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The FCC's Proposed (and Recently Adopted) Rule Loosening Foreign Ownership Restrictions on Broadcast Entities

On October 24, 2013, FCC Acting Chairwoman Mignon Clyburn circulated a declaratory ruling that would reassess the FCC's rule that caps foreign ownership of U.S. television stations to 25%, with a reemphasis on a case-by-case method of review. On November 14, 2013, the Commissioners unanimously agreed to approve and adopt the Declaratory Ruling (FCC 13-150).

The Declaratory Ruling does not alter a preexisting rule; rather, it reinterprets the original language of the rule to satisfy what it was intended to do: limit foreign-ownership of domestic broadcasting while providing opportunity for foreign ownership on a case-by-case basis that would serve the public interest. This summary assesses how a rule affecting foreign ownership of domestic broadcasting entities, codified at Section 310(b)(4) of the Communications Act of 1934, has evolved over time, and how this new interpretation will affect domestic broadcasting entities and their prospective foreign investors.

I. HISTORY OF SECTION 310(B)(4)

Section 310(b)(4) of the Communications Act of 1934 prohibits foreign ownership in excess of 25% of U.S. entities that control broadcast licensees when the Commission determines that the limitation is in the public interest. At the time the rule was adopted, foreign-ownership of domestic broadcast entities was perceived as a potential threat to national security, affecting the United States' ship-to-shore communications and other paramilitary uses. The FCC's foreign ownership restrictions, including 310(b)(4), were intended to secure homeland broadcasts from threats such as foreign coercion and propaganda during wartime.

The language of the rule clearly provides that foreign-ownership in excess of 25% would be permitted on a case-by-case basis. Initially, the benchmark served as a "soft cap" restriction, requiring broadcast entities to seek FCC approval should they exceed the 25% limit. Over the next 80 years, the rule was interpreted as having a "hard cap," and the FCC preferred to treat the 25% ownership as an absolute limit, rather than spend time determining whether foreign ownership would be a threat to the public interest. The FCC believed that substantial foreign ownership of domestic broadcast stations and other types of radio spectrum licensees naturally did not serve the public interest. In fact, the FCC has

issued only one waiver of the 25% cap in the past, when it granted a retroactive waiver to Rupert Murdoch in the 1990s.

II. REINTERPRETATION OF SECTION 310(B)(4)

For the past 80 years, the decline in potential military threats to U.S. broadcasting, coupled with a globalizing economy, have stimulated new opportunities for the communications market. Over 15 years ago, the FCC adjusted its policies and procedures authorizing foreign investment exceeding a statutory benchmark for common carrier licensees to reflect the changes of globalization and a growing market, while remaining inflexible with the broadcast benchmark. It is only natural that other communication venues, such as broadcast stations, should be granted opportunities to international capital.

Broadcasters, special interest groups, and other proponents of a reinterpretation asserted that the previous application of 310(b)(4) restricted the flow of foreign capital to domestic broadcast licensees. The National Association of Media Brokers ("NAMB") indicated that banks from Canada and Europe, which are interested in equity investments in U.S. broadcast stations, have limited participation because of the 25% rule. Another supporter of the Declaratory Ruling, the Coalition for Broadcast Investment, comprised of companies such as CBS Corp., Walt Disney Co., and Univision, led the charge in instigating the change to capitalize on foreign investments. Other supporters believe that the ruling will benefit station diversity, leveling the playing field for minorities, women, and small broadcast entities that historically have an issue finding access to capital.

III. EFFECTS OF THE NEW INTERPRETATION OF SECTION 310(B)(4)

The new interpretation clarifies that the FCC will, in presumably most or all cases, review petitions for foreign ownership that exceed 25% on a case-by-case basis. Although the rule is being relaxed, this does not mean that all companies seeking foreign investment should anticipate a sudden influx of capital. The Commission will still take issues such as national security, foreign policy, and trade policy into consideration when reviewing broadcast foreign investment proposals, and will still discuss the issues with other Executive Branch agencies. Further, broadcast-controlling entities still may not exceed the 25% threshold without FCC approval, and to satisfy the public interest filing required by Section 310(b)(4), they must still provide detailed information to the Commission.

