

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

In the Matter of)
)
 Review of Foreign Ownership Policies for) IB Docket No. 11-133
 Common Carrier and Aeronautical Radio)
 Licensees under Section 310(b)(4) of the)
 Communications Act of 1934, as Amended)

FIRST REPORT AND ORDER

Adopted: August 17, 2012

Released: August 17, 2012

By the Commission: Commissioner Pai issuing a statement.

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I. INTRODUCTION

1. In this First Report and Order, we forbear, pursuant to section 10(a) of the Communications Act of 1934, as amended (the “Act”),¹ from applying the 20 percent foreign ownership limit set forth in section 310(b)(3) of the Act² to the class of common carrier licensees in which foreign

¹ 47 U.S.C. § 160(a).

² *Id.* § 310 (b)(3).

ownership in the licensee is held through U.S.-organized entities that do not control the licensee,³ to the extent we determine such foreign ownership is consistent with the public interest under the policies and procedures the Commission has adopted for the public interest review of foreign ownership subject to section 310(b)(4) of the Act.⁴ The forbearance approach we adopt today applies only to such foreign ownership in common carrier licensees and not to broadcast or other licensees covered by section 310(b)(3), because our forbearance authority does not extend to such other licensees. Nor does our approach apply to foreign ownership held in the licensee other than indirectly through an intervening U.S.-organized entity that does not control the licensee.

2. Our forbearance approach will enable the Commission to determine in each particular case whether proposed foreign ownership of a common carrier licensee is in the public interest, instead of strictly applying the 20 percent limit. This approach will provide common carrier licensees and their potential owners with greater flexibility in how they choose to structure foreign investment in a licensee, which is an important source of equity financing for U.S. telecommunications companies.⁵ At the same time, our forbearance approach will ensure that we have the information we need to carry out our statutory duties under section 310(b) of the Act, including the protection of national security and law enforcement interests. The forbearance approach is also consistent with U.S. trade policy objectives, and, unlike our current approach, will ensure consistency in our treatment of foreign ownership in a licensee when the foreign interest is held through a U.S.-organized entity regardless of whether that entity controls or does not control the licensee.

3. We take this action in response to pleadings filed in response to the *Foreign Ownership NPRM* in this proceeding,⁶ in which several parties urged us to treat all “indirect” foreign interests in common carrier licensees in a similar manner under section 310(b)(4), and to a supplemental set of comments supporting adoption of a section 310(b)(3) forbearance approach.⁷ Our action furthers our goals in this proceeding to: reduce to the extent possible the regulatory costs and burdens imposed on common carrier licensees; provide greater transparency and predictability with respect to the Commission’s filing requirements and review process; and facilitate investment from new sources of capital, while continuing to protect competition and important interests related to national security, law enforcement, foreign policy, and trade policy.⁸ We believe that providing greater flexibility in the structuring of foreign investment in common carrier licensees will enhance opportunities for technological innovation and promote economic growth and potential job creation in the telecommunications sector.⁹

II. BACKGROUND

4. Section 310 of the Act requires the Commission to review foreign ownership in radio

³ For ease of reference, we refer to applicants, licensees, and spectrum lessees collectively in this First Report and Order as “licensees” unless the context warrants otherwise. “Spectrum lessees” are defined in section 1.9003 of Part 1, Subpart X, 47 C.F.R. § 1.9003.

⁴ 47 U.S.C. § 310(b)(4).

⁵ See *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act, as Amended*, IB Docket No. 11-133, Notice of Proposed Rulemaking, FCC 11-121, 26 FCC Rcd 11703, 11705, ¶ 2 (2011) (*Foreign Ownership NPRM*).

⁶ *Foreign Ownership NPRM*, 26 FCC Rcd 11703.

⁷ See *infra* ¶ 9 and accompanying notes.

⁸ *Foreign Ownership NPRM*, 26 FCC Rcd at 11704, ¶ 1.

⁹ See *id.*

station licensees. It imposes specific restrictions on who may be granted and who may hold certain types of radio station licenses, including common carrier radio licenses. Section 310 states, in relevant part:

Sec. 310. Limitation on Holding and Transfer of Licenses.

(a) The station license required under this Act shall not be granted to or held by any foreign government or representative thereof.

(b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station 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 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 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.¹⁰

5. In 2011, we issued the *Foreign Ownership NPRM* initiating a review of the Commission's policies and procedures that apply to foreign ownership of common carrier and aeronautical en route and aeronautical fixed (hereinafter, "aeronautical") radio station licensees pursuant to section 310(b)(4) of the Act.¹¹ Section 310(b)(4) establishes a 25 percent benchmark for equity and/or voting interests held by foreign governments, individuals, and entities in U.S.-organized entities that directly or indirectly control U.S. broadcast, common carrier, or aeronautical radio station licensees but grants the Commission discretion to allow higher levels of foreign ownership in controlling U.S. parent companies unless it finds such ownership would be inconsistent with the public interest.¹²

6. We did not specifically seek comment in the *Foreign Ownership NPRM* on the policies and procedures that apply to foreign ownership interests under section 310(b)(3), which is a separate provision that sets a 20 percent limit on equity and/or voting interests held by foreign governments, individuals, and entities in U.S. broadcast, common carrier, and aeronautical radio station licensees.¹³ However, several commenters in this proceeding asked the Commission to find that section 310(b)(3) does not apply to foreign interests in a common carrier licensee held through an intervening U.S.-organized entity that does not control the licensee, and that all "indirect" foreign interests (whether held through an intervening U.S.-organized entity that controls or does not control the licensee) should be governed under section 310(b)(4).¹⁴ They contend that not applying section 310(b)(4) to all "indirect"

¹⁰ 47 U.S.C. § 310(a)-(b).

¹¹ See *Foreign Ownership NPRM*, 26 FCC Rcd 11703, 11704, ¶ 1. The *Foreign Ownership NPRM* did not address the Commission's policies with respect to the application of section 310(b) to broadcast licensees. The Commission historically has recognized different policy concerns for foreign ownership in broadcast licensees and their U.S.-organized parents. See *Foreign Ownership NPRM*, 26 FCC Rcd at 11704, ¶ 1 n.3.

