



PUBLIC NOTICE

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INTERNATIONAL BUREAU SEEKS FURTHER COMMENT ON FOREIGN OWNERSHIP POLICIES

Forbearance from Section 310(b)(3) for Common Carrier Licensees

IB Docket No. 11-133

Comment Date: [21 DAYS AFTER PUBLICATION IN FEDERAL REGISTER]

Reply Comment Date: [31 DAYS AFTER PUBLICATION IN FEDERAL REGISTER]

In the Notice of Proposed Rulemaking in this docket, the Commission sought comment on proposals to revise and simplify the policies and procedures that apply to foreign ownership of common carrier and aeronautical radio station licensees pursuant to section 310(b)(4) of the Communications Act of 1934, as amended (the “Act”).¹ Although the Commission did not specifically seek comment on its policies and procedures relating to section 310(b)(3), several commenters in this docket have asked the Commission to find that all “indirect” foreign interests in a common carrier licensee should be governed under section 310(b)(4), rather than section 310(b)(3).² They are concerned that applying section 310(b)(3) to “indirect” foreign interests in common carrier licensees may limit the flexibility of foreign investors in structuring their investments. Commenters also state that applying section 310(b)(3) to foreign interests in a licensee held through an intervening U.S.-organized entity that does not control the licensee (which commenters term “indirect non-controlling” foreign interests) is inconsistent with the

¹ *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, IB Docket No. 11-133, Notice of Proposed Rulemaking, FCC 11-121, 26 FCC Rcd 11703 (2011) (*Section 310(b)(4) NPRM*). Section 310(b)(4) states that no broadcast, common carrier, aeronautical en route, or aeronautical fixed radio station license shall be granted to or held by “any corporation directly or indirectly controlled by any other corporation 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.” 47 U.S.C. § 310(b)(4).

² *See, e.g.*, Verizon Communications Comments at 18-19, Reply at 3-4; Vodafone Group Comments at 12-29, Reply at 7-9; AT&T Comments at 5-8; European-American Business Council Comments at 3-6; United States Telecom Association Reply at 3; Sprint Nextel Reply at 4; Organization for International Investment (OFII) Reply at 5-6; European Telecommunications Network Operators’ Association Reply at 2; and CTIA Reply at 6-7. Section 310(b)(3) states that no broadcast, common carrier, aeronautical en route, or aeronautical fixed radio station license shall be granted to or held by “any corporation 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.” 47 U.S.C. § 310(b)(3).

U.S. commitments in the WTO Basic Telecom Agreement.³ Commenters state that a determination that section 310(b)(3) does not apply in this situation would be one of the “most helpful actions” the Commission could take to further this proceeding’s goals of reducing unnecessary regulatory barriers to foreign investment that can benefit innovation, economic growth, and employment in the United States.⁴

In addition to considering the statutory interpretation suggested by these commenters, we seek public comment on a related approach not specifically raised by the comments to date. In particular, we invite comment on the legal and policy implications of forbearing under section 10 of the Act⁵ from applying section 310(b)(3) to certain foreign interests in common carrier licensees if – contrary to the comments discussed above – section 310(b)(3) is interpreted as applying to foreign interests in a broadcast, common carrier or aeronautical licensee held through an intervening U.S.-organized entity that itself holds non-controlling equity and voting interests in the licensee.⁶ Section 10 provides that the Commission shall forbear from applying any regulation or any provision of the Act to a telecommunications carrier if the Commission determines that: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.⁷

³ Vodafone Group Reply at 8; Sprint Nextel Reply at 4; OFII Reply at 5-6; CTIA Reply at 7; European-American Business Council Reply at 5. Fourth Protocol to the General Agreement on Trade in Services (GATS), April 30, 1996, 36 I.L.M. 366 (1997) (World Trade Organization Basic Telecom Agreement, or WTO Basic Telecom Agreement).

⁴ See Vodafone Group Reply at 7 (“one of most helpful actions that Commission could take in this proceeding”); European Telecommunications Network Operators’ Association Reply at 2 (“applying section 310(b)(4) instead of 310(b)(3) to all forms of indirect foreign investment would allow equal restrictions for indirect non-controlling foreign investments and indirect controlling foreign investments”); OFII Reply at 2 (across sectors, U.S. subsidiaries of foreign-based companies employ 5.3 million Americans and account for U.S. payroll of more than \$400 billion, and OFII urges Commission “to take full advantage of this opportunity to make its processes substantially more transparent, efficient, and attractive to foreign-based investors in this key sector of the U.S. economy”). See also *Section 310(b)(4) NPRM*, 26 FCC Rcd at 11705, ¶ 2 (“foreign investment has proven to be an important source of equity financing for U.S. telecommunications companies, fostering technical innovation, economic growth, and job creation”).