This decision paves the way for foreign companies like Qatar-based Al-Jazeera to consider expanding their presence in the U.S. Broadcasting market, and conglomerates like Univision may spread their influence through anticipated

Initial Public Offerings in foreign markets. In summation, this Declaratory Ruling simply relaxes the Commission's interpretation of a rule, which will likely enable foreign companies to invest more capital in U.S. broadcasting entities. Hopefully, this will accomplish the FCC's goal of providing new opportunities to capital for broadcasting entities, while still providing ample room for the FCC to step in and prevent foreign ownership when it harms the public interest.

Summarized by Andrew C. Burr

S. 1680, The Consumer Choice in Online Video Act

In November 2013, Senator Jay Rockefeller introduced S. 1680, The Consumer Choice in Online Video Act. Senator Rockefeller sees the growth of online video as an opportunity to promote competition and innovation in the media marketplace that would result in a benefit to consumers. The Act aims to reduce anticompetitive practices by Multichannel Video Playback Distributors (MVPDs) and Internet Service Providers (ISPs) that can inhibit the growth of online video providers. The Act also seeks to help consumers make more informed decisions when purchasing an Internet service. Finally, the Act legitimizes antenna rental services like the heavily litigated Aerio. Senator Rockefeller hopes this could eventually lead to an "a la carte" video marketplace.[1]

Title I of S. 1680 seeks to improve consumers' ability to make an informed decision when choosing an Internet service provider. It instructs the Commission to promulgate regulations within a year of the Act's passage that would require ISPs to disclose the length of the contract, terms of renewal, and a projected monthly bill. These include post-initial promotions, procedures to cancel the service, actual transmission speeds, and details on their network management, as well any additional features the Commission finds necessary. The legislation includes further direction for usage based billing. It would require a plain language statement of the terms and conditions and an explanation of how usage would be calculated, including how it would affect a consumer's use of the service. For example, it would indicate how much high definition video a consumer could watch during a billing period without incurring overuse fees. It then requires ISPs to disclose the requisite overuse fees, while also showing consumers their monthly data usage and notifying them of how much data remains to be used. Finally, the legislation directs the Commission to develop standards on how to

1 *Featured Legislation: The Consumer Choice in Online Video Act*, U.S. Senate Committee on Commerce, Science, and Transportation, Nov. 12, 2013, http://www.commerce.senate.gov/public/index.cfm?p=Legislation&ContentRecord_id=060460a1-5ef6-4c7b-8d52-c65ee5266d87.

track consumers' data usage.

Title II attempts to put online video distributors on the same level as traditional MVPDs by attacking what S. 1680 calls "unfair competition." The Act states it would "increase competition, innovation, and diversity in the video programming marketplace." If enacted, the legislation would make it unlawful for MVPDs to contract with content providers in a way that would create disincentives for them to sell their content to online video distributors as well. This also includes understandings and arrangements not to sell to online video providers or limit what platform the online video provider can play the content on. It also targets exclusive contracts between content providers and either MVPDs and online video providers. The legislation also makes it unlawful for broadcasters or television networks to refuse to negotiate with online video providers. Further, a video program vendor cannot block consumers from its content during disputes with the consumers' MVPD if they previously made the content available online.

The most significant part of the legislation deals with the effect the Act would have on the broadcast industry and its relationship with IP-based antenna services. The legislation would give statutory legitimacy to services such as the increasingly popular and legally controversial Aerio antenna service. It states that antenna services can rent antennas to consumers that can be viewed directly over the internet or to an individual data storage system so it can be viewed as a recording through an internet connection. Unlike traditional MVPDs, the bill would exempt these antenna services from paying retransmission fees to broadcasters under Section 325 of the Communications Act. However, the legislation limits access only to broadcast signals that are in the consumer's market.

The legislation also touches on net neutrality issues. It makes it unlawful for an ISP to inhibit anyway an online video provider's ability to deliver content to a consumer. This includes blocking or degrading content, discriminating against content, providing benefits to a video content company that is affiliated with the ISP, or using a billing system that deters competition with the ISP or its affiliate services.

