

Communications and Information Technology Alert

Akin Gump
STRAUSS HAUER & FELD LLP

FCC Seeks Comment on Simplifying Filing Obligations for Pro Forma Transactions

July 21, 2020

An area in which businesses have repeatedly and inadvertently run afoul of the rules of the Federal Communications Commissions (FCC) is determining when a corporate transaction or restructuring involves changes in the ownership chain or voting control of entities holding FCC licenses such that prior FCC approval is required. Failure to obtain the necessary approval can result in FCC enforcement actions against the parties to these transactions and monetary penalties in the hundreds of thousands of dollars to settle these actions, as was the case **just last week**.

In an attempt to move the FCC to simplify and clarify the application and prior approval requirements for such transactions and restructurings, the wireless and telecommunications industry trade associations CTIA and USTelecom filed a **petition** with the FCC. The petition requests that the FCC initiate a rulemaking proceeding and issue a declaratory ruling about filing and approval requirements for *pro forma* transfer of control and assignment applications required for wireless and satellite licensees. The FCC classifies *pro forma* transactions as those that do not involve a substantial change in ownership or control. Such transactions could include, but are not limited to, adding or altering intermediate entities in the ownership structure of the licensee without changing the ultimate ownership and control of the licensee. CTIA and USTelecom ask the FCC to either: (1) exempt satellite and wireless *pro forma* transactions from the requirement to obtain prior FCC approval; or (2) establish automatic approval processes for such applications. If the FCC adopts the petition's proposals, many licensees would have simplified filing obligations at the FCC when undertaking *pro forma* transactions.

CTIA and USTelecom filed the petition to address inconsistencies in the treatment of wireless and satellite licensees that engage in *pro forma* transactions. As a general matter, Section 310(d) of the Communications Act of 1934, as amended, requires prior FCC approval of any transaction transferring control of an FCC licensee, including assignments of licenses from one entity to another and changes in direct and indirect control of FCC licensees. The FCC relies, however, on its forbearance authority for certain licensees, requiring only a post-transaction notification for a *pro forma* transaction, rather than prior approval.

Contact Information

If you have any questions concerning this alert, please contact:

Jennifer L. Richter

Partner

jrichter@akingump.com

Washington, D.C.

+1 202.887.4524

Galen A. Roehl

Senior Policy Advisor

groehl@akingump.com

Washington, D.C.

+1 202.887.4224

Steven A. Rowings

Counsel

srowings@akingump.com

Washington, D.C.

+1 202.887.4412

C. Shea Boyd

Associate

Shea.boyd@akingump.com

Washington, D.C.

+1 202.887.4421

The statute granting the FCC its forbearance authority refers specifically to the use of that power with respect to the provision of “telecommunications services” that are provided for a fee directly to the public, i.e., common carrier services. As a result, the FCC has taken the position that it can only use its forbearance authority to reduce or eliminate regulatory requirements for common carrier licensees, and not for the broad class of entities operating non-telecommunications services, such as Internet service or private (not public, common carrier) service. These licensees must still obtain prior FCC approval of any *pro forma* transfer of control or assignment of its licenses. The petition seeks to resolve this inconsistency.

Given the FCC’s prior stance on the statutory limitations of its forbearance authority, CTIA and USTelecom may face challenges with their request to eliminate prior approval requirements altogether. However, there does not appear to be a statutory barrier to the FCC finding that, as CTIA and USTelecom request in the alternative, such transactions presumptively serve the public interest and should be subject to automatic approval processes. This would not be a new endeavor for the FCC, as it has taken this step for other types of license transfer and assignment applications. The FCC is seeking comment on the petition and its proposals. Interested parties must submit comments on the petition by July 24, 2020, with reply comments due on August 10, 2020.

akingump.com