

Before the
Federal Communications Commission
Washington, D.C. 20554

GN Docket No. 93-252

In the Matter of

Implementation of Sections 3(n) and
332 of the Communications Act

Regulatory Treatment of Mobile Services

FIRST REPORT AND ORDER

Adopted: January 4, 1994;

Released: January 5, 1994

By the Commission:

I. INTRODUCTION

1. On September 23, 1993, we adopted a *Notice of Proposed Rule Making (Notice)*¹ in which we proposed, *inter alia*, to establish a procedure by which private land mobile radio licensees that will be reclassified as commercial mobile radio service (CMRS) providers pursuant to this rule making proceeding could file a waiver petition to retain existing foreign ownership. We now establish the filing procedure for these waiver petitions and remind all potentially affected licensees of the February 10, 1994, filing deadline. We also emphasize that filing such a petition will not prejudice the licensee's right at a later date to assert that it should not be classified as a CMRS provider.

II. BACKGROUND

2. The Omnibus Budget Reconciliation Act of 1993 (Budget Act)² amended Sections 3(n) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153(n), 332 (Communications Act), to create a comprehensive regulatory framework for all mobile radio services. "[A]ny provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993" is subject to the foreign ownership restrictions imposed on common carriers by Section 310(b) of the Communications Act, 47 U.S.C. § 310(b).³ Nevertheless, the statute allows affected

licensees to petition the Commission for waiver of the application of Section 310(b) to any foreign ownership that lawfully existed as of May 24, 1993. The statute requires that these petitions for waiver be filed with the Commission by February 10, 1994 (within 6 months of enactment of the Budget Act). The Commission may grant such waivers to eligible petitioners only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b).

47 U.S.C. § 332(c)(6)(A), (B).⁴

3. Section 310(b) states in relevant part:

No ... common carrier ... license shall be granted to or held by --

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

For the purposes of Section 310(b), certain partnership interests, as well as certain other interests held by non-corporate entities and associations, may be considered ownership interests.⁵

4. The *Notice* proposed to establish a petition procedure to allow licensees to "grandfather" their foreign ownership. Under this procedure, petitioners would be required to (1) identify all foreign persons or entities holding an interest

¹ GN Docket No. 93-252, 8 FCC Rcd 7988, 8002-03 ¶¶ 76-78 (1993).

² Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392, 395 (1993); see H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 492, 494-95 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News 1179, 1183-84.

³ See 47 U.S.C. § 332(c)(6); see also Budget Act, § 6002(c)(2)(B) (effective dates). For the text of Section 310(b), see paragraph 3, *infra*.

⁴ In regard to condition (B), the legislative history of the amended statute states: "In effect, this condition 'grandfathers' only the particular person who holds the foreign ownership on May 24, 1993; the 'grandfathering' does not transfer to any

future foreign owners." H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 495 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News 1184.

⁵ See, e.g., Wilner & Scheiner, 103 FCC 2d 511 (1985), reconsideration granted in part, 1 FCC Rcd 12 (1986); see also *Moving Phones Partnership, L.P. v. FCC*, 998 F.2d 1051, 1055-57 (D.C. Cir. 1993). Section 310(b) was amended in 1974 to eliminate the restriction on alien ownership of private radio licensees. P.L. 93-505, 88 Stat 1576; H.R. Report No. 93-1423, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6305, 6307. However, the ban on licensing radio facilities to foreign governments or representatives, established in Section 310(a), still applies to all licensees.

in the licensee and the percentage of ownership interest for each; and (2) certify that the identity and level of foreign ownership are unchanged since May 24, 1993, and that no change will occur in the future (other than divestiture of a foreign ownership interest to a domestic person or entity) without prior notice to the Commission.⁶

5. The *Notice* indicated that we intend to place the burden on licensees to file petitions, regardless of whether we have made a final determination as to whether the licensee is subject to reclassification as a CMRS provider. Furthermore, the *Notice* stated that while the filing of a petition would not prejudice a licensee's future arguments as to whether it should be reclassified, licensees who failed to file a timely petition would be subject to immediate enforcement of our foreign ownership restrictions.⁷