⁵ 47 U.S.C. § 160.

⁶ There is Commission precedent that has applied section 310(b)(4) where a foreign government, entity or individual holds interests in a U.S.-organized entity that itself *controls* a broadcast, common carrier, or aeronautical radio station licensee, and section 310(b)(3) where a foreign government, entity or individual holds interests in a licensee through a U.S.-organized entity that has *non-controlling* interests in the licensee. *Wilner & Scheiner I*, 103 F.C.C. 2d 511, 521-24, ¶¶ 17-22 & nn.44-56 (1985), *recon.*, *Wilner & Scheiner II*, 1 FCC Rcd 12 (1986); *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17545-46, ¶ 231 & nn.799-803, 17547, ¶ 237 (2008) (applying section 310(b)(3) to foreign investment in three common carrier licensees held through a U.S.-organized entity that does not control the licensees). Commenters assert there is contrary Commission precedent. See *Verizon Communications Comments*, Exhibit 1, at 11; *Vodafone Group Comments* at 17; *AT&T Comments* at 6. See also *Wilkinson Barker Knauer ex parte*, IB Docket No. 05-55 (filed July 29, 2011); *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, 19 FCC Rcd 22612, 22617-18, 22631 (Int’l Bur., 2004), *erratum*, 21 FCC Rcd 6484 (Int’l Bur., 2006), *petition for recon. pending*, IB Docket No. 05-55. For ease of reference we use the term “licensee” in this Public Notice to refer to applicants, licensees and spectrum lessees unless the context warrants otherwise. See *Section 310(b)(4) NPRM*, 26 FCC Rcd at 11704, n.2.

⁷ 47 U.S.C. § 160.

Under a forbearance approach, the Commission might forbear from applying section 310(b)(3) to foreign interests held in a common carrier licensee, through a U.S.-organized entity that does not control the licensee, that would exceed 20 percent of the licensee's equity interests and/or 20 percent of its voting interests, where the Commission finds the particular foreign interests to be consistent with the foreign ownership policies the Commission applies under section 310(b)(4) of the Act. The Commission would not grant forbearance when applying section 310(b)(3) to broadcast, aeronautical fixed, and aeronautical en route licenses, as these services are not telecommunications services to which section 10 forbearance applies. Foreign ownership of broadcasting licenses, moreover, raises distinct policy issues,⁸ and is not subject to the WTO Basic Telecom Agreement.

We seek comment on this general approach. We specifically seek comment on whether a forbearance approach would satisfy the three requirements of section 10 of the Act. We further request comment on whether this forbearance approach would permit the Commission to authorize greater than 20 percent foreign interests held in a common carrier licensee, through a U.S.-organized entity that does not control the licensee, when those interests would be consistent with the public interest under the policy framework established by section 310(b)(4) and the *Foreign Participation Order*,⁹ and whether such a forbearance approach would treat all "indirect" foreign interests similarly (whether through a controlling or non-controlling U.S.-organized entity), as requested by commenters.¹⁰

We further seek public comment on whether forbearance from application of section 310(b)(3) in this context, if adopted by the Commission, should apply procedures like those used when licensees seek Commission approval to exceed the 25 percent foreign ownership benchmark in section 310(b)(4). If that approach were applied, we would require licensees to file a petition for declaratory ruling when seeking Commission approval of foreign interests held in a common carrier licensee, through an intervening U.S. entity that does not control the licensee, that would exceed 20 percent of the equity interests and/or 20 percent of the voting interests in the licensee. The Commission would place the petition on notice for public comment and forward the petition to the Executive Branch for review.¹¹ Following conclusion of the public notice and comment process, the Commission would issue a declaratory ruling, consistent with

⁸ See *Section 310(b)(4) NPRM*, 26 FCC Rcd at 11704, n.3.

