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

In the Matter of	)	
	)	
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

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By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, and Clyburn issuing separate statements.

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I. INTRODUCTION

1. This Notice of Proposed Rulemaking (NPRM) initiates a review of the Commission's policies and procedures that apply to foreign ownership of common carrier radio station licensees – *e.g.*, companies using wireless licenses to provide phone service – and of aeronautical en route and aeronautical fixed (hereinafter, "aeronautical") radio station licensees pursuant to section 310(b)(4) of the Communications Act of 1934, as amended (the "Act").[1] We seek to reduce to the extent possible the regulatory costs and burdens imposed on wireless common carrier and aeronautical applicants, licensees, and spectrum lessees;[2] provide greater transparency and more predictability with respect to the Commission's filing requirements and review process; and facilitate investment from new sources of capital, while continuing to protect important interests related to national security, law enforcement, foreign policy, and trade policy.[3]

[1] 47 U.S.C. § 310(b)(4). 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." *Id*. For ease of reference, we refer to aeronautical en route and aeronautical fixed radio station licenses as "aeronautical" radio station licenses. In using this shorthand, we do not include other types of aeronautical radio station licenses issued by the Commission. *See*, *e.g.*, 47 C.F.R. § 87.5 (defining various types of aeronautical radio stations); 47 C.F.R. § 87.19(a)-(b) (applying foreign ownership requirements to aeronautical en route and aeronautical fixed station licenses).

[2] For ease of reference, we refer to applicants, licensees, and spectrum lessees collectively in this NPRM as "licensees" unless the context warrants otherwise. "Spectrum lessees" are defined in section 1.9003 of Part 1, Subpart X ("Spectrum Leasing"), 47 C.F.R. § 1.9003.

[3] This NPRM does not address our policies with respect to the application of section 310(b)(4) to broadcast licensees. The Commission historically has recognized different policy concerns for foreign ownership in the U.S. parents of broadcast licensees. *See*, *e.g.*, *Application of GRC Cablevision, Inc., Charleston, Clarksville, Jeffersonville, and Sellersburg, Ind. for Construction Permit in the Cable Television Relay Service*, Memorandum Opinion and Order, 47 F.C.C.2d 467, 468, ¶ 6 (1974) (stating that alien ownership in broadcast television "presents different questions"); *Cable & Wireless, Inc*., Declaratory Ruling and Memorandum Opinion, Order, Authorization and Certificate, 10 FCC Rcd 13177, 13179, ¶ 18 (1995) ("[T]he Commission traditionally has found that alien ownership of common carrier radio licensees raises far fewer policy concerns than that of radio broadcast licensees. We have concluded that concern about the effect of alien ownership is lessened when common carrier radio licenses are involved because they are 'passive' in nature and there is no control over the content of transmission."); *Application of Fox Television Stations, Inc*., Second Memorandum Opinion and Order, 11 FCC Rcd 5714, 5722 & 5722 n.7 (1995) (stating that presumption in broadcast area that the public interest will be served by denying licenses to entities controlled by U.S.-organized companies with alien ownership above 25 percent does not necessarily apply outside of broadcast area); *Market Entry and Regulation of Foreign-Affiliated Entities,* IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873, 3946-47, ¶¶ 192-193 (1995) (*Foreign Carrier Entry Order*) (stating that "foreign ownership of broadcast licenses presents different questions than for other types of radio spectrum licenses" and noting that "affording broadcast licenses disparate treatment from common carrier licenses is consistent with the distinction that the Commission has consistently drawn in applying Section 310(b)(4)").

2. Wireless networks are critical components of the nation's telecommunications infrastructure, providing mobile broadband Internet access, mobile voice and data services, and fixed telecommunications services. 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. We have issued approximately 150 section 310(b)(4) rulings authorizing foreign investment in U.S. telecommunications carriers since 1998, when we implemented the *Foreign Participation Order*'s "open entry" standard for foreign investors from World Trade Organization Member ("WTO") countries.[4] However, practical application of the foreign ownership policies adopted in the *Foreign Participation Order* has proven to be complex. Wireless licensees seeking Commission approval of foreign ownership under section 310(b)(4) face significant difficulties and expense in trying to ascertain their percentages of foreign ownership, whether existing or planned, from WTO Member countries as distinguished from non-WTO Member countries, as the *Foreign Participation Order* requires.[5] Many section 310(b)(4) proceedings generate voluminous records consisting of highly detailed information that companies must compile as to the citizenship and principal places of business of their investors, including individuals and entities that hold *de minimis* interests directly or indirectly through multiple intervening investment vehicles and holding companies.[6] Each of these cases also requires Commission staff to undertake a fact-

[4] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market: Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891 (1997) (*Foreign Participation Order*), Order on Reconsideration, FCC 00-339, 15 FCC Rcd 18158 (2000). The Commission adopted the *Foreign Participation Order* after the conclusion of the World Trade Organization (WTO) Basic Telecommunications Agreement in November 1997, which resulted in 69 nations, including the United States and most of its major trading partners, committing to open their markets to foreign competition for some or all basic telecommunications services. The Commission determined in the *Foreign Participation Order* that its international telecommunications policy goals were best served by adopting an open entry standard for WTO Member investment in the U.S. basic telecommunications services market, while continuing to apply the "effective competitive opportunities" (ECO) test to proposed investment from non-WTO Member countries. *Foreign Participation Order*, 12 FCC Rcd at 23893-94, ¶ 2, 23902-04, ¶¶ 25-28. *See also infra* Section II.B. The results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecommunications Agreement." The United States has made no market access commitments with respect to broadcasting services or broadcast licenses under the GATS. *See* U.S. Schedule of Specific Commitments, GATS/SC/90 (Apr. 15, 1994) at 46-48, *available at* http://www.citizen.org/documents/1994_USSCHEDULEATWTO.pdf.

