FCC Further Revises and Reforms Its Foreign Ownership Rules for Common Carrier and Aeronautical Radio Licensees

On April 18, 2013, the U.S. Federal Communications Commission ("FCC") issued its Second Report and Order in IB Docket No. 11-133 ("Second R&O") establishing revised foreign ownership policies and procedures for common carrier and aeronautical radio station licensees. The new rules will simplify and clarify the FCC's process for approving foreign ownership in U.S. parent companies of common carrier and aeronautical radio licensees, which the FCC estimates will reduce the number of Section 310(b) petitions for declaratory ruling by up to 70 percent.

1. Background on the FCC's Prior Approach

Section 310(b) of the Communications Act (the "Act") prohibits a foreign government, corporation organized under foreign law, non-U.S. citizen, or representative of a foreign government from directly holding a common carrier radio (for terrestrial wireless/microwave, mobile, or satellite service) or aeronautical license. Section 310 does, however, permit direct and indirect foreign investment in such licensees, subject to a number of additional requirements established by the FCC. These requirements, which the Second R&O partly displace, provided as follows:

- ***Common Carrier or Aeronautical License Not Controlled by a Foreign Investor***: For non-controlling investments that result in aggregate direct and indirect foreign ownership of 20 percent or less, the FCC does not require prior approval. For non-controlling investments that result in aggregate direct and indirect foreign ownership in a licensee in excess of 20 percent, the FCC requires that the licensee first obtain a declaratory ruling finding that such foreign ownership would serve the public interest. For investors from WTO member countries, the FCC presumes that aggregate foreign ownership of up to 100 percent serves the public interest. For investors from non-WTO member countries, the FCC permits foreign ownership (up to 100 percent) only upon satisfaction of the effective competitive opportunities ("ECO") test, which requires such investors to show that their home countries offer effective competitive opportunities to U.S. investors.

- ***Common Carrier or Aeronautical License Controlled by a Foreign Investor***: Section 310(b)(3) prohibits direct, controlling ownership in the licensee in excess of 20 percent. For controlling investments that result in aggregate direct and indirect foreign ownership in a licensee in excess of 25 percent, the FCC requires that the licensee first obtain a declaratory ruling finding that such foreign ownership would serve the public interest. For investors from WTO member countries, the FCC presumes that aggregate foreign ownership of up to 100 percent serves the public interest. For investors from non-WTO member countries, the FCC permits foreign ownership (up to 100 percent) only upon satisfaction of the ECO test.

2. Second R&O Changes to FCC's Foreign Ownership Policies

The Second R&O modifies the FCC's approach to approving foreign investment in common carrier and aeronautical radio licensees in several ways:

- ***Eliminating the WTO/Non-WTO Distinction***. Under the new rules, the FCC will apply the open entry standard formerly reserved for investment from WTO member countries to its assessment of *all* foreign investment.

- ***Streamlining Approach to Section 310(b)(3) and 310(b)(4) Reviews***. The FCC will:

  - No longer require petitioners to identify foreign equity or voting interests of 5 percent or less or, in certain circumstances, of 10 percent or less;

  - Allow petitioners to request specific approval for any named foreign investor to increase its equity and/or voting interest up to and including a non-controlling 49.99 percent interest at some future time;

  - Permit petitioners, under Section 310(b)(4), to request specific approval for any named foreign investor that proposes to acquire a controlling interest of less than 100 percent to increase the interest to 100 percent at some future time;

  - Issue new declaratory rulings with a 100-percent aggregate allowance for unnamed and future foreign investors, provided that the licensee obtains approval before any foreign investor acquires an interest greater than 5 percent (or, in certain circumstances, 10 percent).

- ***Allowing Subsidiaries and Affiliates to Rely on Licensee's Foreign Ownership Ruling***. The FCC will now permit a subsidiary or affiliate of an FCC licensee that has obtained a declaratory ruling under Section 310(b)(3) or 310(b)(4) to rely on that ruling rather than filing its own separate petition for declaratory ruling.

- ***Permitting Licensees to Add Certain New Foreign Owners Without Prior Approval***. Provided that the new foreign-organized entity is under 100-percent common ownership and control with a previously-approved foreign investor, the new rules will permit licensees to add new foreign-organized entities into the approved vertical ownership chain above the licensee's controlling U.S. parent (under Section 310(b)(4)) or above a non-controlling, U.S.-organized entity investing in the licensee (under Section 310(b)(3)) without prior FCC approval.

- ***Adopting Rules Formally Requiring Prior Approval of Foreign Ownership***. The new rules will codify the requirement for prior approval of foreign ownership under the FCC's Section 310(b)(3) forbearance approach and its Section 310(b)(4) review. The FCC will also establish content and filing requirements for petitions for declaratory ruling.

- ***Eliminating Service- and Geographic-Specific Rulings***. Rather than issue service- or geographic-specific rulings, the FCC will permit a licensee with an existing foreign ownership ruling to add new services and new geographic service areas without filing a new petition for declaratory ruling.

3. Certain Aspects of FCC Foreign-Ownership Reviews Remain Unchanged

The Second R&O also clarifies that certain aspects of the FCC's approach to review of foreign investment in common carrier and aeronautical radio licensees will stay the same. In particular, the FCC will continue to coordinate with other Executive Branch agencies in making determinations about foreign ownership, and will continue to defer to those agencies on matters involving national security, law enforcement, foreign policy, and trade policy. This means that the FCC will continue to allow the "Team Telecom" agencies—the Departments of Defense, Homeland Security, and Justice—to defer FCC action on applications for initial licenses and consents for mergers and acquisitions pending negotiation of security mitigation arrangements with those agencies. The FCC also retains discretion to condition or disallow foreign investment that may pose a risk of harm to important national policies.

The FCC's rules will take effect 30 days after publication of the Second R&O in the Federal Register, following approval by the White House Office of Management and Budget. That publication has not yet occurred.

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For more information regarding the FCC's foreign ownership rules or Wiltshire & Grannis LLP's telecommunications or international trade and investment practices, please contact **Kent Bressie** at +1 202 730 1337 or kbressie@wiltshiregrannis.com, or contact the W&G lawyer with whom you regularly work.