⁹ The section 310(b)(4) policy framework employs an open entry standard for foreign investment from WTO Member countries in U.S. basic telecommunications markets. In the *Foreign Participation Order*, 12 FCC Rcd 23891 (1997), which adopted this standard, the Commission concluded, pursuant to the discretionary authority granted to the Commission in section 310(b)(4), that the public interest would be served by permitting greater investment by foreign individuals and entities from WTO Member countries in the U.S.-organized entities that control common carrier and aeronautical radio licensees. See *Foreign Participation Order*, 12 FCC Rcd at 23891-97, ¶¶ 1-12, 23935-42, ¶¶ 97-118. The Commission adopted a rebuttable presumption by which it presumes that foreign investment from WTO Member countries does not pose competitive concerns in the U.S. market. See also *Section 310(b)(4) NPRM*, 26 FCC Rcd at 11705, ¶ 2, nn.4-5. The language of section 310(b)(3) does not include the public interest test set forth in section 310(b)(4). 47 U.S.C. § 310(b)(3).

¹⁰ See *supra* note 2. See also Letter from Michele C. Farquhar, Counsel to Vodafone Group, to Secretary, Federal Communications Commission (filed Feb. 21, 2012) (stating that "The Vodafone and Verizon representatives also indicated that they would support other means to achieve uniform regulatory treatment of indirect foreign investment in common carrier licensees, such as use of the Commission's forbearance authority to treat non-controlling indirect foreign interests in common carrier licensees in the same manner as controlling indirect foreign interests under Section 310(b)(4)").

¹¹ In assessing the public interest, the Commission takes into account the record developed in each particular case and accords deference to the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, foreign policy and trade policy. *Foreign Participation Order*, 12 FCC Rcd at 23919-21, ¶¶ 61-66.

its section 310(b)(4) policy framework, as to whether the foreign investment would be consistent with the public interest.¹² If the ruling is affirmative (*i.e.*, the Commission determines that such investment comports with the public interest), the Commission would forbear from applying the section 310(b)(3) restrictions that would otherwise prohibit the foreign investment.

We ask in particular that interested parties who contend that the forbearance proposals discussed above would or would not adequately address national security, law enforcement, or public safety concerns, or that they would advance or conflict with U.S. trade policy, explain their positions in detail and provide support for their conclusions. In addition, if the Commission alters in this docket the policies and procedures that apply to section 310(b)(4), should it apply those same revisions to its public interest review under any section 310(b)(3) forbearance approach that also is adopted?

We further seek comment on modifications to these proposals, or alternative forbearance approaches, that parties may want the Commission to consider.

Interested parties may file **comments on or before [21 DAYS AFTER PUBLICATION IN FEDERAL REGISTER] of this Public Notice**, and **reply comments on or before [31 DAYS AFTER PUBLICATION IN FEDERAL REGISTER] of this Public Notice**. All pleadings are to reference **IB Docket No. 11-133**. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.¹³

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, D.C. 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8:00 a.m. to 7:00 p.m. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, S.W., Washington D.C. 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

¹² The Commission, or the International Bureau on delegated authority, in granting a section 310(b)(4) declaratory ruling: (1) authorizes the named foreign investors from WTO Member countries to hold specified equity and voting interests in the U.S. parent that controls the licensee; (2) includes provisions and limitations to accommodate future changes in foreign ownership of the U.S. parent and to prohibit non-WTO investment from exceeding 25 percent of the U.S. parent's equity and/or voting interests; and (3), on a case-by-case basis, imposes specific conditions that respond to concerns raised by the Executive Branch in particular proceedings with respect to potential effects of the proposed foreign investment on U.S. national security, law enforcement, and public safety. *Section 310(b)(4) NPRM*, 26 FCC Rcd at 11712, ¶ 15.

¹³ See *Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

In addition, one copy of each pleading must be sent to each of the following:

- (1) The Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, www.bcpiweb.com; phone #: (202) 488-5300 fax #: (202) 488-5563;
- (2) James Ball, Chief, Policy Division, International Bureau, 445 12th Street, S.W., Room 7-A760, Washington, D.C. 20554; e-mail: james.ball@fcc.gov;
- (3) Howard Griboff, Deputy Chief, Policy Division, International Bureau, 445 12th Street, S.W., Room 7-A662, Washington, D.C. 20554; email: howard.griboff@fcc.gov;
- (4) Kathleen Collins, Attorney-Advisor, Policy Division, International Bureau, 445 12th Street, S.W., Room 7-A515, Washington, D.C. 20554; e-mail: kathleen.collins@fcc.gov.

Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, D.C. 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, telephone: # (202) 488-5300, fax: # (202) 488-5563, or via e-mail www.bcpiweb.com.

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.¹⁴ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

For further information, please contact Kathleen Collins, Attorney-Advisor, Policy Division, International Bureau at (202) 418-1474.

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¹⁴ 47 C.F.R. §§ 1.1200 *et seq.*