[5] The Commission stated in the *Foreign Participation Order* that it will deny an application if it finds that more than 25 percent of the ownership of an entity that controls a common carrier radio licensee is attributable to parties whose principal place(s) of business are in non-WTO Member countries that do not offer effective competitive opportunities to U.S. investors in the particular service sector in which the applicant seeks to compete in the U.S. market, unless other public interest considerations outweigh that finding. *See Foreign Participation* Order, 12 FCC Rcd at 23946, ¶ 131.

[6] *See, e.g.*, *Vodafone Americas Asia Inc. (Transferor), Globalstar Corporation (Transferee), Consent to Transfer Control of Licenses and Section 214 Authorizations and Petition for Declaratory Ruling Allowing Indirect Foreign Ownership*, Order and Authorization, DA 02-1557, 17 FCC Rcd 12849 (Int'l Bur. 2002) (*Vodafone/Globalstar Order*); *Applications of Space Station System Licensee, Inc., Assignor, and Iridium Constellation LLC, Assignee, for Consent to Assignment of License Pursuant to Section 310(d) of the Communications Act,* Memorandum Opinion, Order and Authorization, DA 02-307, 17 FCC Rcd 2271 (Int'l Bur. 2002); *TerreStar Networks Inc., Petition for Declaratory Ruling Under Section 310(b)(4) of the Communications Act of 1934, as amended*, Order and Declaratory Ruling, DA 09-2628, 24 FCC Rcd 14664 (Int'l Bur. 2009) (*2009 TerreStar Order*); *Iridium Holdings LLC and Iridium Carrier Holdings LLC, and GHL Acquisition Corp*., Memorandum Opinion and Order and Declaratory Ruling, DA 09-1809, 24 FCC Rcd 10725 (Int'l Bur. 2009); *Robert M. Franklin, Transferor, Inmarsat,* (continued….)

intensive, time-consuming review of the company's ownership information to confirm that its non-WTO ownership does not exceed 25 percent. Moreover, the information that licensees are able to provide for the record gives us only a snapshot of their foreign ownership, which reflects a licensee's ownership at the time of the section 310(b)(4) proceeding. As a result, a licensee that has received a ruling must return to the Commission, often repeatedly, for additional approval under section 310(b)(4) before its foreign ownership can exceed the parameters of its ruling. Based on more than 13 years of experience in applying the principles of the *Foreign Participation Order*, we believe our section 310(b)(4) filing requirements and review process are due for reexamination to determine whether we can reduce delay, uncertainty, and expense for U.S. wireless licensees and their potential investors, including strategic joint venture partners from foreign markets, thereby reducing barriers to investment to the ultimate benefit of U.S. consumers.

3. In light of these considerations, we undertake this review of the Commission's policies and procedures implementing section 310(b)(4) for common carrier and aeronautical radio licensees. As this agency observed in the 1995 *Foreign Carrier Entry Order*, the Commission has a general mandate to promote the availability to U.S. consumers of a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,"[7] and authority to allow foreign investment above the 25 percent benchmark level in section 310(b)(4) unless we determine that the investment is inconsistent with the public interest.[8] In making our public interest determination, Congress has given us the flexibility to consider a broad range of factors, and to adapt our policies and rules to reflect current conditions. In light of the changing market conditions since 1997, when we last comprehensively examined our policies implementing section 310(b)(4) as part of the *Foreign Participation Order*, we believe it is time to once again review our foreign ownership policies. We thus seek comment in this NPRM on measures to revise and simplify our regulatory framework under section 310(b)(4) for authorizing foreign ownership of common carrier and aeronautical radio licensees. We also propose to codify whatever measures we ultimately adopt in this proceeding to provide more predictability and ensure transparency of our section 310(b)(4) filing requirements and review process. We estimate that adopting the proposals and other options discussed in this NPRM would result in a more than 70 percent reduction in the number of section 310(b)(4) petitions for declaratory ruling filed with the Commission annually, as compared to the current regulatory framework.[9] We also anticipate a reduction in the time and expense associated with filing petitions under the proposed framework.

4. The proposed framework incorporates certain existing and revised policies and procedures, as summarized below. Under this framework, we would:

- Continue to require common carrier and aeronautical radio station licensees to obtain Commission approval under section 310(b)(4) of the Act *before* the aggregate direct or indirect

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plc, Transferee, Consolidated Application for Consent to Transfer of Control of Stratos Global Corporation and Its Subsidiaries from an Irrevocable Trust to Inmarsat, plc, Memorandum Opinion and Order and Declaratory Ruling, IB Docket No. 08-143, DA 09-117, 24 FCC Rcd 449 (Int'l Bur. 2009) (*2009 Inmarsat Order*); *Vizada Services LLC and Vizada, Inc*., Order and Declaratory Ruling, DA 10-357, 25 FCC Rcd 2029 (Int'l Bur. 2010); *SkyTerra Communications, Inc., Transferor and Harbinger Capital Partners Funds, Transferee, Applications for Consent to Transfer Control of SkyTerra Subsidiary, LLC*, Memorandum Opinion and Order and Declaratory Ruling, IB Docket No. 08-184, DA 10-535, 25 FCC Rcd 3059 (Int'l Bur./OET/WTB 2010), *recon. pending* (*SkyTerra Transfer Order*).