III. COMMENTS

6. A single commenter responded to this issue. Roamer One, Inc., argues that the *Notice* misread the Budget Act's amendment to the Communications Act to the extent that it imposes "immediate" foreign ownership restrictions on all private radio licensees.⁸ It maintains that while the *Notice* refers to private land mobile service providers that "may" be treated as common carriers, the statute refers to existing private land mobile service providers that "will" be treated as common carriers as a result of the enactment of the Budget Act.⁹ It contends that, prior to the completion of this rule making proceeding, the Commission may not impose alien ownership restrictions on private radio licensees who are unlikely to be classified as CMRS providers.¹⁰

IV. DISCUSSION

A. Who Should File a Waiver Petition

7. Initially, we agree with Roamer One that Section 332(c)(6) does not impose foreign ownership restrictions on all private radio licensees. As noted above, the foreign ownership restrictions apply only to those current private land mobile service providers that "will be" classified as CMRS providers "as a result of enactment of the [Budget Act]." As we discussed in the *Notice*, a private land mobile radio licensee could potentially be reclassified as a CMRS licensee if it meets two criteria: its service (1) is "provided for profit," and (2) makes "interconnected service" available "to the public" or "to such classes of eligible users as

to be effectively available to a substantial portion of the public." In addition, it is possible that a service might not fully satisfy the two criteria, but nonetheless be classified as CMRS if the Commission were to find that the service is the "functional equivalent" of CMRS.¹¹ If a licensee determines that there is a possibility that it will be reclassified as a CMRS provider, it must also determine whether its foreign ownership as of May 24, 1993, would be prohibited under Section 310(b).¹²

8. Final rules governing regulatory classification of mobile services may not be available on or before the February 10, 1994, filing deadline. We recognize that this presents private land mobile licensees with the potentially difficult decision of whether they should file petitions for waiver. Therefore, in instances where there is any chance at all that the licensee might later be classified as a CMRS provider, we strongly encourage the licensee to err on the side of filing and thereby preserve all of its rights under the new statutory provisions. Similarly, if a licensee is uncertain of whether it would be affected by Section 310(b) restrictions absent a waiver, we strongly recommend that the licensee file a petition.

B. Contents of Waiver Petition

9. As noted above, Section 332(c)(6) permits the Commission to grant waiver petitions only where two conditions are met. First, the waiver can only cover "the [licensee's] extent of foreign ownership interest [that has] not ... increased above the extent which existed on May 24, 1993." Consistent with the legislative history quoted previously (*see note 4, supra*), we interpret this language to refer to the precise identities of persons or entities and not merely to preexisting levels of foreign ownership interests. Petitioners must therefore identify in their petitions all foreign interests in the licensee as of May 24, 1993, that would, absent a waiver, be subject to the Section 310(b) restrictions and for which a waiver is sought. For instance, except as noted below, petitioners should specifically identify all foreign persons or entities holding an ownership interest in the licensee and the percentage of ownership interest of each and identify all foreign partners,¹³ officers, and directors, regardless of whether they have any ownership interest. While we will not require publicly traded corporations¹⁴ to identify each foreign stockholder in instances where this requirement would be especially onerous,¹⁵ we note that it is the responsibility of all petitioners to ensure that all foreign ownership listed in the petition,

⁶ *Notice*, 8 FCC Rcd at 8002-03 ¶ 77.

⁷ *Id.* at 8003 ¶ 78.

⁸ Comments of Roamer One, Inc., at 15-16 (Nov. 8, 1993); *see also id.* at iii-iv.

⁹ *Id.* at 15.

¹⁰ *Id.*

¹¹ *See Notice*, 8 FCC Rcd at 7990-96 ¶¶ 10-40.

¹² *See paragraph 3, supra.*

¹³ Petitioners must list all foreign partners regardless of whether they are general or limited partners, except that petitioners need not list a limited partner (1) whose level of ownership interest in the licensee does not exceed the level allowed by Section 310(b), and (2) who is "insulated" from the management and control of the partnership. *See, e.g.,* Wilner and Scheiner, *supra*, 103 FCC 2d at 517 n.31, 520 n.43; Attribution of Ownership Interests, Memorandum Opinion and Order in MM Docket No. 83-46, 58 RR 2d 604, 619-20 ¶¶ 48-50 (1985).

