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ALERT

Section 310(b)(4) Petitions for Indirect Foreign Ownership Exceeding 25% in Broadcast Licensees

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The Federal Communications Commission (FCC or Commission) has authority to restrict indirect foreign ownership in broadcast licensees to no more than 25% if the Commission determines that such a restriction is in the public interest.[1] Traditionally, this has meant that the 25% benchmark set forth in section 310(b)(4) of the Communications Act was a *de facto* cap on indirect foreign ownership in the broadcast context. However, in a recent declaratory ruling,[2] the Commission made clear that it will consider proposals for foreign investment in the parent company of a broadcast licensee in excess of 25% on a case-by-case basis.

Outside of the broadcast sector, the FCC has developed precedent for making foreign ownership determinations. The Commission has issued approximately 150 declaratory rulings authorizing telecommunications carriers to exceed the 25% statutory benchmark for indirect foreign ownership. The Commission has emphasized the distinction between broadcast and common carrier facilities, and has stated that it will review broadcast investments in excess of the 25% benchmark on a case-by-case basis and not immediately consider comprehensive rules and policies such as exist in the telecommunications space. The body of rulings in the telecommunications area, however, may serve as some guidance for media companies interested in seeking approval under § 310(b)(4) for foreign ownership that exceeds the 25% benchmark and may inform prospective media investors of some of the factors the FCC considers when ruling in the telecommunications space. Additionally, there are other considerations specific to the broadcasting service

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which we believe may factor into Commission judgments on proposals to exceed the 25% indirect foreign ownership benchmark in radio and television licensees.

I. Foreign Ownership Rulings in the Telecommunications Area

In the telecommunications space, just as it will do in the broadcast area, the Commission views each petition for declaratory ruling for foreign ownership authorization on a case-by-case basis. However, the body of rulings regarding foreign ownership in the telecommunications sector reveals the following rules, precedents, and procedures:[3]

- The Commission has discretion to allow indirect foreign ownership in excess of 25% unless the Commission finds that it is in the public interest to deny that foreign ownership.
- For many years, the Commission concluded that it was in the public interest to permit an excess of 25% foreign ownership by individuals or entities from World Trade Organization (WTO) member countries in common carrier and certain aeronautical radio licenses; however, the focus on WTO versus non-WTO member countries was removed with recent 2013 rules for common carrier and aeronautical radio licensees.
  - If any interests could not be identified, then the Commission would presume they were investments from non-WTO member countries.
  - If less than 25% of the foreign ownership was attributable to non-WTO member countries, then the petitioner was entitled to a rebuttable presumption that the post-transaction foreign ownership would not pose a risk to competition in the U.S. market.
- The Commission considers the national security, law enforcement, foreign policy, and/or trade policy concerns raised by the proposed foreign ownership. These same considerations will apply in the broadcast context; the Commission has stated that in passing upon broadcast proposals, it "will continue to afford appropriate deference to the expertise of the Executive Branch agencies on issues related to national security, law enforcement, foreign policy, and trade policy."
- In both telecommunications and broadcast cases, the calculation of foreign ownership interests is a two-pronged analysis. The Commission examines foreign equity interests and foreign voting interests separately.
  - To calculate attributable foreign **equity interests** in a parent company, the FCC uses a multiplier to dilute the percentage of each investor's equity interest in a parent company if those equity interests are indirect (i.e., held through intervening companies), and it uses the multiplier at each link in the vertical ownership chain, regardless of whether that link is a controlling interest or not.
  - To calculate attributable foreign **voting interests** in a parent company, the FCC does not use the multiplier to dilute the interest at a particular link in the vertical ownership chain if that interest represents a controlling interest in the company below it in the chain.
    - If a partnership is involved in the calculations of voting interests, a general partner is deemed to have the same voting interest as the partnership in the company below it in the chain. The

same is true for a limited partner unless there is a showing that the limited partner is insulated from active involvement in the partnership.