[7] 47 U.S.C. § 151.

[8] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3964, ¶ 238.

[9] This estimate is based on the International Bureau staff's review of the 21 section 310(b)(4) petitions filed with the Commission during a randomly-selected period (September 1, 2007 through August 31, 2008).

foreign ownership of their controlling U.S. parent companies exceeds 25 percent, measured as a percentage of the equity and/or voting interests in the U.S. parent.

- Retain the current distinction between WTO and non-WTO Member investment, modify the distinction to reduce associated regulatory burdens, or eliminate the distinction.
- No longer require U.S. parent companies to obtain specific approval of named foreign investors, unless a foreign investor proposes to acquire a direct or indirect equity and/or voting interest in the U.S. parent that exceeds 25 percent, or a controlling interest at any level.
- Reduce the need for repeated filings by U.S. parent companies after they receive an initial section 310(b)(4) ruling, by allowing the parent to request specific approval for foreign investors named in the petition to increase their direct or indirect equity and/or voting interests in the U.S. parent at any time after issuance of the initial ruling, up to and including a non-controlling 49.99 percent equity and/or voting interest.
- Issue section 310(b)(4) rulings in the name of the U.S. parent of the licensee, and allow for automatic extension of the U.S. parent's ruling to cover any of the U.S. parent's subsidiaries or affiliates, whether existing at the time of the ruling or formed or acquired subsequently, *provided* that the U.S. parent remains in compliance with the terms of its ruling.
- Require that section 310(b)(4) petitions for declaratory ruling identify any individual or entity, regardless of citizenship, that holds or proposes to hold, directly or indirectly, 10 percent or more of the equity and/or voting interests in the U.S. parent, or a controlling interest at any level.
- Continue to make our rulings subject to the separate and independent requirement in section 310(d) of the Act that licensees obtain Commission approval for the assignment or transfer of control of a radio license.
- Continue to act on petitions in coordination with the appropriate Executive Branch agencies and accord deference to their views in matters related to national security, law enforcement, foreign policy, and trade policy.

5. We seek comment on these proposals, which are discussed more fully in Section III of this NPRM. We also seek comment on the following questions:

- Whether, once we have issued a ruling to a U.S. parent company, we should as a general rule authorize the U.S. parent to have up to and including 100 percent aggregate foreign ownership from foreign investors that are not named in the petition, *provided* that no single foreign investor or "group" of foreign investors acquires a direct or indirect equity and/or voting interest in the U.S. parent that exceeds 25 percent, or a controlling interest at any level, without prior Commission approval.
- Whether to permit internal reorganizations of the controlling U.S. parent without prior Commission approval under section 310(b)(4) in circumstances where a new, foreign-organized controlling parent is inserted into the vertical ownership chain above the U.S. parent, *provided* that the new foreign company is under 100 percent common ownership and control with the controlling foreign parent for which the U.S. parent has received prior Commission approval.
- Whether to permit internal reorganizations of the controlling U.S. parent's approved, non-controlling foreign investors without prior Commission approval under section 310(b)(4) in circumstances where a new foreign company is inserted into the approved foreign investor's vertical ownership chain, *provided* that the new foreign company is under 100 percent common ownership and control with the approved foreign investor.
- Whether to retain our practice of issuing rulings on a service-specific basis and on a geographic-specific basis.
- Whether to extend our streamlined processing procedures to additional types of section 310(b)(4) petitions that are currently excluded under policies adopted in the *Foreign Participation Order*.

6. The changes that we propose today should, if adopted, reduce significantly the regulatory costs and burdens that our current requirements impose on wireless carriers seeking section 310(b)(4) approval and provide carriers with greater transparency and more predictability.[10] At the same time, the proposed changes would ensure that we have the information we need to carry out our statutory duties under section 310(b) of the Act.

II. BACKGROUND

A. Section 310 of the Act

7. Section 310 of the Act requires the Commission to review foreign investment in radio station licenses.[11] This section imposes specific restrictions on who may hold certain types of radio licenses. The provisions of section 310 apply to applications for initial radio licenses,[12] applications for assignments and transfers of control of radio licenses, and spectrum leasing arrangements under the Commission's secondary market rules.[13] The relevant provisions of section 310 are as follows:

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;

[10] We use the term "wireless carriers" in this NPRM to refer to common carrier and aeronautical radio station licensees.

[11] A "station license" is defined in Section 3(42) of the Act as "that instrument of authorization required by [the] Act or the rules and regulations of the Commission made pursuant to [the] Act, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio by whatever name the instrument may be designated by the Commission." 47 U.S.C. § 153(42). For example, the Commission issues radio station licenses for the provision of broadcast, wireless personal communications services, cellular, microwave, aeronautical en route, and mobile satellite services.

[12] With respect to an applicant seeking to participate in a spectrum auction pursuant to section 1.2101 *et seq*. of the Commission's rules, the applicant must certify, as of the deadline for filing a short-form application, that it complies with the foreign ownership provisions of section 310 or that it has a request for waiver or other relief from the requirements of section 310 pending. *See* 47 C.F.R. § 1.2105(a)(2)(v), (vi).

