

March 19, 2001

EX PARTE – Via Electronic Filing

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: Applications of VoiceStream Wireless, Powertel and Deutsche Telekom
for Transfer of Control, IB Docket No. 00-187

Dear Ms. Salas:

On March 16, 2001, Brian O'Connor (of VoiceStream Wireless), John Nakahata (representing VoiceStream), Andreas Tegge (of Deutsche Telekom), and John Harwood (representing Deutsche Telekom) met with Don Abelson, Chief, International Bureau ("IB"), Rebecca Arbogast (IB), Karen Oniyje (IB), Linda Haller (IB), John Branscome, Wireless Telecommunications Bureau ("WTB"), Lauren Kravetz (WTB), and Jim Bird (Office of General Counsel) to discuss the above-captioned proceeding.

During the meeting, we presented the points on the first of the attached documents. We used the attached matrix to demonstrate that Senator Hollings' interpretation of section 310 would require treating section 310(a) more expansively than sections 310(b)(1) and (b)(2) and therefore would be contrary to the plain language of section 310 and to its legislative history.

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In accordance with the Commission's rules and the Public Notice in this docket, we are filing electronically a copy of this letter, with two attachments, in the above-captioned docket, and serving copies on all parties.

Sincerely,

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Attachments

c: Peter Tenhula, Senior Legal Advisor to the Chairman
Mark Schneider, Senior Legal Advisor to Commissioner Ness
Bryan Tramont, Legal Advisor to Commissioner Furchtgott-Roth
Adam Krinsky, Legal Advisor to Commissioner Tristani
Attached service list

March 16, 2001

**The VoiceStream-Powertel-DT Mergers Are Covered by
Section 310(b)(4) of the Communications Act**

- The language and legislative history of section 310 make clear that section 310(b)(4) applies to the merger applications.
 - By its plain language, section 310(b)(4) governs the applications, which involve precisely the structure described in that section. DT will own VoiceStream, which in turn will wholly own subsidiaries that will directly hold the Commission licenses. The German government will hold approximately 45 percent of DT.
 - The legislative history of section 310 confirms the plain meaning of section 310(b)(4). In passing the 1934 Act, Congress considered and rejected including a flat ban on indirect foreign ownership of more than 25 percent of the controlling parent of a radio licensee. Instead, Congress gave the Commission discretion to permit such investments if in the public interest.
 - This is the only plausible reading of the language of the statute and its legislative history, and the only outcome that is consistent with the *Foreign Participation Order* and the obligation to construe statutes to avoid conflicts with international obligations.
- Section 310(a) does not apply to the applications.
 - Senator Hollings mistakenly claims that section 310(a) absolutely blocks the mergers. That theory finds no support in the language of section 310(a), which -- in contrast to section 310(b)(4) -- does not address indirect ownership structures.
 - If section 310(a) applied any time a foreign government has indirect control of a radio license, and flatly prohibited such a structure, the scope of section 310(a) would overlap with and trump section 310(b)(4). That reading of section 310 would violate the most basic rules of statutory construction (specific provision prevails over general; each statutory provision must be given effect).
 - Senator Hollings recognizes that problem and attempts to avoid it by arguing that section 310(b)(4) applies only where there is a 25 percent or greater foreign government ownership interest that does *not* confer control, and that section 310(a) applies where there is control. But nothing in the language of the statute or the Commission's decisions supports such an argument.
 - Section 310(b)(4) expressly applies in *every* instance in which a foreign government owns more than a 25% indirect interest in a common carrier radio license, regardless of whether that government exercises "control" over the licensee.
 - To construe the Act any other way would read section 310(b)(4) out of the statute for aliens, foreign corporations, and governments alike (which are treated no differently under the plain language of that section).