¹² 47 U.S.C. § 310(b)(4). See also *Foreign Ownership NPRM*, 26 FCC Rcd at 11709, ¶ 10.

¹³ 47 U.S.C. § 310(b)(3).

¹⁴ Verizon Communications (Verizon), Vodafone Group PLC (Vodafone), AT&T Inc. (AT&T), and the European-American Business Council (EABC) filed comments. Vodafone NPRM Comments (filed Dec. 5, 2011) at 12-29; Verizon NPRM Comments (filed Dec. 5, 2011) at 18-19; AT&T NPRM Comments (filed Dec. 5, 2011) at 5-8; (continued....)

foreign interests in common carrier licensees limits the flexibility of foreign investors in structuring their investments.¹⁵ They also argue that precedent supports their interpretation that section 310(b)(4) applies to all “indirect” foreign interests in a common carrier licensee, be they through a controlling U.S. parent or a non-controlling intervening U.S.-organized entity.¹⁶

7. There is Commission precedent that has applied section 310(b)(4) where a foreign government, individual, or entity holds interests in a U.S.-organized entity that itself *controls* a licensee,¹⁷ and section 310(b)(3) where a foreign government, individual, or entity holds interests in a licensee through an intervening U.S.-organized entity that itself *does not control* the licensee.¹⁸ In assessing whether a U.S.-organized entity does or does not control a common carrier licensee, we look at both *de*

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EABC NPRM Comments (filed Dec. 5, 2011) at 3-6. Verizon, Vodafone, the United States Telecom Association (USTelecom), Sprint Nextel (Sprint), the Organization for International Investment (OFII), the European Telecommunications Network Operators’ Association (ETNO), and CTIA-The Wireless Association® (CTIA) filed reply comments. Verizon NPRM Reply (filed Jan. 4, 2012) at 3-5; Vodafone NPRM Reply (filed Jan. 4, 2012) at 7-9; USTelecom NPRM Reply (filed Jan. 4, 2012) at 3; Sprint NPRM Reply (filed Jan. 5, 2012) at 4; OFII NPRM Reply (filed Jan. 4, 2012) at 5-6; ETNO NPRM Reply (filed Jan. 5, 2012) at 2; and CTIA NPRM Reply (filed Jan. 4, 2012) at 6-7. In addition to filing comments addressing section 310(b)(3), these and other parties to the proceeding filed comments on the proposals in the *Foreign Ownership NPRM* to revise and simplify the Commission’s section 310(b)(4) policies and procedures. We do not address these issues here, as they will be the subject of a Second Report and Order in this proceeding.

¹⁵ See, e.g., CTIA NPRM Reply at 7; Vodafone NPRM Reply at 9; Sprint NPRM Reply at 4.

¹⁶ See, e.g., Vodafone NPRM Comments at 19-25; AT&T NPRM Comments at 5-8; EABC NPRM Comments at 3-6.

¹⁷ See, e.g., *Fox Television Stations, Inc.*, Memorandum, Opinion and Order, FCC 95-188, 10 FCC Rcd 8452 (1995) (*Fox I*) (applying section 310(b)(4) where a foreign entity held 99 percent equity capital and 24 percent of the voting interests in a U.S.-organized entity that itself controlled the licensees); *VoiceStream Wireless Corporation, et al.*, IB Docket 00-187, Memorandum Opinion and Order, FCC 01-142, 16 FCC Rcd 9779 (2001) (applying section 310(b)(4) where a foreign entity held controlling interests in a U.S.-organized entity that itself controlled the licensees).

¹⁸ See, e.g., *Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as Amended*, Declaratory Ruling, FCC 85-295, 103 F.C.C.2d 511, 521-23 & nn. 44-51 (1985) (stating that section 310(b)(3) applies where a foreign government, individual, or entity holds interests in a licensee through a U.S.-organized entity that does not control the licensee); *on recon.*, 1 FCC Rcd 1, 13, ¶ 12 (1986); *Applications of BBC License Subsidiary*, 10 FCC Rcd 10968, 10973-74, ¶¶ 22-25 (1995) (establishing the Commission’s methodology for calculating foreign equity and voting interests in a licensee, under section 310(b)(3), and in the U.S.-organized parent controlling a licensee, under section 310(b)(4), where such foreign ownership interests are held through intervening entities); *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, FCC 08-258, 23 FCC Rcd 17444, 17545-46, ¶ 231 & nn.799-803, 17547, ¶ 237 (2008) (applying section 310(b)(3) to foreign interests in common carrier licensees held through U.S.-organized entities that do not control the licensees); *Application for Pro Forma Assignment of Licenses from Wireless Alliance, LLC to WALLC License, LLC*, ULS File No. 0003660033 (filed Nov. 25, 2008) (assigning licenses to a new, wholly-owned subsidiary, as its foreign ownership exceeded the 20 percent limit in section 310(b)(3)). Section 310(b)(3) also applies where a foreign government, entity or individual holds interests directly in a licensee itself. See, e.g., *PrimeMedia Broadcasting, Inc.*, Memorandum, Opinion and Order, FCC 88-218, 3 FCC Rcd 4293 (1988) (denying petition for reconsideration of dismissal of applications where an alien held over 20 percent equity interest in applicants for licenses); *Glentel Corp.*, Memorandum Opinion and Order, DA 02-1509, 17 FCC Rcd 12008 (Sat. Div., Int’l Bur., 2002) (dismissing application for common carrier license where a foreign entity wholly owned the applicant).

jure and *de facto* control.¹⁹

8. In view of this precedent and the comments regarding section 310(b)(3), the International Bureau, on behalf of the Commission, issued a *Forbearance Public Notice* seeking comment on an approach not specifically raised by the comments in response to the *Foreign Ownership NPRM*.²⁰ In particular, the *Forbearance Public Notice* invited comment on the legal and policy implications of forbearing from applying section 310(b)(3) to certain foreign interests in common carrier licensees under section 10 of the Act.²¹ It stated that, under a forbearance approach, the Commission might forbear from applying section 310(b)(3) to foreign interests in a common carrier licensee, held through intervening U.S.-organized entities that do not control the licensee, that would exceed 20 percent of the licensee's equity interests and/or 20 percent of its voting interests, provided that 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. It stated that this approach would not grant forbearance to broadcast or aeronautical licensees, as these services are not telecommunications services to which our authority to forbear under section 10 applies.²²