[13] *See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 00-230, FCC 03-113, 18 FCC Rcd 20604 (2003), *modified by Erratum*, 18 FCC Rcd 24817 (2003) (*Secondary Markets Report and Order*), Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, FCC 04-167, 19 FCC Rcd 17503 (2004) (*Secondary Markets Second Report and Order*), Second Order on Reconsideration, FCC 08-243, 23 FCC Rcd 15081 (2008) (*Second Order on Reconsideration*). *See also Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, 19 FCC Rcd 22612, 22634-37 (Int'l Bur. 2004), erratum, 21 FCC Rcd 6484 (*Foreign Ownership Guidelines*), *pet. for recon. pending*. The Commission has extended its secondary market spectrum manager leasing rules to any Mobile Satellite Service spectrum used for terrestrial services pursuant to the Commission's Ancillary Terrestrial Component rules. *See Fixed and Mobile Services in the Mobile Satellite Service Bands at 1525-1559 MHz and 1626.5-1660.5 MHz, 1610-1626.5 MHz, and 2483.5-2500 MHz, and 2000-2020 MHz and 2180-2200 MHz*, Report and Order, ET Docket No. 10-142, FCC 11-57, 26 FCC Rcd 5710 (2011).

(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.[14]

8. Section 310(a) of the Act expressly prohibits a foreign government or its representative[15] from holding any radio license. This prohibition is absolute, and the Commission has no discretion to waive it. Section 310(a), however, does not expressly prohibit indirect foreign government control of licensees. As explained in the *VoiceStream/Deutsche Telekom Order*, a foreign government or representative may hold a controlling ownership interest in a U.S.-organized company that controls the licensee pursuant to section 310(b)(4) of the Act, provided the Commission does not find that the public interest would be served by the refusal or revocation of the license.[16]

9. Section 310(b) of the Act contains four subsections that place specific restrictions on who can hold a broadcast, common carrier, or aeronautical radio station license. Section 310(b)(1) and (b)(2) of the Act prohibit any alien or representative, and any foreign-organized corporation, respectively, from holding a broadcast, common carrier, or aeronautical radio station license. The prohibitions in section 310(b)(1) and (b)(2) are absolute, and the Commission has no discretion to waive them. As with section 310(a), these provisions do not bar an alien or representative, or a foreign-organized corporation, from holding a controlling ownership interest in a U.S.-organized company that controls the licensee pursuant to the discretionary authority afforded by section 310(b)(4). Section 310(b)(3) of the Act prohibits foreign governments, individuals, and corporations from owning more than 20 percent of the capital stock of a broadcast, common carrier, or aeronautical radio station licensee.[17] The Commission strictly applies the statutory restrictions of this section and has no discretion to waive the 20 percent statutory cap.[18]

10. Section 310(b)(4) of the Act establishes a 25 percent benchmark for investment by foreign individuals, corporations, and governments in U.S.-organized entities that directly or indirectly control a U.S. broadcast, common carrier, or aeronautical radio station licensee.[19] This section also grants the Commission discretion to allow higher levels of foreign ownership unless it finds that such ownership

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[14] 47 U.S.C. § 310(a)-(b).

[15] For purposes of Section 310(a), a "representative" is a person or entity that acts "in behalf of" or "in connection with" the foreign government. *See, e.g.*, *QVC Network, Inc.,* Memorandum Opinion and Order, 8 FCC Rcd 8485, 8490-91, ¶ 21 (1993) (citing *Letter from the Commission to Russell G. Simpson, Esq.*, 2 F.C.C.2d 640 (1966)).

[16] *See Application of VoiceStream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and for Declaratory Ruling Pursuant to Section 310 of the Communications Act,* Memorandum Opinion and Order, 16 FCC Rcd 9779, 9805-9806, ¶¶ 41-42 (2001) (*VoiceStream/Deutsche Telekom Order*).

[17] 47 U.S.C. § 310(b)(3).

[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, 103 F.C.C.2d 511, 518, ¶ 12 (1985) (*Wilner & Scheiner I*), *reconsidered in part*, 1 FCC Rcd 12 (1986) (*Wilner & Scheiner II*); *PrimeMedia Broadcasting, Inc.*, Memorandum Opinion and Order, FCC 88-218, 3 FCC Rcd 4293, 4295 (1988).

[19] 47 U.S.C. § 310(b)(4).

is inconsistent with the public interest.[20] Thus, a foreign government, individual, or corporation may own, directly or indirectly, up to 100 percent of the stock of a U.S.-organized entity that holds a controlling interest in a common carrier or aeronautical radio licensee, provided the Commission finds the foreign ownership to be consistent with the public interest.

11. Licensees must request Commission approval of their U.S. parents' foreign ownership under section 310(b)(4), normally done by filing a petition for declaratory ruling.[21] In order for the Commission to make the public interest findings required by that section of the Act, licensees must file the petition and obtain Commission approval *before* direct or indirect foreign ownership of their U.S. parent companies exceeds 25 percent.[22] Where the petition is filed in connection with an application for an initial radio station license, an assignment or transfer of control of a license, or a spectrum leasing arrangement, the Commission or the International Bureau, under delegated authority,[23] must act on the petition before or at the same time as the application is granted.