Title III of the legislation allows for online video providers who perform similarly to traditional MVPDs to elect as a non-facilities based MVPD. The legislation ask the Commission to consider what rules applicable to traditional MVPDs should also apply to non-facilities based MVPDs, including technical standards and broadcast time requirements. Once they elect as a non-facilities based MVPD, the legislation would prohibit practices by MVPDs that block content from non-facilities based MVPDs, acting similarly to the program access rules. It would also make it unlawful for MVPDs to retaliate against program vendors who make their content available on non-facilities based MVPDs.

Also, any commercial broadcast station within a relevant DMA would have a

duty to negotiate in good faith with the non-facilities based MVPD for carriage of the signal. However, in what would be a major development, a non-facilities based MVPD would also be able to bring in a single non-local broadcast signal while not being required to have any local stations at all. These signals could be accessed on any platform used by the non-facilities based MVPD. The bill also states that if a non-facilities based MVPD seeks to add a noncommercial broadcast station, then other noncommercial broadcast stations can seek carriage on the system. These non-facilities based MVPDs would be excluded from franchise requirements and would not be counted towards "effective competition" analyses.

The future of S. 1680 is in doubt. Rep. Bob Latta (R-Ohio), Vice Chairman of the Communications House Subcommittee, said there are no plans to hear testimony about the bill in the subcommittee.[2] Industry reactions of the bill are mixed. Public Knowledge Senior Staff Attorney John Bergmayer hailed the bill as a way of leveling the playing field for online providers and making them more competitive with incumbent MVPDs.[3] However, some are cautious. The National Association of Broadcasters, undoubtedly troubled by the bill's favoritism for rival antenna services like Aerio, stated that they were looking forward to working on the bill, but also asserted that NAB is "concerned about proposals that may legitimize theft of copyrighted programming. Copyright theft poses a very real threat to the revenue stream that supports local television and the U.S. network-affiliate TV relationship that is the envy of the world."[4] Further, Time Warner Cable chairman Glenn Britt questions how S.1680 attacks exclusive contracts and argues that they are an integral part of business in the entertainment industry.[5]

Summarized by William Durdach

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2 Brendan Sasso, *Republican: House Won't Take Up Online Video Bill*, The Hill, Nov. 20, 2013, http://thehill.com/blogs/hillicon-valley/190881-republican-house-wont-take-up-online-video-bill.

3 Jon Brodkin, *Bill Would Make It Illegal for ISPs to Slow Down Online Video Services*, Ars Technica, Nov. 13, 2013, http://arstechnica.com/tech-policy/2013/11/bill-would-make-it-illegal-for-isps-to-slow-down-online-video-services/.

4 Press Release, National Association of Broadcasters, NAB Statement on Introduction of Video Programming Legislation by Sen. Rockefeller, Nov. 12, 2013, available at http://www.nab.org/documents/newsRoom/pressRelease.asp?id=3256.

5 Brian Santo, *Proposed Bill Will Turn Video Business Upside Down*, CED Magazine, Nov. 13, 2013, http://www.cedmagazine.com/news/2013/11/proposed-bill-will-turn-video-business-upside-down.

***In re* Implementing Public Safety Broadband Provisions of the Middle Class Tax Relief and Job Creation Act of 2012; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Service Rules for the 698-746, 747-762 and 777-792 MHz Bands (Oct. 28, 2013).**

On October 28, 2013, the Federal Communications Commission ("FCC" or "Commission") adopted its Second Report and Order ("Order") adopting consolidated technical rules for the 758-769/788-799 MHz band, which is licensed to the First Responder Network Authority ("FirstNet"). The *Order's* purpose is to expedite the availability of equipment for FirstNet as prescribed by the Middle Class Tax Relief and Job Creation Act of 2012 (the "Act").

I. BACKGROUND

The Act provided for deployment of a nationwide public safety network in the 700 MHz band, and established FirstNet as its administrator within the National Telecommunications and Information Administration (NTIA). The Act also established a Technical Advisory Board for First Responder Interoperability ("Interoperability Board"), which recommended a network based on commercial standards for Long Term Evolution (LTE). The Commission approved these recommendations on June 21, 2012 for transmittal to FirstNet, which was required to incorporate them into its requests for proposals.