9. AT&T, USTelecom, Verizon, and Vodafone filed comments supporting adoption of a section 310(b)(3) forbearance approach.²³ Deutsche Telekom and T-Mobile USA (DT/T-Mobile) filed reply comments, also in support of a section 310(b)(3) forbearance approach.²⁴ These parties assert there is ample basis for using the Commission's authority under section 10 of the Act to forbear from applying section 310(b)(3) to foreign interests in a common carrier licensee, held through intervening U.S.-organized entities that do not control the licensee, in excess of 20 percent of the licensee's equity interests

¹⁹ See, e.g., *Rochester Telephone Corporation v. United States*, 23 F. Supp. 634, 636 (W.D.N.Y. 1938), *aff'd*, 307 U.S. 125 (1939) (Congress intended the term "control" as used in the Act to "embrace every form of control, actual or legal, direct or indirect, negative or affirmative"). In construing the term "control," the Commission has held that influence and control are not the same. Rather, the influence necessary to constitute *de facto* control must be such that the minority shareholder is able to determine some or all of the licensee's core policies and operations, or dominate corporate affairs. See, e.g., *News International*, Memorandum Opinion and Order, FCC 84-79, 97 F.C.C. 2d 349, 356, ¶ 16 (1984); *WHDH, Inc.*, Memorandum Opinion and Order, FCC 69-543, 17 F.C.C. 2d 856, 863 (1969); *Benjamin L. Dubb*, 16 F.C.C. 274, 289 (1951). In the context of common carrier authorizations, a variety of factors have been found to be relevant in determining whether a person or entity has *de facto* control over a company. See generally *Applications of Intermountain Microwave*, Public Notice, 12 F.C.C. 2d 559 (1963); *Application of Ellis Thompson Corp.*, 10 FCC Rcd 12554, 12555-56, ¶ 9 (ALJ 1995); see also *Foreign Ownership NPRM*, 26 FCC Rcd at 11727, ¶ 46 n.93; cf. Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-113, 18 FCC Rcd 20604, 20626-30 ¶¶ 46-53 (2003) (replacing *Intermountain Microwave* standard only in the context of spectrum leasing).

²⁰ *International Bureau Seeks Further Comment on Foreign Ownership Policies: Forbearance from Section 310(b)(3) for Common Carrier Licensees*, IB Docket No. 11-133, Public Notice, DA 12-573, 27 FCC Rcd 3946 (Int'l Bur., 2012) (*Forbearance Public Notice*). A summary of the *Forbearance Public Notice* appeared in the Federal Register on April 24, 2012. 77 Fed. Reg. 24452 (Apr. 24, 2012).

²¹ 47 U.S.C. §§ 160, 310(b)(3).

²² See 47 U.S.C. § 160. See also note 11, *supra*.

²³ Vodafone Public Notice Comments (filed May 15, 2012) at 10; Verizon Public Notice Comments (filed May 15, 2012) at 15; AT&T Public Notice Comments (filed May 15, 2012) at 5; USTelecom Public Notice Comments (filed May 15, 2012) at 9.

²⁴ DT/T-Mobile Public Notice Reply (filed May 25, 2012) at 6.

and/or 20 percent of the licensee's voting interests.²⁵ There were no parties that opposed a forbearance approach.

III. DISCUSSION

10. As described below, we forbear from applying section 310(b)(3) to the class of common carrier licensees in which foreign governments, individuals, and/or entities would hold over 20 percent of the ownership interests of the licensee through intervening U.S.-organized entities that do not control the licensee, to the extent we determine such foreign ownership is consistent with the public interest under the policies and procedures we use for assessing foreign ownership under section 310(b)(4).²⁶ We refer hereafter in this First Report and Order to this class of licensees as “licensees subject to section 310(b)(3) forbearance.” We will require a licensee that falls within this class to obtain Commission approval (by filing a petition for declaratory ruling or similar request) *before* foreign ownership of the licensee exceeds 20 percent of its equity and/or voting interests. In reviewing a licensee's request to approve a higher level of foreign ownership, we will apply the same foreign ownership policies and procedures that we apply under section 310(b)(4). By adopting our section 310(b)(3) forbearance approach, we treat all “indirect” foreign ownership of common carrier licensees similarly²⁷ while maintaining Commission precedent on the scope of section 310(b)(3) and the meaning of “control” in section 310(b)(4).

11. Section 10(a) of the Act enables the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or service, or a class of telecommunications carriers or services, if the Commission determines that forbearance satisfies the following three-pronged test: (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.²⁸

12. Parties filing in response to the *Forbearance Public Notice* support forbearing from section 310(b)(3) and assert that the forbearance approach discussed in the *Forbearance Public Notice* meets all three requirements of section 10.²⁹ They urge the Commission, in forbearing from applying the 20 percent limit in section 310(b)(3) to foreign interests in a common carrier licensee held through U.S.-

²⁵ AT&T Public Notice Comments at 3. *See also* Verizon Public Notice Comments at 6-12; Vodafone Public Notice Comments at 4-8; USTelecom Public Notice Comments at 4-6; DT/T-Mobile Public Notice Reply at 3-5.

²⁶ For purposes of this First Report and Order, we will assume that section 310(b)(3) of the Act applies where a foreign government, individual, or entity holds interests in a licensee through an intervening U.S.-organized entity that itself does not control the licensee, and we do not address commenters' contrary argument that section 310(b)(4) applies to all “indirect” foreign interests in a common carrier licensee. We note that to the extent commenters in this proceeding argue that indirect foreign interests are governed by section 310(b)(4) of the Act, the regulatory treatment of common carrier licensees as a result of this First Report and Order will be the same: the application of the Commission's section 310(b)(4) policies and procedures to indirect foreign interests, whether held through an intervening U.S.-organized entity that controls or does not control such common carrier licensees.