B. Overview of Regulatory Approach to Section 310(b)(4)

12. Commission implementation of section 310(b)(4) has evolved, over the last 15 years, from a case-by-case evaluation[24] to a review of foreign ownership of common carrier and aeronautical licensees in accordance with a policy framework intended to promote liberalization of telecommunications markets internationally. Under that framework, we apply an "open entry standard" to foreign investment from WTO Member countries, and an effective competitive opportunities ("ECO") standard to foreign investment from non-WTO Member countries, as a means to facilitate foreign investment in the U.S. telecommunications market and encourage non-WTO Member countries to open their telecommunications markets to competition and to join the WTO.[25]

13. In the 1997 *Foreign Participation Order*, the Commission concluded that the public interest would be served by permitting greater investment by foreign individuals and entities from WTO Member countries in U.S. common carrier and aeronautical radio licensees pursuant to the discretionary authority in section 310(b)(4).[26] The Commission therefore adopted a rebuttable presumption by which it

[20] *Compare* 47 U.S.C. § 310(b)(4) *with* 47 U.S.C.§ 310(b)(3).

[21] *See* 47 C.F.R. § 1.2.

[22] *See Application of Fox Television Stations, Inc.*, Memorandum Opinion and Order, FCC 95-188, 10 FCC Rcd 8452, 8474-77, ¶¶ 52-55 (1995) (*Fox I*) (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. FCC*, 998 F.2d 1051, 1057-58 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1004 (1994) and *Telemundo, Inc. v. FCC*, 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").

[23] *See* 47 C.F.R. § 0.261.

[24] *See Market Entry and Regulation of Foreign-affiliated Entities*, Notice of Proposed Rulemaking, IB Docket No. 95-22, FCC 95-53, 10 FCC Rcd 4844, 4851-53, ¶¶ 15-19 (1995). *See also Foreign Carrier Entry Order*, 11 FCC Rcd at 3943, ¶ 183 (noting that, prior to adoption of the *Foreign Carrier Entry Order*, the Commission had exercised its section 310(b)(4) discretion sparingly).

[25] *See supra* note 4 and accompanying text. *See also Foreign Participation Order*, 12 FCC Rcd at 23944-45, ¶ 125, 23945, ¶ 127.

[26] *See Foreign Participation Order*, 12 FCC Rcd at 23893-97, ¶¶ 1-12, 23935-42, ¶¶ 97-118.

presumes that foreign investment from WTO Member countries does not pose competitive concerns in the U.S. market.[27] For purposes of determining whether foreign investors are based in WTO Member countries and, thus, afforded greater investment opportunities under section 310(b)(4) of the Act, the Commission uses the "principal place of business" test to determine the nationality or "home market" of foreign entities that seek to invest directly or indirectly in the U.S. parent of a common carrier or aeronautical radio licensee.[28] 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.[29] 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.[30]

14. With respect to foreign investment from countries that are not Members of the WTO, the Commission determined in the *Foreign Participation Order* to continue to apply the ECO test as part of its public interest analysis under section 310(b)(4).[31] Thus, to the extent non-WTO Member investment in the controlling U.S. parent of a common carrier or aeronautical radio licensee would exceed 25 percent, the Commission requires the petitioner to submit an ECO showing for the relevant wireless service sector in each non-WTO Member country where an investor has its home market.[32] The Commission found in

[27] Where there is a showing of a risk to competition in the U.S. market from foreign investments by an individual or entity from a WTO Member country, the Commission may impose specific conditions on the licensee to address such risks to competition. In addition, in the exceptional case where an application poses a very high risk to competition in the U.S. market, where conditions imposed by the Commission would not satisfactorily address competition concerns, the Commission could deny the application. *Foreign Participation Order*, 12 FCC Rcd at 23913-15, ¶¶ 51-54.

[28] The Commission generally considers a foreign individual's home market to be its country of citizenship. Where the interest would be held by a foreign corporation, partnership, or other business organization, the petition must establish the investing entity's principal place of business by specifying the following information: (1) the country of a foreign entity's incorporation, organization, or charter; (2) the nationality of all investment principals, officers, and directors; (3) the country in which the world headquarters is located; (4) the country in which the majority of the tangible property, including production, transmission, billing, information, and control facilities is located; and (5) the country from which the foreign entity derives the greatest sales and revenues from its operations. *Foreign Participation Order*, 12 FCC Rcd at 23941, ¶ 116 (citing *Foreign Carrier Entry Order*, 11 FCC Rcd at 3951, ¶ 207).

[29] *Foreign Participation Order*, 12 FCC Rcd at 23913-15, ¶¶ 59-66.

[30] *Id.* at 23918, ¶¶ 59, 23919, ¶¶ 61-66.

[31] The Commission adopted the ECO test in 1995 as an important element in its public interest determination under section 310(b)(4) for all foreign investment in U.S. parent companies of common carrier radio licensees above the 25 percent benchmark. *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3941-64, ¶¶ 179-238. In applying the ECO test, the Commission will consider the legal and practical limitations on U.S. investment in the foreign investor's home market for the particular wireless service (or analogous service) in which the investor seeks to participate in the U.S. market. *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3948, ¶¶ 197-98. *See also id*. at 3952-53, ¶¶ 209-212 (the ECO analysis compares "restrictions on U.S. participation in the home market for the particular wireless service in which the foreign investor seeks to participate in the U.S. market. If the services in the U.S. and home markets are not precisely matched, we will use the most closely substitutable wireless service in the home market, as determined from the consumers' perspective."); and *id*. at 3954, ¶¶ 213-215 (stating that the ECO test considers first, the existence and extent of any legal restrictions on U.S. investment in the relevant market(s) and, to the extent they are relevant, the practical limitations on U.S. participation, including the price, terms and conditions of interconnection, competitive safeguards, and the regulatory framework of the relevant market(s)).