On September 7, 2012, the Public Safety and Homeland Security Bureau adopted a *Report and Order* deleting inconsistent Commission rules and directing the Commission to reallocate Block D spectrum for "public safety services." This action deleted rules that governed operations of FirstNet under previous "Public Safety Broadband License."

As a result, the Commission released a *Notice* on March 8, 2013, seeking comments regarding the adoption of consolidated technical service rules, the exercise of the Commission's statutory responsibilities overseeing FirstNet, and transition matters for incumbent operation in spectrum licensed to FirstNet.

II. CONSOLIDATING TECHNICAL RULES THAT GOVERN FIRSTNET:

The *Order* includes nine categories of rule consolidations: (1) Power Limits, (2) Emission Limits, (3) Field Strength Limits, (4) Interference Coordination, (5) International Considerations, (6) 700 MHz Public Safety Guard Band, (7) Equipment Certification, (8) Miscellaneous Proposals From the Comment Record, and (9) Further Rule Consolidations.

A. Power Limits

The Commission proposed modifying § 90.542(a) of its rules to bring D Block frequencies under its purview while deleting the redundant provisions of § 27.50(b). At the same time, the Commission sought comment on whether § 90.542(a) power limits remain appropriate for the combined public safety broadband allocation, and whether operation parameters for LTE will require more restrictive limits on portable device power output.

Most commenters supported the general approach of § 90.542(a) and its application to the D block. Verizon and Harris had opposing views regarding reduced base station power limits for antennas greater than 305 meters Height Above Average Terrain (HAAT), with Verizon favoring stricter power limits consistent with adjacent bands. Regarding issues of power limits on portable devices, Motorola Solutions noted that § 90.542(a) expresses power limits in terms of "effective radiated power" (ERP) to account for antenna gains and losses, which is different than the LTE standard. General Dynamics stated that further restrictions on hand-held device power outputs may negate important advances in research and development by device manufacturers.

As a result of these comments, the Commission maintains power and antenna height limits of § 90.542(a) and extends them to the D Block. The Commission also maintains the 3 watt ERP for hand-held devices.

The Commission also proposed consolidation of power flux density limits for FirstNet spectrum under § 90.542(a). Among commenters, Motorola Solutions argued that a 3000 $\mu W/m^2$ limit is an effective compromise, while Harris argued that limiting power flux density only of signals transmitted in excess of 1000 watts ERB is counterproductive to minimizing interference. The Commission agreed with Motorola Solutions and consolidated existing power flux density limits under § 90.542(a), but not without observing that it expects FirstNet to carefully coordinate site deployments with adjacent narrowband licensees.

B. Emission Limits

The Commission proposed unifying under § 90.543 out-of-band emission (OOBE) limits on FirstNet spectrum. This would be accomplished by first consolidating into § 90.543(e) emissions restrictions from FirstNet allocations into adjacent 700 MHz public safety narrowband segments. Second, consolidation would include § 90.543(f) limits on emissions from FirstNet devices into the 1559-1610 MHz Global Positioning System (GPS) bands. And third, the Commission sought comment on whether the limits of § 27.53(d)(3) on D Block emissions should be extended to apply to FirstNet spectrum.

For emissions into adjacent narrowband spectrum, AT&T supported the proposed rule consolidation, while Harris believed that more protection was needed.

Regarding the 1559-1610 MHz GPS band, commenters generally agreed to consolidate as proposed, but with differing views on whether this should include harmonics language in the final rule. For limits on FirstNet emissions, both AT&T and General Dynamics supported the Commission's proposal.

After consideration, the Commission modified § 90.543(e) to encompass the D Block portion of FirstNet's spectrum. The Commission also extended § 90.543(f) protections of GPS operations to emissions from D Block devices, retaining the harmonics language. Finally, the Commission adopted § 27.53(d)(3) limits on FirstNet emissions into adjacent commercial spectrum.

