including a non-controlling interest of 49.99% at some time in the future." (¶ 11)

The proposed rules would only require a broadcast licensee to "obtain specific approval of foreign investors (i.e., individuals, entities, or a 'group' of foreign individuals or entities) that hold or would hold, directly or indirectly, more than five percent, and in certain circumstances, more than ten percent of the U.S. parent's equity and/or voting interests, or a controlling interest in the U.S. parent." (¶ 11) The NPRM makes clear that the Commission will continue to coordinate with the Executive Branch's "Team Telecom" as necessary regarding foreign ownership petitions, just as it does in the common carrier context. ("Team Telecom" is a working group of officials from the U.S. Department of Defense, the U.S. Department of Homeland Security, and the U.S. Department of Justice that conducts national security reviews of transactions involving foreign ownership.)

The NPRM sets forth five major modifications of the current common carrier rules that would be specific to broadcast licensees seeking permission to exceed the 25% foreign ownership benchmark:

- ***Disclosable Interest Holders:*** Petitions for declaratory ruling must contain certain information about entities and individuals that hold interests in the parent company of a licensee that meet or exceed certain thresholds (these entities are called "disclosable interest holders"). Under the proposed rules, broadcasters would be required to disclose the name, address, citizenship, and principal business of any individual or entity that holds or would hold, after implementation of any planned ownership changes described in a petition for declaratory ruling, an "attributable interest" in the broadcast licensee under the broadcast attribution rules. In general, any entity or individual holding (1) a 5% or greater voting stock interest in a corporation, (2) any general partnership, uninsulated limited partnership, or uninsulated limited liability company interest, or (3) more than 33% of a licensee's "total asset value" (defined as all equity plus all debt), would be considered attributable and thus a disclosable interest holder. This proposal differs from the disclosable interest holder definition that

applies to common carriers, which requires disclosure of any entity or individual that holds a 10% or greater equity or voting interest. (¶ 14)

- ***Specific Approval of Named Foreign Investors:*** Petitions for declaratory ruling generally must identify and request specific approval for any foreign individual or entity, or "group" of foreign individuals or entities, that holds or would hold directly or indirectly more than 5% of the equity and/or voting stock of, or a controlling interest in, the U.S. parent of a licensee (the entities requiring specific approval are referred to as "named foreign investors"). Petitions must also include certain information about entities and individuals that hold interests in named foreign investors. Under the proposed rules, broadcasters would again use the broadcast attribution standards to determine which interests in named foreign investors must be disclosed. This proposal differs from the 10% voting or equity threshold that common carriers use to evaluate their disclosure obligations. (Note that, for purposes of determining *whether* a named foreign investor requires specific approval, the FCC proposes to require broadcasters to use the same standards that apply to common carriers.) (¶15)
- ***Insulation Criteria:*** Under the current rules, the Commission details the methodology for calculating foreign ownership and voting interests in the controlling U.S. parent based, in part, on whether interests are "insulated" or not under criteria set forth in the foreign ownership rules. The FCC's broadcast attribution rules also contain insulation criteria, although those criteria differ from those for common carriers. The NPRM proposes to rely on the broadcast insulation criteria when calculating foreign ownership and voting interests in controlling U.S. parents of broadcast licensees. Under those rules, "all general partners and non-insulated limited partnership and LLC interests are attributable," unless the organizational documents of the entity contain certain specific provisions and the licensee certifies that those holding insulated interests are not materially involved in the management or operations of the entity's media-related activities. (¶ 18)
- ***Service-Specific Rulings:*** Under the current common carrier rules, a foreign ownership ruling applies to *all* types of common carrier wireless services (*e.g.*, satellite, CMRS, microwave, AWS), and is *not* geographically specific. However, given the "heightened concern for foreign influence over or control over broadcast licensees which exercise editorial discretion over the content of their transmissions," the Commission asks whether it should consider foreign investment in broadcast licensee parent companies on a service-specific and/or geographic basis. (¶ 21) For example, the Commission poses the following questions: "If a licensee has a ruling covering television licenses, would it need a new ruling if it later sought to acquire AM radio station licenses? Would a licensee with a ruling for an AM radio station in small market require a new ruling if it sought to acquire a national chain of radio stations or additional stations in that small market?" (¶ 22)

The Commission also seeks comment on how it should address situations in which a single entity may hold, or seek to hold, both common carrier and broadcast licenses, particularly given its proposal to require the submission of different information in common carrier and broadcast petitions for declaratory ruling. The Commission tentatively concludes that an entity should only have to disclose information for both common carrier and broadcast services if it proposes to provide both services. (¶

23)

- ***Filing and Processing of Petitions:*** The NPRM proposes that broadcasters file petitions for declaratory ruling regarding the 25% foreign ownership benchmark through CDBS (rather than ECFS) as an attachment to the underlying applications for construction permit or assignment or transfer of control that broadcasters file. If there is no underlying broadcast application, then the NPRM proposes that petitioners file a non-docketed filing on ECFS. (¶¶ 24-25)

Methodology for Assessing Compliance with the 25% Foreign Ownership Benchmark

In the NPRM, the Commission also seeks comment on the methodology for assessing compliance with Section 310(b)(4)'s foreign ownership threshold. Even though these issues were largely brought to the Commission's attention in the broadcast context during the proceeding involving Pandora through comments from the National Association of Broadcasters (NAB) and the Multicultural Media and Telecommunications Council (MMTC), the NPRM seeks to address the practices used to measure compliance by *all* licensees subject to Section 310(b)(4). (The FCC also asks whether any changes that it makes to the requirements for evaluating compliance with Section 310(b)(4) should also apply to Section 310(b)(3), which imposes a 20% limit on direct foreign investment in broadcast, common carrier, or aeronautical radio licensees.)