²⁷ Our approach ensures that all “indirect” foreign interests, whether held through a U.S.-organized entity that controls a common carrier licensee, or through a U.S.-organized entity that does not control the licensee, are treated under the same Commission policies and procedures, as sought by the commenters in this proceeding, and are subject to our public interest review.

²⁸ 47 U.S.C. § 160(a)(1)-(3).

²⁹ USTelecom Public Notice Comments at 4; Verizon Public Notice Comments at 6-7; AT&T Public Notice Comments at 4; Vodafone Public Notice Comments at 4-8; DT/T-Mobile Public Notice Reply at 3-5.

organized entities that do not control the licensee, to review such foreign interests under the Commission's section 310(b)(4) policies and procedures.³⁰ They suggest that the Commission grant forbearance on a "blanket basis," to the class of common carrier licensees in which foreign governments, individuals, and/or entities hold ownership interests in a licensee through intervening U.S.-organized entities that do not control the licensee, rather than requiring each licensee to independently apply for forbearance under section 10.³¹

A. Compliance with the Section 10 Forbearance Requirements

13. We find that forbearing from applying section 310(b)(3)'s 20 percent foreign equity and voting limits to the class of common carrier licensees in which foreign interests in the licensee are held through U.S.-organized entities that do not control the licensee, to the extent such foreign ownership serves the public interest as determined under the policies and procedures we use for assessing foreign ownership under section 310(b)(4), satisfies each of the three section 10 criteria. Specifically, we require licensees subject to section 310(b)(3) forbearance to file a petition for declaratory ruling or similar request to obtain Commission approval *before* foreign ownership held in the licensee through U.S.-organized entities that do not control the licensee, together with foreign ownership held in the licensee itself, exceeds 20 percent of the licensee's equity interests and/or 20 percent of its voting interests.³² We will review such foreign interests consistent with the foreign ownership policies and procedures the Commission applies under section 310(b)(4) of the Act.

1. Section 10(a)(1) – Just, Reasonable and Non-discriminatory Charges and Practices

14. Under the first prong of section 10, we analyze whether it is necessary for the Commission to apply the foreign ownership limit in section 310(b)(3) to foreign interests in licensees subject to section 310(b)(3) forbearance, to ensure that charges, practices, classifications, or regulations by, for, or in connection with such licensees are just and reasonable and not unjustly or unreasonably discriminatory. Commenters assert it is not necessary to apply section 310(b)(3) to ensure that charges and practices are just and reasonable and not unjustly or unreasonably discriminatory. They state, for example, that "[f]oreign investment not only opens the possibility of additional providers, but also helps ensure that *existing* providers are sufficiently capitalized, and therefore able to provide innovative new service offerings, exerting additional downward pricing pressure and improving the terms and conditions

³⁰ See, e.g., Vodafone Public Notice Comments at 8-9; Verizon Public Notice Comments at 13; DT/T-Mobile Public Notice Reply at 5.

³¹ See, e.g., Verizon Public Notice Comments at 12-13 (stating that "the Commission should adopt a blanket forbearance from application of Section 310(b)(3) to indirect non-controlling interests" and "should decide it will forbear from applying Section 310(b)(3) to *any* indirect non-controlling interest, contingent on Commission review under Section 310(b)(4)'s framework. That is, all indirect foreign ownership interests should be subject to the same Section 310(b)(4) analysis.") (italics in original); DT/T-Mobile Public Notice Reply at 5 (urging the Commission to adopt an approach to section 310(b)(3) forbearance that applies "to indirect, non-controlling foreign ownership interests," applies "the Commission's section 310(b)(4) analytical framework to those interests," and also "is granted "on a blanket basis to all foreign-owned licensees, rather than requiring each licensee to independently apply for forbearance").

³² We do not forbear from applying section 310(b)(3)'s 20 percent limit to foreign interests held in a common carrier licensee where there is no intervening U.S.-organized entity between the licensee and the foreign owner. See also *infra* Section III.A.4.

on which customers take service.”³³ They also argue that enforcement of section 310(b)(3) does not have a strong connection to the reasonableness of the charges, practices, or classifications of telecommunications carriers or implicate the Commission’s authority to regulate that conduct.³⁴

15. We conclude that it is not necessary for the Commission to apply the foreign ownership limits in section 310(b)(3) to licensees subject to section 310(b)(3) forbearance to ensure that their charges and practices are just and reasonable and not unjustly or unreasonably discriminatory.³⁵ First, based on the Commission’s experience in authorizing up to 100 percent foreign ownership and control of U.S. wireless parent companies under section 310(b)(4), we find no evidence that the foreign ownership of a common carrier licensee, in and of itself, is directly relevant to the carrier’s compliance with the requirements of sections 201 and 202 of the Act that charges, practices, classifications, and regulations be just and reasonable and not unjustly or unreasonably discriminatory.³⁶ In addition, we have other, more tailored tools at our disposal, such as sections 201, 202, and 208 of the Act,³⁷ to ensure that rates, practices and classifications of common carrier licensees are just and reasonable and not unjustly or unreasonably discriminatory. Forbearance from applying the section 310(b)(3) limit to foreign ownership in a licensee as described above would not hinder the Commission’s ability to enforce sections 201 or 202 of the Act, which require all carriers to establish just, reasonable and non-discriminatory rates, terms and conditions of service.³⁸

2. Section 10(a)(2) – Protection of Consumers

16. Under the second prong of section 10, we assess whether it is necessary for the Commission to apply the foreign ownership limit in section 310(b)(3) to a licensee subject to section 310(b)(3) forbearance for the protection of consumers. Commenters assert it is not. They state, for example, that, under the section 310(b)(3) forbearance approach, the Commission would approve particular foreign interests only where the Commission finds them to be consistent with the foreign ownership policies the Commission applies under section 310(b)(4) of the Act, and that “because the Commission would be merely replacing one analytical standard with another, Commission oversight still would be present to protect consumers.”³⁹

17. We conclude that it is unnecessary for the protection of consumers to apply section 310(b)(3)’s 20 percent limit to foreign interests in licensees subject to section 310(b)(3) forbearance. Under the forbearance approach, the Commission will give notice and seek public comment on a petition

³³ Verizon Public Notice Comments at 7-8 (italics in original). See also Vodafone Public Notice Comments at 5-6; USTelecom Public Notice Comments at 4-5; DT/T-Mobile Public Notice Reply at 3; AT&T Public Notice Comments at 4.