[32] *Foreign Participation Order*, 12 FCC Rcd at 23944-46, ¶¶ 124-127, 131. The Commission extended its foreign ownership policies that apply to common carrier radio licensees under section 310(b)(4) to aeronautical radio

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the *Foreign Participation Order* that the circumstances that existed when it adopted the *Foreign Carrier Entry Order* had not changed sufficiently with respect to countries that were not Members of the WTO, as the markets of non-WTO Members, in almost all cases, were not liberalized and presented legal and practical barriers to entry.[33] Thus, the Commission stated that it would deny an application if it found that more than 25 percent of the ownership of an entity that controls a common carrier radio licensee is attributable to parties whose principal place(s) of business are in non-WTO Member countries that do not offer effective competitive opportunities to U.S. investors in the particular service sector in which the applicant seeks to compete in the U.S. market, unless other public interest considerations outweigh that finding.[34] The Commission concluded that its goals of increasing competition in the U.S. telecommunications service market and opening foreign telecommunications service markets would continue to be served by opening the U.S. market to investors from non-WTO Member countries only to the extent that the investors' home markets are open to U.S. investors.[35]

C. Implementation of the *Foreign Participation Order*

15. Under the regulatory framework adopted in the *Foreign Participation Order*, we will authorize up to 100 percent foreign ownership of a U.S. parent company that, in turn, controls a common carrier or aeronautical radio licensee, provided the petition is properly supported and absent countervailing public interest concerns. As a general rule, we authorize the foreign investors named or otherwise specifically described in the section 310(b)(4) petition to hold the ownership amounts – both equity and voting interests – specified in the petition so long as the petition contains sufficient information to demonstrate that the foreign investment is properly ascribed to WTO Member countries. We also include in our section 310(b)(4) rulings certain provisions and limitations, described below, 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. In addition, we have imposed, on a case-by-case basis, 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.[36]

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licensees in the *Foreign Participation Order*, because it found that some aeronautical radio services are basic telecommunications services that fall within the class of services covered by the WTO Basic Telecommunications Agreement. *See id*. at 23942, ¶ 117.

[33] *See id*. at 23944-45, ¶ 125 ("Since 1995, our application of the ECO test has provided incentives for foreign governments to allow U.S. participation in their markets, and it played a part in the WTO negotiations that resulted in the Basic Telecom Agreement. We believe that continuing to apply the ECO test to non-WTO Member countries may encourage some of those countries to take unilateral or bilateral steps toward opening their markets to competition and may provide incentives for them to join the WTO.").

[34] *Id.* at 23946, ¶ 131.

[35] *Id*.

[36] *See, e.g.*, *Vodafone Airtouch Plc and Bell Atlantic Corporation, For Consent to Transfer of Control or Assignment of Licenses and Authorizations*, Memorandum Opinion and Order, DA 00-721, 15 FCC Rcd 16507, 16520-21, ¶¶ 34-37 (WTB/Int'l Bur. 2000); *VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9821-23, ¶¶ 73-77; *Verizon Communications, Inc., Transferor, and América Móvil, S.A. de C.V., Transferee, Application for Authority to Transfer Control of Telecomunicaciones de Puerto Rico, Inc. (TELPRI)*, WT Docket No. 06-113, Memorandum Opinion and Order and Declaratory Ruling, FCC 07-43, 22 FCC Rcd 6195, 6225-27, ¶¶ 69-72 (2007); *2009 TerreStar Order*, 24 FCC Rcd at 14675-76, ¶ 26; *International Authorizations Granted*, Public Notice, DA 11-347, 26 FCC Rcd 2073 (Int'l Bur. 2011) (granting ISP-PDR-20101022-00019, filed by eLandia International Inc.).

16. In addition to approving specific ownership interests to be held by foreign investors named in the petition, our rulings generally have authorized the acquisition of an additional, aggregate 25 percent foreign equity interest and/or 25 percent foreign voting interest in the U.S. parent, either from investors approved specifically in the ruling or from other investors, without seeking additional Commission approval.[37] Our purpose in granting the 25 percent allowance (sometimes referred to in Commission orders as the "cushion") is to accommodate future changes in ownership of the U.S. parent, including ownership by investors from non-WTO Member countries.

17. The allowance, generally, is subject to two conditions to ensure that no single foreign investor obtains an interest that exceeds 25 percent without prior Commission approval and that aggregate non-WTO Member investment does not exceed 25 percent.[38] First, the U.S. parent may not use all or part of the allowance to permit any foreign investor, whether WTO or non-WTO, to acquire a block of equity and/or voting interests directly or indirectly in the U.S. parent of the licensee in excess of 25 percent. Any investment by a foreign individual or entity in excess of 25 percent must receive prior Commission approval. Second, once the U.S. parent "uses up" the allowance, *e.g*., by selling an additional 25 percent capital stock interest to new foreign investors, the parent must obtain prior Commission approval before it may accept any additional foreign investment.[39]

18. In order to accommodate investments in U.S. parent companies by publicly-traded, foreign-organized companies with widely held securities, we have issued section 310(b)(4) rulings to approve ownership of the U.S. parent by the foreign company *and* its shareholders to the extent they are citizens of the country where the foreign company has its "principal place of business" (also referred to as its "home market").[40] These "home market" rulings, as we refer to them in this NPRM, include the