- For foreign voting interest evaluations, the FCC will sometimes treat multiple investors as holding the same voting interest if the investment is held by multiple intervening holding companies or partnerships. This is to ensure that no particular foreign interest raises any flags.

- To determine a foreign entity's principal place of business, the Commission identifies and balances these factors:
  - Country of incorporation, charter, or organization
  - Nationality of all investment principals, officers, and directors
  - Country in which the entity is headquartered
  - Country in which the majority of tangible property is located
  - Country from which the entity derives the greatest sales and revenues from its operations
- The Commission requires that applicants make use of ownership diagrams.

The Commission has considered a number of factors in its common carrier rulings, including:

- **WTO Membership:** The Commission has approved indirect ownership from numerous WTO-member countries, including Anguilla, Antigua and Barbuda, Australia, Belgium, Bermuda , the British Virgin Islands, Canada, the Cayman Islands, Denmark, Fiji, France, Germany, Guernsey, Ireland, Italy, Japan, Jersey, Luxembourg, Mauritius, Mexico, the Netherlands, New Zealand, Norway, the Philippines, Russia, Singapore, Spain, St. Kitts and Nevis, Switzerland, and the United Kingdom.
- **Non-WTO Membership:** The Commission has approved limited indirect ownership from non-WTO member countries as well, including the Cook Islands, the Bahamas, and the Republic of the Seychelles.
- **Level of foreign ownership:** The Commission considers what level of indirect foreign ownership will exist after a proposed transaction. The Commission has approved indirect foreign ownership at numerous levels, including 34.07%, 38.53%, 40.18%, 49.99%, 50%, 63.81%, 69.5%, 70%, 75.39%, 82.66%, and even 100%.
- **Entity Organization/Type:** The Commission considers the type of entity applying for indirect foreign ownership, and has granted approval for a variety of entities, including corporations, general partnerships, government-owned banks, holding companies, limited liability companies, limited partnerships, proprietary limited companies, public limited companies, publicly-traded companies, and venture capital funds.
- **Mechanism Employed to Determine Interests in Widely-Held, Publicly-Traded Companies:** The Commission considers the method used to determine indirect foreign ownership and has approved publicly-traded companies who determine ownership interests through citizenship surveys and tabulation of shareholder addresses. Information regarding the addresses of custodian banks or brokers is not sufficient.[4] This will likely be an even more important factor in the broadcast context. In 2011, the FCC stated that even though it allowed a publicly-traded broadcast company to use

shareholder mailing addresses to show that it fell below the 25% foreign ownership mark, that case "did not sanction reliance on mailing addresses as a substitute for random surveys in the broadcast context."[5] The FCC concluded that "[n]otwithstanding our conclusion that beneficial owner addresses may be sufficiently reliable indicators of citizenship in cases involving common carriers . . . we emphasize . . . that such addresses are not a substitute for the more reliable method of statistical surveys in the broadcast context given the different policy concerns in that service."

- **Active or Passive Investment:** The Commission considers whether investment will be active or passive. For example, in ruling on a 2011 petition for ITC Global USA, LLC, the FCC noted that an American citizen would control and manage the day-to-day operations, and that foreign individuals would not be involved in management, hold officer positions, or be on the Board of Directors.

II. Considerations Which May Apply in Broadcast Cases

In its November 2013 declaratory ruling regarding proposals to exceed the 25% foreign ownership benchmark in broadcast holding companies, the Commission declined to create a standard review process or streamlined procedural mechanisms such as those which exist in the common carrier area, stating that it was "cognizant of the distinctions between common carrier facilities and broadcast stations." The FCC further stated that "we do not believe that the historical statutory concern for foreign influence over broadcast stations has disappeared," noting that broadcast stations are licensed to serve the needs and interests of U.S. communities and offer a range of critical information services to the public. This suggests that in considering proposals to exceed the 25% indirect foreign ownership benchmark in broadcast licensees, the Commission may well look at existing factors in a different manner and could consider additional factors that are uniquely applicable to broadcasting.