C. Field Strength Limits

The Commission previously sought comment on whether a field strength limit should be established for the expanded public safety broadband allocation. These limits would reduce interference between the FirstNet radio access network (RAN) and any State Networks deployed on the same band. The Commission also proposed adopting the § 27.55(a)(2) field strength limit of 400 dBuV/M.

Commenters were split, with some arguing that the potential for multiple network deployments supported the Commission's limits. Others argued that State Networks should function within the single, FirstNet RAN, and that limits should be unnecessary given expectations of siting cooperation.

The Commission elected not to adopt any field strength limits for RANs operating within FirstNet's licensed spectrum, citing the requirements that State Networks must coordinate with FirstNet before deployment of their own networks.

D. Interference Coordination

In the *Notice*, the Commission also discussed considered FirstNet or other broadband operators in its licensed spectrum should be required to undertake any forms of interference coordination with 700 MHz commercial licensees or public safety narrowband users.

Among commenters, APCO, Motorola Solutions, and AT&T advised against imposing potentially burdensome coordination requirements, noting that stakeholders have significant motivation to act voluntarily to minimize interference. The Commonwealth of Virginia argued for the imposition of coordination requirements, noting that its network had already experienced harmful interference.

The Commission found that it was not necessary to adopt formal coordination requirements, but noted that licensing and spectrum management tools remain

available to minimize interference.

E. International Considerations

The Commission agreed to remove international coordination provisions for D Block from § 27.57(b) of the rules and move them to § 90.533, which already contains substantively identical provisions.

F. 700 MHz Public Safety Guard Band

The Commission recognized in the *Notice* that the FirstNet license includes 768-769/798-799 MHz bands which have been designated as guard bands by the Commission to protect nearby broadband and narrowband segments of the 700 MHz public safety band. The Commission proposed that these designations remain, and sought comment.

Some commenters agreed with the Commission's proposed plan, at least during early stages of broadband deployment. Others suggested that the guard band spectrum could see limited use for localized, low power applications. In addition, a third group argued that FirstNet should retain control over all spectrum licensed to it, including the guard bands.

The Commission elected to retain its regulations requiring the 768-769/798-799 MHz guard bands, but allowed that later stage network developments might see a relaxation of these rules.

G. Equipment Certification

In the *Notice*, the Commission proposed consolidating equipment certification rules for FirstNet devices under § 90.549. This was done with knowledge that these certifications would be subject to as yet unadopted technical rules. The Commission also sought comment on whether it should adopt certification requirements specific to this band that would augment those already present in § 90.549. The Commission also proposed removing the legacy provisions of § 90.203(p).

Commenters supported consolidating equipment certification rules, though many including FirstNet itself and Motorola Solutions noted that the suspension of certifications was problematic for early deployment. Others including APCO and Harris urged adoption of an expedited process for approval of equipment prior to adoption of technical service rules. For the augmented certification requirements, Motorola Solutions and FirstNet both argued that they would add unnecessary delay.

With this *Order*, the Commission adopted technical service rules for equipment certifications to begin. The Commission also decided to unify equipment certification under § 90.549 without further augmentation, and to delete § 90.203(p).

H. Miscellaneous Proposals from the Comment Board

In addition to existing technical rules, AT&T proposed that the Commission adopt rules ensuring that the public safety broadband network operates in accordance with "commercial standards" defined by statute. This was opposed by Motorola Solutions, which argued that such language could hinder development of technologies that do not precisely follow commercial standards. The Commission declined AT&T's proposal, noting that the topic of "commercial standards" was beyond the scope of the original *Notice*.

Commenter Harris proposed that the Commission establish distinct rules for different base stations consistent with 3GPP definitions and technical specifications, especially concerning transmitting power and minimum coupling loss restrictions. The Commission declined this proposal, noting that the technical rules already include well defined interference protections.

I. Further Rule Consolidations

The Commission also consolidated other minor rules, ensuring that operations of D Block are entirely governed by Part 90 of the rules, with no provisions remaining in Part 27.

