

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Review of Foreign Ownership Policies for
Broadcast, Common Carrier and Aeronautical
Radio Licenses under Section 310(b)(4) of the
Communications Act of 1934, as Amended

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GN Docket No. 15-236

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	COMMENTERS AGREE THAT MODERNIZING AND STREAMLINING BROADCAST FOREIGN OWNERSHIP RESTRICTIONS WILL PROVIDE IMPORTANT PUBLIC INTEREST BENEFITS	3
III.	THE COMMISSION SHOULD ADOPT ITS PROPOSAL TO HARMONIZE THE COMMON CARRIER LICENSEE AND BROADCAST PETITION PROCEDURES	5
IV.	THE COMMISSION SHOULD REFORM ITS FOREIGN OWNERSHIP CALCULATION METHODOLOGY	9
	A. The Commission’s Foreign Ownership Calculation Methodology Is Outdated as Applied to Publicly Traded Companies	9
	B. Broadcasters Should Only Be Required to Consider Reasonably Identifiable Interest Holders and Should be Allowed to Use Alternative Proxies to Determine the Citizenship of Identifiable Interest Holders	9
V.	CONCLUSION	12

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)¹ hereby replies to comments filed in response to the *Notice of Proposed Rulemaking* issued by the Federal Communications Commission (Commission) in the above-captioned proceeding.² Commenters overwhelmingly agree with the Commission’s proposed reform of its policies and procedures applying Section 310(b)(4).³ Because the record strongly supports the Commission’s view that such updates will “reduc[e] regulatory burdens and costs, provid[e] greater transparency and predictability, and facilitat[e] investment in the U.S. broadcast and

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

² *Review of Foreign Ownership Policies for Broadcast, Common Carrier and Aeronautical Radio Licenses under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 30 FCC Rcd 11830 (2015) (*Notice*).

³ 47 U.S.C. § 310(b)(4).

telecommunications infrastructure,”⁴ NAB urges the Commission to act expeditiously on the proposed reforms.

Broadcast commenters agree that the Commission should extend to broadcasters the streamlined Section 310(b)(4) petition for declaratory ruling (Petition) filing and approval procedures currently applicable to common carrier wireless licensees, subject to certain modifications proposed by the Commission. They also agree that the Commission should replace its current case-by-case analysis of Petitions with a more clearly defined review and approval process to increase regulatory transparency and predictability, which, in turn, will increase broadcasters’ access to foreign capital and remove a key impediment to increasing diversity in broadcast ownership. Further, the broadcasters’ comments demonstrate the need for the limited changes to the Commission’s Petition procedures that were proposed by NAB, including the ability of broadcasters to seek retroactive Petition approval to the extent that they first learn after the fact that their foreign ownership has crossed an applicable threshold.

In addition, broadcast commenters all support the Commission’s proposal to reform the methodology used by licensees subject to Section 310(b)(4) to assess and maintain their compliance with the statute. Commenters demonstrate that the Commission’s foreign ownership calculation methodologies need to be updated to take into account the modern prevalence of electronic stock exchanges and the adoption of stockholder privacy regulations by the Securities and Exchange Commission (SEC). They generally agree that the Commission only should require broadcasters to consider the citizenship of interest holders that broadcasters reasonably can be expected to identify and that broadcasters should be

⁴ Notice, 30 FCC Rcd 11846 ¶ 44.

permitted to use reasonable means, including reasonable proxies, to determine the citizenship of such reasonably identifiable interest holders.

For these reasons the Commission should adopt on a timely basis the foreign ownership reform that it proposed in the *Notice* and the further reforms proposed by the NAB.

II. COMMENTERS AGREE THAT MODERNIZING AND STREAMLINING BROADCAST FOREIGN OWNERSHIP RESTRICTIONS WILL PROVIDE IMPORTANT PUBLIC INTEREST BENEFITS

Commenters explain that the foreign ownership reforms proposed by the Commission in its *Notice* will provide important public interest benefits. The proposed reforms will provide broadcasters with access to new sources of both foreign and domestic capital, which in turn will promote diversity of broadcast ownership. The proposed reforms also will allow broadcasters to compete for capital available to other video programming delivery platforms that are not subject to foreign ownership restrictions. In addition, by modernizing and streamlining its foreign ownership rules, the Commission will create new opportunities for American broadcasters to enter foreign radio and television markets. Importantly, no commenter identifies any plausible public interest harms that could result from the Commission's proposed reforms.