- **Level of Foreign Ownership**: The Commission could consider the proposed level of indirect foreign ownership in broadcast cases more carefully than in telecommunications cases. We believe that, at least initially, proposals that modestly exceed the 25% benchmark are likely to have a greater chance of success than those which propose a controlling or greater level of foreign ownership.
- **National Identity of Foreign Investment**: Given broadcast stations' nature as content producers and originators (as opposed to telecommunications companies, which largely act as conduits for the messages of others), we would expect the FCC to closely scrutinize the nationalities of proposed foreign investors above the 25% benchmark. National security, law enforcement, and other considerations could well be of more importance in broadcast cases.
- **Active or Passive Investment**: Again, this factor may be of greater importance in broadcast cases due to the nature of the medium. The success of a proposal involving a high level of foreign investment may rest in large part on whether the foreign owners are investing for purely economic reasons or, conversely, whether they intend to play a role in management, program selection, or other day-to-day operations of the broadcast enterprise.
- **Programming Proposals**: In those cases where foreign owners propose to take a significant stake and be involved in day-to-day station operation, we could foresee the Commission ruling in part on the

basis of the programming proposed to be aired by the stations under the proposed ownership. Given the November 2013 declaratory ruling's admonition that broadcast stations are licensed to serve the needs of local U.S. communities, we would anticipate that a would-be significant foreign owner of a broadcast holding company be prepared to show that the company's station(s) will produce and air a substantial amount of locally-geared programming (as opposed to, for example, delivering large blocks of non-U.S. network programming).

- **Economic Hardship**: We also anticipate that the FCC may consider the need for a proposed foreign investment in excess of the 25% benchmark. In proposing significant foreign investment, an applicant may enhance its chances of success by showing an acute need for the investment (for example, to rescue a failing or failed station) and the absence of domestic financing alternatives.
- **TV Spectrum Auction**: In his statement accompanying the November 2013 declaratory ruling, FCC Chairman Wheeler made it a point to note that the ruling "could unleash new capital" to help television stations invest in meeting the objectives of the projected 2015 auction of television spectrum – in particular, to invest in channel sharing arrangements or migration from the UHF to the VHF band. This suggests that proposals for foreign ownership above the 25% benchmark will have an enhanced chance of success if they can demonstrate the foreign investment will assist one or more television stations in relinquishing their spectrum to auction.

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[1] The Communications Act limits *direct* foreign ownership in licensees to 20%, and the Commission has made clear that it has no discretion to approve foreign ownership in excess of that benchmark.

[2] *Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees*, MB Docket No. 13-50, Declaratory Ruling, FCC 13-150, 2013 WL 6987158, ¶ 14 (2013).

[3] In 2013, the FCC adopted policies to streamline the approval process for indirect foreign ownership in common carrier and certain aeronautical licenses. Therefore, this body of rules and procedures has now been codified, and in some cases, amended. *See 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, 28 FCC Rcd. 5741 (2013).

[4] *See Verizon Communications, Inc.*, WT Docket No. 06-113, Memorandum Opinion and Order and Declaratory Ruling, FCC 07-43, 22 FCC Rcd. 6195, 6222–23 (2007). Regarding this transaction between Verizon Communications Inc. and América Móvil, the FCC stated: "Although we recognize América Móvil's concerns as to the difficulties associated with being able to provide reliable identification of the beneficial owners where a company's equity is publicly traded and widely held, nevertheless, we decline, based on the record in this proceeding, to change the Commission's precedent by accepting street addresses of stockholders and banks as an indicator of citizenship of the beneficial owners." *Id.*

[5] *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases, and Petitions for Declaratory Ruling that the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, WT Docket No. 08-95, Order on Reconsideration, FCC 11-122, 26 FCC Rcd. 11763, n.92 (2011).