³⁴ Vodafone Public Notice Comments at 5-6.

³⁵ A provision or regulation is “necessary” if there is a strong connection between the requirement and regulatory goal. See *CTIA v. F.C.C.*, 330 F.3d 502, 512 (D.C. Cir. 2003).

³⁶ 47 U.S.C. §§ 201, 202. Cf. *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891, 23940, ¶ 112 (1997) (*Foreign Participation Order*) (“Because [wireless markets] are, for the most part, wholly domestic, there is no possibility of leveraging foreign bottlenecks in order to create advantages for some competitors in U.S. markets.”). See also *Foreign Ownership NPRM*, 26 FCC Rcd at 11718, n.63.

³⁷ 47 U.S.C. §§ 201, 202, 208.

³⁸ 47 U.S.C. §§ 201, 202.

³⁹ USTelecom Public Notice Comments at 5-6. See also Verizon Public Notice Comments at 8; DT/T-Mobile Public Notice Reply at 3-4; Vodafone Public Notice Comments at 6; AT&T Public Notice Comments at 4.

for declaratory ruling or similar request asking for approval of proposed foreign equity and/or voting interests in a common carrier licensee over 20 percent. This notice and comment process will inform any Commission decision to grant a petition for declaratory ruling to exceed section 310(b)(3)'s 20 percent limit and allow us to assess any potential harms to consumers.

3. Section 10(a)(3) – Public Interest

18. Under the third prong of the forbearance test, we determine whether forbearance from applying the foreign ownership limit of section 310(b)(3) to licensees subject to section 310(b)(3) forbearance is consistent with the public interest. Commenters assert that it is.⁴⁰ And no commenters asserted otherwise. Commenters contend that this approach would further the public interest by: (1) attracting additional foreign capital to the U.S. economy and providing more flexible access to such capital by licensees building next-generation broadband networks,⁴¹ (2) fostering competition,⁴² (3) providing clarity and consistency with the Commission's section 310(b)(4) policies and procedures,⁴³ (4) ensuring greater consistency with U.S. commitments to the World Trade Organization (WTO) Basic Telecom Agreement,⁴⁴ (5) preserving the Commission's ability to review such foreign interests,⁴⁵ and (6) not undermining national security or other non-market concerns addressed by section 310(b).⁴⁶

19. We conclude that the public interest would be served by not applying the foreign ownership limit of section 310(b)(3) to licensees subject to section 310(b)(3) forbearance – where the licensee has greater than 20 percent foreign ownership held through U.S.-organized entities that *do not*

⁴⁰ Verizon Public Notice Comments at 8-12; Vodafone Public Notice Comments at 6-8; USTelecom Public Notice Comments at 6-7; DT/T-Mobile Public Notice Reply at 4-5; AT&T Public Notice Comments at 4.

⁴¹ Vodafone Public Notice Comments at 7 (stating that, under section 310(b)(3) forbearance, “common carrier radio licensees would be able to use additional indirect non-controlling foreign investment to expand and upgrade their networks, deploy advanced communications services, and become more competitive in the marketplace”); Verizon Public Notice Comments at 9 (stating that section 310(b)(3) forbearance coupled with the application of a streamlined section 310(b)(4) framework “would foster indirect investment by foreign entities, offering domestic entities more flexible access to additional sources of capital to continue building next-generation networks”); DT/T-Mobile Public Notice Reply at 4 (stating that section 310(b)(3) forbearance “would help to attract additional capital and facilitate innovation, bolstering not only the wireless marketplace but also the U.S. economy” because “[s]uch investment is key to the continuing development and deployment of next generation wireless networks, services, technologies and applications in the United States”).

⁴² DT/T-Mobile Public Notice Reply at 4 (stating that additional foreign investment that is attracted by section 310(b)(3) forbearance “would help to foster additional competition, leading to better rates and services for consumers”). *See also* USTelecom Public Notice Reply at 6.

⁴³ Vodafone Public Notice Comments at 2 (stating that forbearance “would ensure that all indirect foreign investment in common carrier radio licensees is considered under a consistent framework”). *See also* DT/T-Mobile Public Notice Reply at 5 (stating that an approach to section 310(b)(3) forbearance that applies “to indirect, non-controlling foreign ownership interests,” is granted “on a blanket basis to all foreign-owned licensees,” and applies “the Commission’s section 310(b)(4) analytical framework to those interests” would “provide consistency in the Commission’s foreign ownership review process”).

⁴⁴ Verizon Public Notice Comments at 10. *See also* DT/T-Mobile Public Notice Reply at 4-5 (stating that section 310(b)(3) forbearance “would be consistent with the United States’ international policies and trade commitments to ensure a market environment that is open to foreign investment”); AT&T Public Notice Comments at 4-5 (stating that section 310(b)(3) forbearance would demonstrate compliance with U.S. multilateral trade commitments and bilaterally-agreed trade principles).

⁴⁵ Vodafone Public Notice Comments at 8; Verizon Public Notice Comments at 11-12.

⁴⁶ *Id.*

control the licensee – for the same reasons that the public interest is served when we allow, under section 310(b)(4), greater than 25 percent foreign ownership in a U.S.-organized entity that *does control* the licensee under otherwise identical circumstances.⁴⁷ We can discern no public interest distinction between these two situations in the context of common carrier licensees.