III. CONCLUSION

In addition to issuing these consolidated technical rules, the Commission found that there is sufficient "good cause" to implement the *Order* immediately rather than wait the thirty days required by § 553 of the Administrative Procedure Act. Reasons included the earlier suspension of equipment certification, impending deployments, the presence of signed contracts, and public safety benefits of FirstNet. The *Order* was therefore effective on October 28, 2013.

Summarized by Nick Kokkinos

Do Not Track Online Act of 2013, S. 418, 113th Congress

On February 28, 2013, Senate Commerce, Science, and Transportation Committee Chairman Jay Rockefeller (D-WV) and Senator Richard Blumenthal (D-CT) introduced S. 418, the Do-Not-Track Online Act of 2013 ("Act"). The Act would direct the Federal Trade Commission ("FTC") to establish rules for a national online privacy regime enabling individuals to opt out of personal data collection efforts conducted by their internet, mobile, and online service providers. Once an individual elects to opt out of collection of their personal information, any provider who does so would be in violation of the Act. Remedies, enforceable by the FTC and the states, include injunctive relief, damages, restitution, and civil penalties.

I. REGULATIONS RELATING TO "DO-NOT-TRACK" MECHANISMS

Section 2 would direct the FTC to promulgate regulations establishing the standards for an online mechanism allowing consumers to opt out of data collection within one year after the Act's enactment. In an effort to address growing concerns about online privacy, the mechanism should give an "individual [a] simpl[e] and eas[y way to] indicate whether the individual prefers to have personal information collected by providers of online services, including by providers of mobile applications and services." The Act directs the FTC to use its rulemaking authority to promulgate specific rules prohibiting providers from "collecting personal information on individuals who have expressed . . . a preference not to have such information collected."

The Act contains two exceptions: the first permits collecting personal information "necessary to provide a service requested by the individual, including with respect to such service, basic functionality and effectiveness, so long as such information is anonymized or deleted upon the provision of such service," and; the second permits individuals to affirmatively consent to the collection of their personal information after having received "clear, conspicuous, and accurate notice on the collection and use of such information."

In promulgating the standards and rules, the FTC would be directed to take several factors into consideration that include: the appropriate scope of the standards and rules; the conduct that will be covered and the individuals who will be required to comply; the technical feasibility and costs of implementation and compliance; any mechanisms which are already developed and in use; how to publicize and offer the mechanisms to individuals; whether information can be collected anonymously so it cannot be reasonably linked or identified with a person or device, on its own or in combination with other information; and

whether information can be collected and used subject to the anonymization and deletion requirements.

II. ENFORCEMENT OF "DO-NOT-TRACK" MECHANISMS

Section 3 would authorize the FTC to enforce violations of the Act under existing statutes pertaining to unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce. All privileges and immunities available under the FTC Act would be available under the Act. Nonprofit organizations are treated as an individual subject to the Act.

Section 3 would authorize enforcement by states' Attorneys General as *parens patriae* on behalf of aggrieved citizens through civil action in district court. Remedies available would be enjoinment of further violations, compulsive compliance, damages, restitution, and other compensation, with civil penalties up to $16,000 per day an individual is in violation, for a maximum of $15,000,000.

Generally, a state's Attorney General must notify the FTC prior to initiating suit. If pre-filing notice is not feasible, notice still must occur immediately upon filing of a complaint. The FTC can intervene in any civil action brought under the Act by an Attorney General, be heard on all issues raised, and appeal final decisions. Venue lies in the appropriate district court, and service can be made upon any inhabitant of the State or any individual personally in the State.

Section 3 would permit "[a]ny other officer of a State who is authorized by the State to . . . bring a civil action . . . subject to the same requirements and limitations that apply . . . to civil actions." The Act would not "prohibit an authorized official of a State from initiating or continuing any proceeding in a court of the State for a violation of any civil or criminal law of the State."

III. BIENNIAL REVIEW AND ASSESSMENT

Finally, the Act would require the FTC, no later than two years after the effective date, to conduct a review of the regulations' implementation, effectiveness (including how the term "personal information" is defined or interpreted), effect on online commerce, and to submit these findings in a report to Congress.

Summarized by Janette M. Richardson