[37] *See Vodafone/Globalstar Order,* 17 FCC Rcd at 12866, ¶ 52. As a general rule, however, this allowance may not be used to increase the holdings of any named foreign investor for which the Commission's ruling specifically approves an equity and/or voting interest in excess of 25 percent. Any ownership increases by such a foreign investor would require prior Commission approval. *See*, *e.g.*, *Application of General Electric Corporation, Transferors, and SES Global, S.A., Transferees*, Order and Authorization, 16 FCC Rcd 17575, 17593, ¶ 42 (Int'l Bur./WTB 2001), *Supplemental Order*, 16 FCC Rcd 18878, 18884-85, ¶ 11 (Int'l Bur./WTB 2001). In addition, because the Commission's rulings generally do not approve specific non-WTO investment, non-WTO investment must always be counted against the allowance for an additional, aggregate 25 percent foreign equity interest and 25 percent foreign voting interest. *See*, *e.g.*, *SkyTerra Transfer Order*, 25 FCC Rcd at 3076, ¶ 27 (stating that, "for purposes of calculating the additional, aggregate 25 percent amount, SkyTerra shall include the 0.42 percent equity interest and 0.50 percent voting interest attributed in this Memorandum Opinion and Order and Declaratory Ruling to investors from non-WTO Member countries").

[38] *See, e.g.*, *Applications of XO Communications, Inc*., Memorandum Opinion, Order and Authorization, IB Docket No. 02-50, DA 02-2512, 17 FCC Rcd 19212, 19223, ¶ 25 n.77 (Int'l Bur./WTB/WCB 2002) (*XO Communications*).

[39] *See*, *e.g*., *Global Crossing, Ltd. (Debtor-in-Possession), Transferor, and GC Acquisition Limited, Transferee,* Order and Authorization, IB Docket No. 02-286, DA 03-3121, 18 FCC Rcd 20301, 20329, ¶ 35 (Int'l Bur./WCB/WTB 2003) (*Global Crossing Transfer Order*). Thus, for example, where the U.S. parent's ruling authorizes a named foreign investor to hold a specified percentage of the parent's total capital stock and/or voting stock in an amount below 25 percent (*e.g*., 15 percent), the 25 percent aggregate allowance enables the parent to accept additional capital from the foreign investor without prior Commission approval, *provided*: (i) the foreign investor's total equity interests and/or voting interests in the parent do not exceed 25 percent; *and* (2) the increase in the investor's equity and/or voting interest (*e.g*., 10 percent) does not cause the parent to exceed the 25 percent allowance when combined with any other new foreign investment in the U.S. parent since issuance of its ruling.

[40] *See*, *e.g*., *Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc. For Consent to Transfer Control of Licenses and Authorizations, et al*., Memorandum Opinion and Order and Declaratory Ruling, FCC 06-167, 21 FCC Rcd 13580 (2006) (authorizing, *inter alia*, 100 percent indirect foreign ownership of Guam Cellular by DoCoMo and its Japanese shareholders); *International Authorizations Granted*, Public Notice, DA 04-
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standard 25 percent aggregate allowance, which in such cases permits non-U.S. citizens of other foreign countries to acquire an aggregate 25 percent ownership interest in the foreign company. These rulings also include standard conditions to ensure that no single foreign shareholder acquires an interest in the foreign company that exceeds 25 percent without prior Commission approval and that non-WTO Member investment does not exceed 25 percent. In order to comply with a "home market" ruling, the foreign company must take steps to ensure that its foreign ownership from countries other than its home market does not exceed 25 percent.[41]

19. We utilized a different approach in approving the acquisition of Stratos Global Corporation and its U.S.-licensed subsidiaries by Inmarsat plc, a publicly-traded, U.K.-organized company.[42] The *2009 Inmarsat Order* authorized the Stratos Global licensees to be 100 percent indirectly owned by Inmarsat plc and its shareholders without requiring Commission approval before foreign ownership of Inmarsat from countries other than the United Kingdom could exceed 25 percent.[43] The only citizenship limitations on the ruling were that ownership of Inmarsat from non-WTO investors, or from any single foreign investor, not exceed 25 percent without prior Commission approval.[44] In essence, we approved 100 percent indirect foreign ownership of the Stratos Global licensees by Inmarsat and its shareholders from WTO Member countries generally, whether the United Kingdom or another WTO Member signatory. We refrained from taking a "home market" approach in the Inmarsat-Stratos Global proceeding because the record indicated that Inmarsat's shares were not owned primarily by U.K. shareholders but rather were held primarily by investors from a wide range of WTO Member countries, including the United Kingdom.[45] The International Bureau has followed the approach taken in the *2009*

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25, 19 FCC Rcd 275 (Int'l Bur. 2004) (authorizing, *inter alia*, 100 percent indirect foreign ownership of SkyWave Mobile Communications, Corp. by SkyWave Mobile Communications, Inc. and its Canadian shareholders); *VoiceStream/Deutsche Telekom Order*, 16 FCC Rcd at 9848-49, ¶¶ 135-138 (authorizing, *inter alia*, 38 percent indirect foreign ownership of Iowa Wireless Services Holding Corporation by Deutsche Telekom and its German shareholders).

[41] The effect of this approach is that the foreign company and its "home market" shareholders essentially count as U.S. citizens, with the exception of the condition that prohibits *any* single foreign shareholder from acquiring an interest in the U.S. parent that exceeds 25 percent without prior Commission approval.

[42] *Stratos Global Corporation, Transferor, Robert M. Franklin, Transferee, Consolidated Application for Consent to Transfer of Control*, Memorandum Opinion and Order and Declaratory Ruling, WC Docket No. 07-73, FCC 07-213, 22 FCC Rcd 21328 (2007) (*2007 Inmarsat Order*) (approving the first step of the Inmarsat-Stratos Global transaction, which involved the transfer of control of the Stratos Global licensees to a trustee); *2009 Inmarsat Order*, 24 FCC Rcd 449 (approving the second step of the transaction to transfer control of the Stratos Global licensees to Inmarsat).