20. We note that, by incorporating our section 310(b)(4) policies and procedures, our forbearance approach will protect the national security objectives underlying the statute. The Commission’s section 310(b)(4) policies and procedures provide Executive Branch expert agencies the opportunity to review proposed foreign ownership in the controlling U.S.-organized parents of common carrier licensees for any national security, law enforcement, or public safety issues.⁴⁸ Our forbearance approach will provide the Executive Branch agencies the same opportunity to assess proposed foreign ownership in licensees subject to section 310(b)(3) forbearance.⁴⁹

21. We agree with the commenters that the approach set out in the *Forbearance Public Notice* will promote U.S. trade policy by providing U.S. common carrier licensees and their potential owners additional flexibility in the structuring of investments in a licensee.⁵⁰ For example, this approach will ensure that foreign ownership from WTO Member countries will be reviewed under the Commission’s open entry standard, whether the investment is held through U.S.-organized entities that control the licensee or through U.S. entities that do not control the licensee.⁵¹ As a result, the outcome of today’s decision comports with the commenters’ request that the Commission treat all “indirect” foreign ownership in a common carrier licensee in a manner consistent with the Commission’s section 310(b)(4) policies and procedures so as to further the objectives of the WTO Basic Telecom Agreement.⁵² We also find that our forbearance approach will enhance competitive market conditions for common carrier licensees by allowing them and their potential owners to structure foreign investment in the licensee in a manner that best accommodates their financial considerations and business needs.⁵³

22. Finally, we find that conforming the Commission’s foreign ownership policies under sections 310(b)(3) and 310(b)(4) will clarify and simplify Commission regulation of foreign ownership of common carrier licensees, thereby facilitating investment from new sources of equity financing and enhancing opportunities for technological innovation, economic growth, and job creation in this vital sector of the U.S. economy.

⁴⁷ See *Foreign Participation Order*, 12 FCC Rcd at 23940-42, ¶¶ 111-118.

⁴⁸ In some cases, the relevant Executive Branch agencies have negotiated network security agreements with applicants or licensees to meet particular national security, law enforcement, and public safety concerns, and the agencies and the applicant or licensee have asked the Commission to condition grant of the license, or grant of the transfer of control of the licensee or assignment of the license, on compliance with the condition. We have imposed, on a case-by-case basis, specific conditions that respond to concerns raised by the Executive Branch agencies. See, e.g., *Foreign Ownership NPRM*, 26 FCC Rcd at 11712, ¶ 15.

⁴⁹ As a result, our forbearance approach both provides common carrier licensees with additional flexibility in structuring their foreign ownership and ensures that foreign governments, individuals, and/or entities cannot circumvent the section 310(b) foreign ownership limits.

⁵⁰ See, e.g., Vodafone Public Notice Comments at 6-7; Verizon Public Notice Comments at 10; AT&T Public Notice Comments at 4-5; USTelecom Public Notice Comments at 7-8; DT/T-Mobile Public Notice Comments at 4-5.

⁵¹ See *infra* Section III.B.

⁵² See, e.g., Vodafone Public Notice Comments at 6-7.

⁵³ See 47 U.S.C. § 160(b) (instructing the Commission to consider whether forbearance will promote competitive market conditions as part of its section 10(a)(3) determination).

4. Adoption of a Section 310(b)(3) Forbearance Approach

23. In sum, we conclude that the forbearance approach we adopt today satisfies the three requirements of section 10(a) of the Act, and that we may therefore forbear from applying section 310(b)(3)'s prohibition against greater than 20 percent foreign ownership for the class of common carrier licensees in which the foreign interests would be held in a licensee through one or more intervening U.S.-organized entities that do not control the licensee to the extent we determine that the foreign ownership interests are consistent with the public interest under the policies and procedures the Commission has adopted for foreign ownership subject to section 310(b)(4) of the Act.⁵⁴ For such foreign ownership, we will require a licensee to obtain Commission approval *before* foreign ownership held in the licensee through U.S.-organized entities that do not control the licensee, together with foreign ownership held in the licensee itself, exceeds 20 percent of the licensee's equity interests and/or 20 percent of its voting interests. We will assess, in each particular case, whether the foreign interests presented for approval by the licensee are in the public interest, consistent with the Commission's section 310(b)(4) policy framework, as discussed below.

24. We emphasize that our section 310(b)(3) forbearance approach only applies to common carrier licensees. Although section 310(b)(3) also applies to broadcast and aeronautical licensees, section 10 forbearance applies only to telecommunications carriers.⁵⁵ Therefore, our approach does not apply to broadcast or aeronautical licensees. In addition, this approach does not apply to foreign interests held in a common carrier licensee where there is no intervening U.S.-organized entity between the licensee and the foreign owner. Our *Forbearance Public Notice* sought comment on a proposal raised in this docket that was limited to foreign ownership held in a licensee through U.S.-organized entities that do not control the licensee. No commenters addressed the question of forbearance in the situation where foreign ownership would be held directly in the licensee. Such foreign interests will continue to be bound by section 310(b)(3) and our precedent thereunder.

25. As the preceding analysis makes clear, the benefits of adopting our forbearance approach outweigh the costs. By forbearing from applying the section 310(b)(3) foreign ownership limit to the subject class of common carrier licensees, we afford these licensees and their potential owners flexibility in the structuring of their investment, free of a statutory constraint. We anticipate that the costs of the approval process for proposed foreign ownership of licensees subject to section 310(b)(3) forbearance will be far less for licensees than the costs they have to incur in structuring their investments to comply with the section 310(b)(3) limit. Moreover, under the approach we adopt today, the approval process will be consistent with the policy framework we have in place for foreign ownership of the controlling U.S. parents of licensees under section 310(b)(4). For these reasons, we expect our approach to reduce unnecessary costs and burdens on common carrier licensees. Finally, our forbearance approach will not compromise our ability to carry out our statutory duties under section 310(b) of the Act, including protection of national security and law enforcement interests.

B. Foreign Ownership Approval Process for Section 310(b)(3)

26. The foreign ownership approval process we adopt today for common carrier licensees subject to section 310(b)(3) forbearance will employ the policies and procedures that currently govern approval of foreign interests in the U.S.-organized parents of common carrier licensees under section 310(b)(4). These policies and procedures derive from the express statutory discretion accorded the Commission, in section 310(b)(4), to permit foreign interests in excess of 25 percent in a U.S.-organized

⁵⁴ As sought by commenters, our approach adopts forbearance from the section 310(b)(3) limit for the class of relevant common carriers, instead of requiring each common carrier to individually seek forbearance.