¹⁴ For a definition of such corporations, see First Report and Order and Memorandum Opinion and Order on Reconsideration in CC Docket Nos. 90-6, 85-388, 6 FCC Rcd 6185, 6213 ¶ 63 (1991).

¹⁵ *See, e.g.,* Advanced Mobile Phone Inc., 54 RR 2d 354, 362 ¶ 29 (Com. Car. Bur. 1983) (applicant demonstrated sufficient compliance with the requirements of FCC Form 401 by indicating the percentage of its common stock held or voted by aliens, and by listing the identities of its ten largest stockholders and stating that none of them was an alien, and would not be required to circulate a questionnaire to all of its stockholders). The burden will be on any entity claiming such an onerous burden to explain why identifying individual shareholders would be extraordinarily burdensome.

including that held by individual stockholders, did exist as of May 24, 1993, and to retain documentation substantiating that ownership.

10. The second condition is that the waiver cannot permit any "subsequent transfer of ownership to any other person in violation of section 310(b)." We interpret "subsequent" here to mean subsequent to May 24, 1993. Petitioners must therefore certify in their petitions that the identity and percentages of each listed component of foreign ownership are unchanged since May 24, 1993, and that each listed foreign officer, director or partner continues to hold the same position. The waiver can recognize only the particular person or entity that held the ownership interest on May 24, 1993; it cannot recognize any subsequent transfers to other foreign owners or foreign officers or directors.¹⁶ If, following the grant of a waiver in light of the above condition, a licensee wishes to transfer "grandfathered" foreign ownership interests, the waiver will remain valid (for the remaining "grandfathered" interests) only if the transfer is made to a domestic person or entity.¹⁷ The same is true for "grandfathered" partners, officers, and directors.

C. Effective Date of Section 310(b) Restrictions

11. Roamer One appears to object to our statement in the *Notice* that "all reclassifiable private licensees are *immediately* subject to the foreign ownership restrictions on common carriers by Section 310(b)."¹⁸ As noted above, Roamer One contends that, prior to the completion of this rule making proceeding, the Commission should not impose alien ownership restrictions on private radio licensees who are unlikely to be classified as CMRS providers. We agree that the restrictions in Section 310(b) would only apply to licensees that are actually reclassified pursuant to the statute and its implementation in this rule making. Section 310(b) does not and will not apply to private land mobile radio licensees who will not be reclassified as CMRS providers. On the other hand, the statute does require immediate enforcement of Section 310(b) for private land mobile providers that are reclassified as CMRS. Section 6002(c)(2)(B) of the Budget Act states:

[A]ny private land mobile service provided by any person before [the Budget Act's] date of enactment, and any paging service utilizing frequencies allocated as of January 1, 1993, for private land mobile services, shall, *except for purposes of section 332(c)(6) of [the Communications Act]*, be treated as a private mobile service until 3 years after such date of enactment.

Budget Act, § 6002(c)(2)(B) (emphasis added). Although other common carrier regulation may not apply to some licensees for 3 years, unless a licensee timely files and is

granted a waiver pursuant to Section 332(c)(6), Section 310(b) will apply immediately upon the effective date of our rules reclassifying the licensee's service as CMRS. Accordingly, as stated above, licensees that may be reclassified should file a timely waiver request to grandfather any foreign ownership or other interest that existed as of May 24, 1993, and that might be affected by the application of Section 310(b).

V. PETITIONING PROCEDURE

12. In light of the above, we adopt the following petitioning procedure. First, petitions should be in an informal, letter format, and must contain the caption "COMMERCIAL MOBILE RADIO SERVICE FOREIGN OWNERSHIP WAIVER PETITION." Petitions must clearly specify the licensee's name, radio service, call sign(s), station address(es) or geographical location(s), and contact person with telephone number. Petitions must specifically request a waiver of Section 310(b), identify the particular subsection(s) of Section 310(b) for which the waiver is requested, and state that the waiver is sought under Section 332(c)(6). The original copy of the waiver petition must be signed by the licensee,¹⁹ and this signature will be taken to certify that all statements made in the petition are true, complete, correct, and made in good faith.