For purposes of tracking foreign ownership to ensure compliance with the 25% benchmark, the Commission proposes to distinguish between privately-held and publicly-traded entities. As to privately-held entities, the FCC contemplates that such entities should have knowledge of and be able to easily track their owners. (¶ 30) For publicly-traded companies, however, the Commission acknowledges that demonstrating compliance is more complicated, in part because most shares are held in "street name" (meaning the broker holds legal title on behalf of the beneficial shareholder), and surveys may not be able to ascertain beneficial shareholders' citizenship. Despite these recognized complications, the FCC states that a publicly traded company should know information about certain shareholders, namely, shareholders that are required to disclose ownership pursuant to U.S. Securities and Exchange Commission (SEC) rules (generally, shareholders with greater than 5% ownership and institutional investors with greater than 10% ownership), shareholders whose shares are registered with the company, and shareholders who are officers and directors. (¶ 31)

The Commission asks whether it has authority to allow a licensee with a U.S.-organized public company in its ownership chain to rely solely on ownership information that is known or reasonably should be known to the public company. It also seeks comment on the amount and type of data licensees should be required to access and review in order to satisfy a requirement to use "best efforts" to comply with Section 310(b)(4). The FCC asks, further, if there are policy or legal reasons to limit the availability of such a method to U.S.-organized public companies and/or companies with a certain percentage of U.S. citizens as officers and directors. The agency also inquires as to whether it should apply the same standards for equity and voting ownership or whether there should be a greater obligation to know whether entities holding voting interests are foreign. Additionally, the Commission seeks comment on whether it should accept shareholder street addresses alone as a proxy for citizenship (as it currently does outside of the broadcast context), whether

there are circumstances under which street addresses alone should not be acceptable, and how frequently it should require a company to assess the extent of its foreign ownership. (¶ 32)

The FCC also requests comments regarding alternative approaches to assessing foreign ownership. Specifically, the Commission references certain of the methods outlined in the Pandora Declaratory Ruling, including the possibility of allowing reliance on street addresses coupled with participation in the Depository Trust Corporation's "SEG-100" program—which allows for the deposit of foreign-owned shares into a segregated account for monitoring—for purposes of measuring foreign ownership. (¶ 34) In addition, the FCC seeks comment on the NAB's suggestion that it eliminate the presumption that unidentified shareholders should be counted as foreign shareholders. In this regard, the Commission asks whether, if it eliminates that presumption, applicants should be allowed to extrapolate foreign ownership percentages based on known shareholders, whether it should use a multiple, and whether there should be an upper limit on the relative number of shareholders that can be estimated. (¶ 35) The NPRM also suggests that the Commission might permit small foreign equity and/or voting interests in U.S. public entities without individual review and approval by the FCC. Here, it asks whether there is a legal and policy basis to permit equity and voting interests that need not be reported under Exchange Act Rule 13d-1 without Commission approval, even though a U.S. public company could have aggregate foreign ownership exceeding 25%. The FCC asks, further, if there is a basis for allowing a U.S. public company to have up to an aggregate of less than 50% (or some higher level) non-controlling foreign investment, even if it has investments that may have to be reported under Exchange Act Rule 13d-1, without individual review and approval. (¶ 36)

The Commission proposes that the new streamlined rules for broadcast petitions would be applied prospectively. Relatedly, it seeks comment on how to treat requests that are currently pending. (¶ 42)

Finally, the FCC uses the NPRM to seek comment on certain corrections and clarifications to its existing foreign ownership rules, including whether it should:

- Clarify that certain foreign interests of 5% or less may require specific approval in circumstances where there is direct or indirect foreign ownership in the U.S. parent in the form of uninsulated partnership interests or uninsulated interests held by members of an LLC; (¶ 39)
- Consider whether Commission precedent supports the inclusion of (1) additional permissible voting or consent rights in the list of investor protections that may be held by an insulated limited partner or LLC member, and (2) additional minority shareholder protections that may be held by a 5% or greater voting or equity interest holder without triggering the requirement to obtain specific approval of a named foreign investor (these expansions would apparently not apply in the broadcast context); (¶ 40) and
- Make explicit the requirement that parties filing petitions of declaratory ruling include a certification required by Section 1.16 of the Commission's rules. (¶ 38)

The proposed streamlining of the broadcast foreign ownership review process certainly represents a welcome change from the FCC's historical treatment of broadcaster requests to exceed the Section 310(b)(4) benchmark. All five Commissioners endorsed the NPRM, with Chairman Wheeler recognizing the need to inject "greater transparency" into the broadcast foreign ownership review process and the appropriateness of modernizing the FCC's procedures to account for changes in securities laws and regulations for publicly traded companies. Commissioner O'Rielly—who has long pressed for reforming broadcast foreign ownership review—commented that the item represented a "positive, although incremental, step" toward "multiply[ing] potential funding options available to broadcasters." Commissioner Clyburn similarly acknowledged the benefits of increasing broadcasters' access to foreign capital so as to fuel their efforts to serve the local information needs of communities, increase diversity, and lower barriers to entry to for small businesses. Likewise, Commissioner Rosenworcel agreed that the time has come to eliminate the special funding constraints that broadcasters have faced with respect to raising capital from overseas sources as a result of the Commission's uneven treatment of broadcaster requests to exceed Section 310(b)(4)'s benchmark. Commissioner Pai also praised the FCC's efforts, urging the agency to focus on "level[ing] the playing field" to "enable greater foreign investment in the broadcast industry" and "creat[ing] a more rational process for determining compliance with foreign ownership requirements."

Comments will be due 45 days after publication of the NPRM in the Federal Register, with reply comments due 30 days later.