Commenters believe that, in addition to directly facilitating foreign investment in the U.S. broadcast industry generally, modernizing the foreign ownership rules will remove a key obstacle that limits diversity in the ownership of broadcasters.⁵ According to the Multicultural Media, Telecom and Internet Council (MMTC), "U.S. banks and venture capital

⁵ See Comments of Multicultural Media, Telecom and Internet Council, GN Docket No. 15-236, at 2-3 (filed Dec. 21, 2015) (MMTC Comments); Comments of National Association of Broadcasters, GN Docket No. 15-236, at 4-6 (filed Dec. 21, 2015) (NAB Comments).

firms are often unwilling to finance the small or medium-sized broadcast transactions commonly pursued by minority broadcasters and new entrants because such transactions cannot support the expensive regulatory compliance efforts” required under the Commission’s current broadcast foreign ownership rules.⁶ As a result, women and racial and ethnic minorities continue to be underrepresented in broadcast ownership.⁷

Further, broadcasters increasingly compete with a variety of other video programming delivery platforms, including most recently Internet-delivered video programming distributors such as Netflix. These alternative distributors are not saddled with the same restrictive foreign ownership requirements that currently face broadcasters.⁸ Consequently, commenters observe that the Commission can create a more level playing field between broadcasters and other video programming delivery platforms by reducing the regulatory burdens imposed on broadcasters by Section 310(b)(4).⁹

Commenters also state that modernizing the U.S. foreign ownership requirements will foster reciprocal opportunities for American broadcasters to expand into foreign radio and television markets by preventing foreign jurisdictions from using the U.S. rules as a justification for maintaining trade barriers that limit U.S. broadcasters’ participation in foreign broadcast markets.¹⁰ As MMTC explains, “[t]he U.S. often leads by example in the international community. Establishing a more flexible standard for compliance with U.S.

⁶ MMTC Comments at 2-3.

⁷ See MMTC Comments at 1-3; NAB Comments at 4-5.

⁸ See MMTC Comments at 3; NAB Comments at 6.

⁹ See Comments of 21st Century Fox, Inc., GN Docket No. 15-236, at 1 (filed Dec. 21, 2015) (Fox Comments); MMTC Comments at 2-3; NAB Comments at 6-7, 9-10; Comments of Nexstar Broadcasting Group, Inc., GN Docket No. 15-236, at 3-5 (filed Dec. 21, 2015) (Nexstar Comments).

¹⁰ See MMTC Comments at 4-5; NAB Comments at 5-6.

broadcast foreign ownership requirements . . . could enhance the free flow of capital internationally and also help to break down trade barriers between nations.”¹¹

Importantly, no commenter identifies any realistic public interest harm that could result from the foreign ownership reforms proposed in the *Notice*. Nor does any commenter provide a credible, much less a compelling, explanation of how the proposed reforms could provide a meaningful ability for foreign entities to influence U.S. broadcast programming.¹² Further, no commenter asserts any reason to apply a different and more restrictive interpretation of Section 310(b)(4) to broadcasters than the Commission applies to wireless common carriers. Moreover, foreign entities already have the unfettered capability to distribute video programming to U.S. consumers using media channels other than broadcast because, as set forth above, no foreign ownership restrictions apply to the non-broadcast video programming distribution platforms with which broadcasters compete.¹³ Consequently, as concluded by Comcast Corporation, “the dramatically changed media landscape has significantly diminished any risk from foreign ownership of broadcast licensees.”¹⁴

III. THE COMMISSION SHOULD ADOPT ITS PROPOSAL TO HARMONIZE THE COMMON CARRIER LICENSEE AND BROADCAST PETITION PROCEDURES

Commenters support the Commission’s proposal to harmonize the common carrier wireless and broadcast Petition procedures. The Commission also should create a presumption that nonattributable foreign ownership in a broadcaster in excess of 25

¹¹ MMTC Comments at 5.