- It would make no sense for Congress to take away from the Commission with one hand (section 310(a)) the power that Congress gave with the other (section 310(b)(4)), particularly when Congress added the section 310(b)(4) language to the Act *after* what now is section 310(a).
- Commission precedent makes clear that section 310(b)(4) applies to the merger applications.
 - Commission decisions -- *Orion*, *Intelsat*, and *Telecom Finland* -- consistently recognize that section 310(b)(4) applies to ownership structures, such as that here, involving indirect interests of greater than 25% in a common carrier licenses. The Commission never has held that section 310(a) prohibits a foreign government from obtaining *indirect* control over a *common carrier* license.
 - In *Intelsat* the Commission used a *de facto* control analysis under section 310(a) to address *only* Intelsat's non-common carrier authorizations; in contrast, the Commission used section 310(b)(4) to address Intelsat's common carrier authorizations. Thus, if section 310(a) applies to indirect ownership at all, it applies only when radio licenses *not covered by section 310(b)* are at issue.
 - If Senator Hollings' interpretation of section 310 were correct, the Commission could not have approved the mergers of Airtouch and Vodafone or of British Telecom and MCI, or the joint venture of Vodafone and Bell Atlantic. Sections 310(b)(1) and (2) prohibit direct holdings of common carrier radio licenses by *aliens* and *foreign corporations*, respectively, using the same language that section 310(a) employs to bar direct holdings of radio licenses by *foreign governments*.
- The Commission also does not need to decide in this case how section 310(a) might apply in other circumstances where section 310(b)(4) does not provide for Commission public interest review of foreign ownership. If such a case does arise in the future, the Commission *always* will determine whether grant of an application under section 309(a) or (d) is in the public interest. For example, the Commission may consider the character qualifications of any person with an *attributable* though non-controlling interest (*e.g.*, 5 percent voting). Moreover, under section 309(h)(3), every license is also subject to the requirements of section 706, which allows the President to suspend or amend the rules applicable to licenses or confiscate the relevant stations in times of war, "public peril," or "other national emergency."
- If the Commission concluded here that section 310(a) permits use of a *de facto* control test, that would unnecessarily raise a controversial trade issue having farreaching consequences.
 - Such an analysis could imply that, where a foreign government *does* have *de facto* control (unlike the situation in this case), section 310(a) would prohibit such ownership. That reading of section 310 could not be reconciled with the U.S. commitments under the WTO Basic Telecommunications Agreement. Regarding limitations on market access for ownership of a common carrier radio license, the U.S. Schedule specifies: "Indirect: None."

**Statutory Construction of
Section 310(a) - (b) with respect to Common Carrier Licenses**

	<u>Alien or Representative</u>	<u>Foreign Corp.</u>	<u>Foreign Gov't or Representative</u>
Licensee	No [§310(b)(1)]*	No [§310(b)(2)]*	No [§310(a)]*
Ownership of Licensee	$\leq 20\%$ ¹ [§310(b)(3)]**	$\leq 20\%$ [§310(b)(3)]**	$\leq 20\%$ [§310(b)(3)]**
Voting of Licensee	$\leq 20\%$ [§310(b)(3)]**	$\leq 20\%$ [§310(b)(3)]**	$\leq 20\%$ [§310(b)(3)]**
Ownership of Holding Co.	$\leq 25\%$ Unless in the public interest [§310(b)(4)]***	$\leq 25\%$ Unless in the public interest [§310(b)(4)]***	$\leq 25\%$ Unless in the public interest [§310(b)(4)]***
Voting of Holding Co.	$\leq 25\%$ Unless in the public interest [§310(b)(4)]***	$\leq 25\%$ Unless in the public interest [§310(b)(4)]***	$\leq 25\%$ Unless in the public interest [§310(b)(4)]***

Ownership and voting are separate tests under §310(b)(3) and (b)(4). *Wilner & Scheiner*, 103 FCC 2d 511 (1985); *In the matter of BBC License Subsidiary, LP*, 10 FCC Rcd 10, 968 (1995).

Legislative History:

* The predecessor to §310(a), (b)(1) and (b)(2) originated from the Radio Act of 1912, which limited licenses to U.S. citizens or U.S. corporations. The Wickersham Opinion, *Radio Communication Issuance of Licenses*, 29 Op. Atty. Gen. 579, 580 (1912), construed this language as imposing no limit on the extent of alien ownership of a U.S. corporation licensee.

** The predecessor to §310(b)(3) was added by the Radio Act of 1927 to limit alien ownership and voting of the licensee itself, directly responding, in part, to the Wickersham Opinion.

*** The predecessor to §310(b)(4) was added by the Communications Act of 1934 to address the specific issue of indirect foreign ownership and voting of stock in a holding company controlling a U.S. licensee.

¹ These percentages signify the amount of ownership or voting interest an alien, foreign corporation or foreign government may have in a licensee, subject to Commission approval under Section 309(a) or 310(d), as applicable.

CERTIFICATE OF SERVICE

I, Karen R. Stephens, do hereby certify that on this 19th day of March 2001, I caused true and correct copies of the foregoing Ex Parte to be served via first-class mail, postage pre-paid, upon the following parties:

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