13. In addition, as proposed in the *Notice*, petitions must:

1) identify by name,²⁰ as of May 24, 1993, all foreign persons or other entities holding ownership interests in the licensee, directly or indirectly, that would, absent a waiver, not be permitted to hold such interests under Section 310(b), and for which a waiver is sought; likewise, petitions must identify similarly situated foreign partners, officers, or directors of the licensee, regardless of whether they have any ownership interest in the licensee;

2) as applicable, as of May 24, 1993, identify the following for each person or other entity (including officers, directors and partners) identified in (1) above: residence, citizenship, office or directorship held, number of shares or nature of partnership interests, number of votes, and percentage of votes; also, if the entity is other than an individual, petitions must also identify the name, address, and citizenship of the natural person authorized to vote the stock; and

3) answer the following:

(a) Have the ownership and other interests listed pursuant to (1) and (2) above remained the same since May 24, 1993?

would also be required to comply with Section 310(d) of the Communications Act, 47 U.S.C. § 310(d), and with applicable Commission rules.

¹⁸ *Notice*, 8 FCC Rcd at 8002 ¶ 76 (emphasis added).

¹⁹ See Section 1.913 of the Commission's Rules, 47 C.F.R. § 1.913.

²⁰ As noted previously, publicly traded corporations are not required to identify all individual stockholders when to do so would constitute an especially onerous burden. See notes 14-15, *supra*, and accompanying text.

¹⁶ See note 4, *supra*. Thus, transfers to aliens that occurred after May 24 are not covered by the grandfathering provisions of the Budget Act even if they occurred before the Budget Act was enacted on August 10, 1993. Where such a transfer is found to create an ownership interest in violation of Section 310(b), the licensee will be required to comply with Section 310(b) with respect to that interest, regardless of whether alien ownership in the licensee that existed prior to May 24 is grandfathered.

¹⁷ Licensees seeking to transfer their ownership or control

(b) Have the officers, directors or partners continued to retain their positions since May 24, 1993?

If the answer to (a) or (b) is "No," please explain.

14. Petitioners must also certify that, in the case of an individual petitioner, he or she is not subject to a denial of federal benefits, that includes FCC benefits, pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862, or, in the case of a non-individual petitioner, (e.g., corporation, partnership, or other unincorporated association), no party to the application is subject to a denial of federal benefits, that includes FCC benefits, pursuant to that section. For the definition of a "party" for these purposes, see 47 C.F.R. § 1.2002(b).

15. The Commission has no authority to extend the Congressionally mandated deadline date, so it is imperative that waiver petitions be filed on time. To be timely received, petitions must, by February 10, 1994, be either (1) hand-delivered to the offices of the FCC in Gettysburg, Pennsylvania, at the address below, or (2) received through the U.S. Mail or other mail delivery service at the address below.

Federal Communications Commission
Attn.: CMRS Foreign Ownership Waiver Petition
1270 Fairfield Road
Gettysburg, Pennsylvania 17325-7245

Licensees should file one original and two copies. These petitions do not require a filing fee.

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

16. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis is as follows:

A. Need for, and purpose of, this action

As a result of recent legislation, certain private land mobile radio licensees will be reclassified as commercial mobile radio service licensees and will be subject to foreign ownership restrictions within the Communications Act of 1934, as amended. This present *First Report and Order* describes the procedure by which such licensees may file a waiver petition with the Commission to request retention of existing foreign ownership that would otherwise not be permitted.

B. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis

In regard to the foreign ownership issue addressed by this *First Report and Order*, no comments were submitted in response to our Initial Regulatory Flexibility Analysis.

C. Significant alternatives considered

No significant alternatives were considered.

VII. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r), and 332(c)(6) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 332(c)(6), this *First Report and Order* is adopted, effective upon publication in the Federal Register.²¹

18. For further information on filing a waiver petition, contact the Private Radio Bureau, Licensing Division, Consumer Assistance Branch, (717) 337-1212. For further information regarding this *First Report and Order*, contact Carmen Cintron at (202) 632-6450 (Common Carrier Bureau, Mobile Services Division) or Eric Malinen at (202) 632-6497 (Private Radio Bureau, Land Mobile and Microwave Division).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

²¹ In light of the statutory deadline for filing petitions, we find that there is good cause to make this action effective immediately upon publication in the Federal Register.