¹² See Comments of Comcast Corporation, GN Docket No. 15-236, at 12 (filed Dec. 21, 2015) (Comcast Comments); NAB Comments at 7-8.

¹³ See Comcast Comments at 16-17; Fox Comments at 1-3; Nexstar Comments at 4.

¹⁴ Comcast Comments at 17.

percent is consistent with the public interest provided that the broadcaster's aggregate foreign ownership is under 50 percent. And, to the extent a broadcaster is required to file a Petition, the Commission only should require the broadcaster to identify attributable entities in the Petition and the broadcaster should utilize the broadcast insulation rules to determine whether an interest holder is attributable. Each of these proposals is supported by commenters and no commenters oppose these proposals. The Commission also should adopt a procedure for broadcasters to retroactively file a Petition.

As an initial matter, consistent with the comments of NAB and 21st Century Fox, Inc., (Fox),¹⁵ the Commission should create a public interest presumption under Section 310(b)(4) pursuant to which a broadcaster may have non-attributable foreign ownership in excess of 25 percent without prior Commission approval provided that the total aggregate foreign ownership in such broadcaster is less than 50 percent.¹⁶ As Fox explains, "the Commission . . . has ample legal authority to adopt this modest proposal."¹⁷ In support of its proposal that the Commission adopt a similar but more expansive presumption, T-Mobile USA, Inc. notes that "[t]he Commission's public interest analysis is directed at identifying foreign interests with the potential to influence or control the licensee" and a "*de minimis*" interest holder has "virtually no power or influence over [a] company's policies or operation."¹⁸ Accordingly, this proposal poses no potential to create public interest harms,

¹⁵ See Fox Comments at 9-10; NAB Comments at 9-12.

¹⁶ Commission adoption of this Fox and NAB proposal will not obviate the need for reform of the Commission's foreign ownership calculation methodology, as further discussed in Section IV(B) of these reply comments.

¹⁷ Fox Comments at 10; see also NAB Comments at 10.

¹⁸ Comments of T-Mobile USA, Inc. (T-Mobile), GN Docket No. 15-236 at 6-7 (filed Dec. 21, 2015). NAB has no objection to T-Mobile's alternative proposal to permit entities subject to Section 310(b)(4) to refrain from considering interest holders that hold an interest of five percent or

and it would reduce the frequency with which broadcasters would be required to expend resources to file Petitions.¹⁹ Further, no commenter opposes adoption of the proposed presumption.

In addition, consistent with the position of each broadcast commenter that addresses the issue,²⁰ the Commission should replace its current case-by-case approach to broadcast Section 310(b)(4) Petitions with the procedures the Commission applies to wireless licensee Petitions, subject to certain modifications. This will enable broadcasters to seek Commission approval (i) for up to 100 percent aggregate foreign ownership by unnamed and future, nonattributable foreign investors in the controlling U.S. parent of a broadcaster and (ii) for any named foreign investor that proposes to acquire a less than 100 percent controlling interest to increase the interest to 100 percent at some time in the future. Section 310(b)(4) does not differentiate between broadcasters and common carriers, and no commenter asserts a credible reason for the Commission to refrain from providing broadcasters with the same regulatory clarity that wireless licensees enjoy.²¹ Further, as Nexstar Broadcasting Group, Inc. (Nexstar) notes, doing so “may produce similar public interest benefits for the broadcast sector that greater access to foreign capital has brought to the telecommunications sector.”²²

Broadcast commenters addressing the issue generally agree that the Commission should (i) require broadcasters to identify only attributable entities in Petitions and (ii) utilize

less when calculating their foreign ownership for purposes of determining compliance with the statute. *Id.* at 3-13.

¹⁹ See NAB Comments at 12.

²⁰ See Fox Comments at 3-4; NAB Comments at 8-9, 12-14; Nexstar Comments at 3-5.