⁵⁵ 47 U.S.C. § 160. *See also* note 11, *supra*.

entity that controls a common carrier licensee. That is, although section 310(b)(4) establishes a 25 percent benchmark for interests by foreign governments, individuals, and/or entities in U.S.-organized entities that directly or indirectly control a common carrier licensee, this section also grants the Commission express discretion to allow higher levels of foreign interests in the U.S.-organized parent of a common carrier licensee.⁵⁶

27. Under the Commission's section 310(b)(4) policy framework, foreign governments, individuals, and/or entities, may own, directly or indirectly, up to 100 percent of the capital stock of a U.S.-organized entity that holds a controlling interest in a common carrier licensee, provided the Commission finds the foreign ownership to be in the public interest. A licensee must request Commission approval, by filing a petition for declaratory ruling or similar request, of any proposed foreign ownership of its U.S.-organized parent that would exceed the 25 percent benchmark in section 310(b)(4).⁵⁷ In order for the Commission to make the public interest findings required by section 310(b)(4), the licensee must file the petition and obtain Commission approval before direct or indirect foreign ownership of its U.S.-organized parent company exceeds 25 percent.⁵⁸ Under the section 310(b)(4) policy framework adopted by the Commission in the *Foreign Participation Order*, the Commission applies an open entry standard to foreign investment from WTO Member countries in the U.S.-organized parents of common carrier licensees, and an effective competitive opportunities standard to foreign investment from non-WTO Member countries in the U.S.-organized parents.⁵⁹ The Commission's public interest analysis under section 310(b)(4) also considers any national security, law enforcement, foreign policy, or trade policy concerns raised by the proposed foreign investment.⁶⁰ 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.⁶¹

28. Similarly, here we require a licensee subject to section 310(b)(3) forbearance pursuant to this First Report and Order to file a petition for declaratory ruling or similar request seeking Commission approval *before* foreign ownership in the subject licensee exceeds 20 percent of its equity interests and/or 20 percent of its voting interests.⁶² In determining the level of its foreign equity interests and/or voting interests under section 310(b)(3), the licensee shall count all of its foreign interests, regardless of whether the interests are held in the licensee itself or through intervening U.S.-organized entities that do not

⁵⁶ 47 U.S.C. § 310(b)(4).

⁵⁷ See 47 C.F.R. § 1.2 (Declaratory Rulings).

⁵⁸ See *Fox I*, 10 FCC Rcd at 8474-77, ¶¶ 52-55 (1995) (stating that “[i]t is clear that section 310(b)(4) gives the Commission discretion with respect to alien ownership in excess of the statutory benchmark. It is equally clear that the statute requires that the Commission be made aware whenever foreign ownership could exceed the benchmark level, so that it can exercise that discretion” and citing to *Moving Phones Partnership L.P. v. F.C.C.*, 998 F.2d 1051, 1057-58 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1004 (1994) and *Telemundo, Inc. v. F.C.C.*, 802 F.2d 513, 516 (D.C. Cir. 1986)). See also *Galesburg Broadcasting Company*, FCC 91-131, 6 FCC Rcd 2210 (1991) (finding that the transfer of a majority of the voting stock in the U.S.-organized parent of the licensee to a trustee wholly owned by a Canadian bank without prior Commission approval “deprived the Commission of the opportunity to pass on the propriety of alien ownership which Section 310(b)(4) of the Act contemplates”).

⁵⁹ *Foreign Participation Order*, 12 FCC Rcd at 23913-14, ¶¶ 50-52, 23935-47, ¶¶ 97-132.

⁶⁰ *Foreign Participation Order*, 12 FCC Rcd at 23918-21, ¶¶ 59-66.

⁶¹ *Id.* at 23918, ¶ 59, 23919-21, ¶¶ 61-66.

⁶² This requirement also applies to any licensee subject to section 310(b)(3) forbearance that has previously received a ruling that approved its foreign ownership interests in excess of 20 percent under section 310(b)(4).

control the licensee.⁶³ Foreign interests that are held in the licensee itself, and not through an intervening U.S.-organized entity, are not subject to forbearance under today's decision and therefore shall not under any circumstances exceed the statutory maximum of 20 percent.

29. For foreign interests that will be held by WTO Member country governments, individuals, and/or entities in licensees subject to section 310(b)(3) forbearance, we will apply our section 310(b)(4) rebuttable presumption that foreign ownership from WTO Member countries will not cause competitive harm in the U.S. telecommunications market.⁶⁴ On the other hand, consistent with our section 310(b)(4) policies, licensees subject to section 310(b)(3) forbearance with foreign ownership from governments, individuals, and/or entities from non-WTO Member countries must meet the Commission's effective competitive opportunities standard.⁶⁵

30. The Commission, or the International Bureau on delegated authority, will place the petition on notice for public comment and forward the petition to the Executive Branch agencies for review. Following conclusion of this process, the Commission, or the International Bureau on delegated authority, will issue a declaratory ruling as to whether the proposed foreign ownership is in the public interest. The licensee shall not be allowed to have foreign ownership under section 310(b)(3) in excess of 20 percent unless and until the Commission or the International Bureau has granted the licensee's petition for declaratory ruling.

31. Petitions for declaratory ruling and similar requests may be filed with the Commission by paper (an original plus one copy) or electronically through the International Bureau Filing System (IBFS). Paper filings shall reference IB Docket No. 11-133 and be submitted to the attention of the Chief, International Bureau. For information on filing a petition through IBFS, *see* Part 1, Subpart Y of the Commission's rules and the IBFS homepage at <http://www.fcc.gov/ib>.

