Communications

Communications Alert

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FCC Adopts Order Streamlining Its Foreign Ownership Review Policies

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Last week, the FCC adopted an Order to streamline its policies with respect to foreign ownership of common carrier radio station licensees (i.e., entities that provide fixed or mobile telecommunications service over networks that use radio frequencies) and certain aeronautical radio station licensees. The Commission stated that it did so, among other reasons, to provide more predictability, to ensure transparency of its foreign ownership requirements under Section 310(b)(4) of the Communications Act, and to facilitate capital investments from new sources. The Commission estimated that the reforms could reduce the number of Section 310(b) annual filings by up to 70 percent.

The modified rules will take effect 30 days after a summary of the *Second Report and Order*[1] adopting the rules is published in the *Federal Register*. The Commission did not change the terms and conditions of foreign ownership rulings issued prior to the new rules' effective date, but will permit licensees that have received a prior foreign ownership ruling to file a new petition for declaratory ruling to take advantage of the new rules. This can be done through a stand-alone petition, or as part of an application for a new license or for consent to a transfer of control or an assignment of an existing license.

Background

Section 310(b)(4) of the Communications Act governs the situations where a foreign government, representative, individual, or company may hold an ownership interest in a U.S.-organized company (a "Parent") that controls another U.S.-organized company that holds FCC common carrier or aeronautical licenses. Section 310(b)(4) establishes a 25 percent benchmark for investment by foreign governments, individuals, and corporations in U.S.-organized Parents. Direct or indirect foreign ownership in a Parent may exceed 25 percent (even up to 100 percent), unless the FCC determines that such ownership would not be in the public interest.

Licensees wishing to secure FCC approval of foreign ownership of a Parent exceeding 25 percent under Section 310(b)(4) typically must file a petition for declaratory ruling. The FCC or its International Bureau, acting on delegated authority, must approve the petition before direct or indirect foreign ownership of the U.S. parent can exceed 25 percent. Certain Executive Branch agencies, such as the Departments of Justice and Homeland Security, also review proposed foreign investments to ensure that they are consistent with national security, law enforcement, foreign policy, and trade policy concerns.

Primary Updates to the FCC's Foreign Ownership Evaluation Policies and Procedures

Elimination of WTO and Non-WTO Member Distinction

Under its current public interest assessment for foreign investments in Parents exceeding 25 percent, the FCC applies a rebuttable presumption that foreign investments from World Trade Organization ("WTO") Member countries (and their representatives, citizens, and companies) in U.S. Parents of U.S. common carrier and

aeronautical radio licensees do not pose reciprocal competition concerns in the U.S. market. For foreign investments in such Parents by non-WTO Member countries (and their representatives, citizens, and companies), however, the Commission applies a more stringent effective competitive opportunities ("ECO") standard to determine whether competitive opportunities exist in that country for U.S. investors in the particular service sector in which the applicant seeks to invest in the U.S. market.

Under the new rules, the FCC will no longer employ a distinction between foreign investment in Parents from WTO Member countries and non-WTO Member countries, and instead will harmonize the treatment of investments by applying the WTO Member "open entry" standard in the assessment of *all* foreign investments.

Subsidiaries and Affiliates

At present the FCC issues foreign ownership public interest rulings under Section 310(b)(4) to cover only the U.S. common carrier and aeronautical licensee(s) named in the underlying petition. Thus, affiliated entities generally are not permitted to rely on a ruling issued to a parent, subsidiary, or sister company, often resulting in multiple public interest filings that cover the same ultimate corporate entities. The new rules change this, permitting a licensee's subsidiaries and affiliates (as defined in Section 1.990 of the FCC's rules) to rely on a foreign ownership public interest ruling previously issued, so long as the foreign ownership relied on by the subsidiaries and affiliates is within the parameters originally approved by the Commission. New subsidiaries or affiliates relying on a prior ruling will have to make their requests subject to review and comment by the Executive Branch agencies.

Identification of Foreign Equity and Voting Rights

The FCC will streamline its review of foreign investments in Section 310(b)(4) public interest petitions: (1) by requiring that petitioners identify only those foreign investors that would hold equity and/or voting interests of greater than 5 percent, and in certain situations greater than 10 percent; (2) by allowing petitioners to request specific approval for any named non-controlling foreign investor to increase its equity and/or voting interest at some future time so long as control is not transferred; and (3) by permitting petitioners to request specific approval for any named foreign investor that proposes initially to acquire a controlling interest, to increase that interest up to 100 percent at a future time.

New Foreign-Organized Entities

Under the existing rules, whether as a result of an internal corporate reorganization or otherwise, new foreign-organized companies may not be inserted into the vertical ownership chain above the controlling U.S. Parent of a common carrier or aeronautical radio station licensee without prior FCC approval. Under the new rules, such new foreign-organized entities may be inserted without approval, provided that the new entity is under 100 percent common ownership and control with the controlling foreign parent of the licensee's controlling U.S. Parent.

Elimination of Service- and Geographic-Specific Rulings

Rather than continuing to issue Section 310(b)(4) public interest rulings that cover only the specific common carrier or aeronautical services being offered at the time, and specific geographic territories, the Commission will now permit a licensee with a foreign ownership ruling to "extend" its existing ruling to cover new services and geographic areas without filing a new petition.

Disclosable Interest Holders Disclosure Requirements

The new rules require that all Section 310(b)(4) petitions for declaratory ruling must contain the name, address, citizenship, and principal business(es) of any individual or entity, regardless of citizenship, that directly or indirectly holds or would hold, after effectuation of any planned ownership changes described in the petition, at least 10 percent of the equity or voting interests in the controlling U.S. Parent of a common carrier or aeronautical radio station licensee. Petitioners also must provide the percentage of equity and voting interest held or to be held by each such "disclosable interest holder" to the nearest one percent.

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Even after these streamlining updates, the FCC's foreign ownership rules remain complex. Please contact your Mintz Levin telecommunications attorney or one of the authors of this alert for more information as we continue to follow these developments.

View Mintz Levin's Communications attorneys.

Endnotes

[1] *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, IB Docket No. 11-133, Second Report and Order, FCC 13-50 (rel. Apr. 18, 2013) ("*Second Report and Order*").

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