²¹ See Comcast Comments at 11; Nexstar Comments at 4.

²² Nexstar Comments at 4.

the broadcast insulation rules, rather than newly applying the wireless licensee insulation rules to broadcasters.²³ As set forth by Fox, utilizing the broadcast ownership attribution criteria to determine Petition disclosure requirements would foster “certainty and efficiency.”²⁴ Fox also explains that “[m]any broadcast licensees and their investors have configured their ownership and control structures in reliance on the broadcast insulation criteria,” and therefore “the cost and complexity of re-structuring existing ownership arrangements—assuming re-structuring is even possible—are likely to be high.”²⁵

In addition, commenters highlight that it is not always feasible for publicly traded broadcasters to proactively prevent their foreign ownership from exceeding applicable thresholds in light of today’s electronic stock trading.²⁶ Consequently, the Commission should adopt a procedure to permit broadcasters to seek retroactive Commission approval for new or newly attributable foreign shareholders.²⁷ For example, Fox states that “companies with widely-traded shares can experience trading volume of tens of millions of shares on a busy day—easily enough to account for a few percent of its total shares outstanding . . . [T]hese trading swings can result in a widely-held company inadvertently crossing the 25 percent foreign ownership benchmark through no fault of its own.”²⁸ The Commission should provide broadcasters with a retroactive Petition approval mechanism to prevent circumstances that are beyond a broadcaster’s control from causing it to violate Section 310(b)(4).

²³ See Fox Comments at 4; NAB Comments at 14-16, 21-24.

²⁴ Fox Comments at 4.

²⁵ Fox Comments at 4.

²⁶ See Fox Comments at 6; NAB Comments at 17; Nexstar Comments at 5-6.

²⁷ See NAB Comments at 16-18.

²⁸ Fox Comments at 6-7.

IV. THE COMMISSION SHOULD REFORM ITS FOREIGN OWNERSHIP CALCULATION METHODOLOGY

A. The Commission's Foreign Ownership Calculation Methodology Is Outdated as Applied to Publicly Traded Companies

There is broad consensus that the Commission's foreign ownership calculation methodology as applied to publicly traded companies has become outdated in light of the evolution of electronic stock exchanges.²⁹ Nexstar observes that the "vast majority" of its shares are held either in the Depository Trust Company's name or in a broker's name and that the company therefore does not know the identity of most of its beneficial owners.³⁰ Nexstar's description is representative of the industry as a whole because most shares of publicly traded companies today are held in street name,³¹ and SEC regulations prevent brokers from disclosing certain shareholder information to the issuing company without the shareholder's consent.³² In light of these profound challenges, the Commission should reform the method by which broadcasters are required to calculate foreign ownership for purposes of determining their compliance with Section 310(b)(4).

B. Broadcasters Only Should Be Required to Consider Reasonably Identifiable Interest Holders and Should be Allowed to Use Alternative Proxies to Determine the Citizenship of Identifiable Interest Holders

Consistent with NAB's comments, commenters agree on two primary tenets, each of which should be reflected in the foreign ownership calculation methodology adopted by the Commission: (i) when calculating their foreign ownership, broadcasters only should be

²⁹ See Fox Comments at 5-10; NAB Comments at 25-27; Nexstar Comments at 5-8.

³⁰ Nexstar Comments at 5.

³¹ See Comcast Comments at 7-8; Fox Comments at 5-6; NAB Comments at 25-26; Nexstar Comments at 7.