C. Future Rule Changes

32. The *Forbearance Public Notice* in this proceeding sought comment on whether we should apply any changes we may adopt to the section 310(b)(4) policy framework to our analysis of petitions for declaratory ruling to exceed the 20 percent foreign equity and voting limit in section 310(b)(3). Commenters urge the Commission to simplify the section 310(b)(4) requirements and apply those revised requirements to the evaluation of foreign interests in a common carrier licensee held through U.S.-organized entities that do not control the licensee.⁶⁶

33. We defer consideration of this question at this time. We will consider the comments on this matter as we assess the potential changes to the section 310(b)(4) policy framework set out in the NPRM, based on the record in this proceeding.

⁶³ Foreign interests in the U.S.-organized parent that controls the licensee are subject to section 310(b)(4), not section 310(b)(3). We will continue to assess foreign ownership interests subject to section 310(b)(4) separately from foreign ownership interests subject to section 310(b)(3) of the Act.

⁶⁴ *See Foreign Participation Order*, 12 FCC Rcd at 23913-14, ¶¶ 50-52, 23935-42, ¶¶ 97-118.

⁶⁵ *See Foreign Participation Order*, 12 FCC Rcd at 23943-47, ¶¶ 119-132.

⁶⁶ AT&T Public Notice Comments at 4 (urging that the section 310(b)(3) forbearance approach "should include any revisions adopted in this proceeding to streamline [the section 310(b)(4)] procedures"); Vodafone Public Notice Comments at 9 (stating that "Vodafone urges the Commission to substantially streamline its section 310(b)(4) procedures... and it supports the Commission's use of those procedures (whether in their current form or in a streamlined form) to review indirect non-controlling foreign investment in excess of 20 percent"); Verizon Public Notice Comments at 14 (urging the Commission to "eliminate entirely the declaratory ruling requirement with respect to indirect foreign ownership from WTO Member countries" for "all relevant Section 310(b)(4) evaluations, including those that would be brought within the scope of that provision through forbearance here").

IV. CONCLUSION

34. We forbear from applying the 20 percent limit in section 310(b)(3) of the Act to foreign equity and voting interests held in a common carrier licensee through U.S.-organized entities that do not control the licensee, to the extent we would approve the foreign ownership interests if we analyzed them under the policies and procedures the Commission currently applies in exercising its discretion to approve foreign ownership under section 310(b)(4) of the Act. We find that this approach will ensure that we achieve the public interest objectives mandated by the Act, facilitate investment in licensees from new sources of capital, and continue to protect competition and important interests related to national security, law enforcement, foreign policy, and trade policy.

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Certification

35. The Regulatory Flexibility Act of 1980, as amended (RFA),⁶⁷ requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”⁶⁸ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁶⁹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁷⁰ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

36. The approach we adopt today will remove a statutory constraint on common carrier licensees, by forbearing from applying the 20 percent ownership limit under section 310(b)(3) to the class of common carrier licensees in which the foreign ownership is held in the licensee through intervening U.S.-organized entities that do not control the licensee. Instead of prohibiting foreign ownership in excess of 20 percent under section 310(b)(3), we will assess whether the proposed foreign ownership in excess of 20 percent is in the public interest through an approval process that is consistent with our policies and procedures for approval of foreign ownership in a U.S.-organized entity that controls a licensee, under section 310(b)(4). We believe that the new approach will reduce costs and burdens currently imposed on common carrier licensees, including those licensees that are small entities, while continuing to ensure that we have the information we need to carry out our statutory duties. Therefore, we certify that the new approach will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the First Report and Order, including a copy of this Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.⁷¹ This certification

⁶⁷ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁶⁸ 5 U.S.C. § 605(b).

⁶⁹ 5 U.S.C. § 601(6).

⁷⁰ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁷¹ 5 U.S.C. § 605(b).

also will be published in the Federal Register.⁷²

B. Paperwork Reduction Act

37. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. The information collection requirements for the section 310(b) foreign ownership approval process are included in OMB Control No. 3060-0686. In addition, therefore, this document does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

C. Congressional Review Act

38. The Commission will include a copy of this First Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A).

VI. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED, pursuant to sections 1, 2, 4(i), 4(j), 5(c), 10, 303(r), 308(b), 309, 310(b), 310(d), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 155(c), 160, 303(r), 308(b), 309, 310(b), 310(d), and 403, that the First Report and Order in IB Docket No. 11-133 IS ADOPTED.

40. IT IS FURTHER ORDERED that the requirements of this First Report and Order SHALL BE EFFECTIVE upon publication in the Federal Register.⁷³

41. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷² *Id.*

⁷³ *See* 47 C.F.R. §§ 1.103, 1.427(b). As set forth above, by forbearing from applying the strict section 310(b)(3) foreign ownership limit to the subject class of common carrier licensees, we afford these licensees and their potential owners greater flexibility in the structuring of their investment, free of a statutory constraint. Our action thereby "relieves a restriction" within the meaning of 5 U.S.C. § 553(d)(1).

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *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.

I am voting to approve today's item because I agree that indirect, non-controlling foreign interests in common carrier licensees should be analyzed pursuant to the policies and procedures the Commission applies under section 310(b)(4) of the Act. I cast my vote with the understanding that today's order does not resolve the issue of whether section 310(b)(3) of the Act applies to indirect, non-controlling foreign interests in a licensee. Specifically, in footnote 26, today's order makes clear that the Commission is only assuming this to be the case for purposes of resolving this proceeding and that it is not addressing the argument that section 310(b)(4) of the Act, rather than section 310(b)(3), applies to such foreign interests.

Interpreting section 310(b)(3) of the Act to apply to indirect, non-controlling foreign interests leads to an exceedingly strange result. The Commission has the discretion to allow a foreign entity to have an indirect, *controlling* interest in a licensee (e.g., a foreign corporation could own 100% of a U.S. entity that itself owned 100% of a licensee). But the Commission does not have the discretion to allow (absent forbearance, which is only available for a limited class of licensees) that same foreign entity to have an indirect, *non-controlling* interest in a licensee (e.g., a foreign corporation could not own 100% of a U.S. entity that owned 25% of a licensee). We should be hesitant to interpret any statutory scheme to produce such an absurd outcome, and it is far from clear to me that the text of section 310 compels that result.