³² See Comcast Comments at 8; Fox Comments at 5-6; NAB Comments at 26; Nexstar Comments at 6-7.

required to consider the citizenship of interest holders that they reasonably can be expected to identify³³ and (ii) broadcasters should be permitted to use reasonable means, including reasonable proxies, to determine the citizenship of their identifiable interest holders.³⁴ Specifically, the Commission should deem only the following categories of shareholders to be reasonably identifiable: registered shareholders; stockholders that accumulate more than 5 percent of the company's stock and are required to file a SEC Schedule 13D, 13G, or 13F; and non-objecting beneficial owners.³⁵

If the citizenship of an identifiable shareholder cannot be obtained from a publicly available source and the shareholder reasonably cannot be asked about its citizenship directly, then a broadcaster should be permitted to use alternative proxies for determining the shareholder's citizenship. Commenters agree that the use of street addresses as a proxy for citizenship should be permissible when other citizenship information is not available.³⁶ Commenters also uniformly agree that broadcasters should be permitted to assume that "unknown" shareholders have the same percentage of foreign ownership as "known" shareholders.³⁷ The Commission's current policy of treating every "unknown" shareholder as foreign likely drastically overstates the foreign ownership of a broadcaster given that a high percentage of shares of most public companies are held by objecting beneficial owners

³³ See Comcast Comments at 2-4; Fox Comments at 9; NAB Comments at 29-30; Nexstar Comments at 5.

³⁴ See Comcast Comments at 9-10, 13-14; Fox Comments at 9; NAB Comments at 30-33; Nexstar Comments at 6.

³⁵ See Comcast Comments at 4-8; Fox Comments at 9; NAB Comments at 29-30; Nexstar Comments at 7.

³⁶ See Comcast Comments at 2; Fox Comments at 9; MMTC Comments at 3-4; NAB Comments at 31.

³⁷ See Comcast Comments at 9-10, 12-13; Fox Comments at 9; NAB Comments at 32-33; Nexstar Comments at 7-8.

(OBOs), and broadcasters have no means of determining the identities, much less the citizenships, of such OBOs.³⁸ This proposed approach cannot result in any public interest harms because these unidentified shareholders do not have the ability to influence the operations of a broadcaster.³⁹

NAB also supports Fox’s proposal to permit, but not require, broadcasters to utilize a “votes cast,” rather than “votes held,” means of ensuring compliance with foreign voting thresholds as an alternative to periodically calculating a broadcaster’s foreign voting ownership.⁴⁰ As Fox explains, “[t]ying the Commission’s voting analysis under Section 310(b)(4) to votes actually cast would align the residual policy goals of the statute—oversight of non-U.S. shareholders’ role in corporate governance—with the marketplace reality that voting is the locus of influence and control,” and it “would ensure that every shareholder ... is given the maximum rights possible to participate in the governance of a publicly-traded corporation.”⁴¹

Finally, most commenters addressing SEG-100 generally agree that SEG-100 is an effective means of monitoring foreign ownership.⁴² Accordingly, the Commission should adopt NAB’s proposal to permit broadcasters to rely on SEG-100 for purposes of maintaining compliance with Section 310(b)(4).⁴³ However, NAB agrees that participation in SEG-100 should not be mandatory.

³⁸ See Comcast Comments at 8-9; NAB Comments at 26, 30.

³⁹ Comcast Comments at 13, 16; NAB Comments at 32-33.

⁴⁰ See Fox Comments at 10-15.

⁴¹ Fox Comments at 11.

⁴² See Fox Comments at 6, 9; NAB Comments at 33; Nexstar Comments at 7.

⁴³ See NAB Comments at 33; Nexstar Comments at 7.

V. CONCLUSION

Consistent with the overwhelming consensus of parties filing substantive comments in this proceeding, the Commission should adopt its proposed foreign ownership reforms, and the additional reforms proposed by the NAB, to modernize and streamline the Commission's application of Section 310(b)(4). Specifically, the Commission should adopt the presumption proposed by NAB and Fox that nonattributable foreign ownership in excess of 25 percent is consistent with the public interest if a broadcaster's aggregate foreign ownership is under 50 percent; the Commission should extend the wireless licensee Petition procedure to broadcasters, subject to the modifications addressed herein and in NAB's initial comments; and the Commission should broadly reform its foreign ownership calculation methodology. These Commission actions will provide broadcasters with increased access to capital and reduce their regulatory burdens, while protecting the public interest objectives of the Commission. Further, the proposed reforms will pose no concomitant public interest harms. Accordingly, NAB urges the Commission to act expeditiously on the proposals in this proceeding.

Respectfully submitted,

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