[43] *2009 Inmarsat Order*, 24 FCC Rcd at 480, ¶ 70. The International Bureau's ruling in the *2009 Inmarsat Order* follows the approach taken by the Commission in the *2007 Inmarsat Order,* which approved the first step of the two-step transaction. In ruling on the first step of the transaction under section 310(b)(4), the Commission in the *2007 Inmarsat Order* authorized, among other things, Inmarsat's acquisition of a 100 percent indirect equity interest in the Stratos Global licensees in the form of a loan facility financed by an Inmarsat affiliate that would be used to fund the first step. *See 2007 Inmarsat Order*, 22 FCC Rcd at 21361-65, ¶¶ 77-90 (characterizing the Inmarsat loan facility as an equity interest under section 310(b)(4)); *id*. at 21370, ¶ 101 (approving the 100 percent equity interest in the Stratos Global licensees by Inmarsat "and Inmarsat's shareholders").

[44] The International Bureau also conditioned grant of the ruling and associated transfer of control applications on Inmarsat's compliance with the provisions of an Agreement between Inmarsat, on the one hand, and the U.S. Department of Justice (DOJ) and the Department of Homeland Security (DHS) on the other hand, dated September 23, 2008. *See 2009 Inmarsat Order*, 24 FCC Rcd at 484, ¶ 85.

[45] *2007 Inmarsat Order*, 22 FCC Rcd at 21368, ¶ 97 (citing the *Inmarsat Finance October 16 Letter*, which presented the results of a May 2008 citizenship survey of Inmarsat plc shareholders); *2009 Inmarsat Order*, 24 FCC
(continued….)

Inmarsat Order in subsequent decisions authorizing foreign ownership of common carrier licensees by U.S.-organized and foreign-organized public companies.[46] These rulings effectively permit 100 percent foreign ownership of the subject licensee's U.S. parent companies, subject to a 25 percent ceiling on aggregate investment from non-WTO Member countries and on investments by any single foreign individual or entity.[47]

20. Our foreign ownership rulings do not satisfy the separate and independent requirement in section 310(d) of the Act that licensees obtain Commission approval of an assignment or transfer of control of a radio license.[48] Thus, for example, even if a foreign investor's acquisition of an ownership interest in a licensee's U.S. parent company falls within the numerical parameters of the parent's ruling, the parent must file an application for consent to the acquisition if it would result in a *de facto* or *de jure* transfer of control of the licensee under section 310(d) of the Act.

21. Unless otherwise specified in a particular ruling, section 310(b)(4) rulings are granted only to cover the licensee(s) named in the underlying petition for declaratory ruling. An affiliated entity may not rely on a ruling issued to a parent, subsidiary, or sister company for purposes of filing its own application to obtain an initial license, acquire control of or assign a license, or engage in a spectrum leasing arrangement.[49] The affiliated entity must submit its own petition for declaratory ruling requesting Commission approval of its indirect foreign ownership pursuant to section 310(b)(4) of the Act.[50]

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Rcd at 477-78, ¶ 67 and accompanying footnotes (also citing to the results of the May 2008 citizenship survey of Inmarsat plc shareholders).

[46] For example, in the *2009 TerreStar Order*, the Bureau authorized TerreStar Networks, Inc. ("TerreStar") to have "indirect foreign equity and voting interests in excess of the 25 percent benchmark … as a result of foreign ownership interests held in its publicly-traded, controlling U.S. parent, TerreStar Corp." *Id*., 24 FCC Rcd at 14675, ¶ 24. As in the *2009 Inmarsat Order*, the Bureau conditioned its ruling, in pertinent part, to require that TerreStar obtain prior Commission approval before ownership of TerreStar Corp. from non-WTO investors, or from any single foreign investor, exceeds 25 percent. The Bureau also conditioned grant of the ruling on compliance with the provisions of an Agreement between TerreStar, on the one hand, and DOJ and DHS, on the other hand, dated December 18, 2009. *See id.*, 24 FCC Rcd at 14677, ¶ 33.

[47] *See also International Authorizations Granted*, Public Notice, DA 10-1798, 25 FCC Rcd 13369 (Int'l Bur. 2010) (authorizing up to 100 percent indirect foreign ownership of Hawaiian Telcom, Inc. as a result of foreign equity and/or voting interests held directly or indirectly in its controlling U.S. parent, Hawaiian Telcom Holdco, Inc.); *International Authorizations Granted*, Public Notice, DA 10-2391, 25 FCC Rcd 17597 (Int'l Bur. 2010) (authorizing up to 100 percent indirect foreign ownership of subsidiaries of FairPoint Communications, Inc. ("Fairpoint") as a result of foreign equity and/or voting interests held directly or indirectly in Fairpoint); *International Authorizations Granted*, Public Notice, DA 11-347, 26 FCC Rcd 2073 (Int'l Bur. 2011) (authorizing, in pertinent part, indirect foreign ownership of U.S.-licensed subsidiaries of eLandia International, Inc. by Amper, S.A., a publicly-traded, widely-held company organized in Spain (individually, up to and including 100 percent of the equity and voting interests) and its shareholders (collectively, up to and including 100 percent of the equity and voting interests)).

[48] 47 U.S.C. § 310(d).

[49] "Spectrum leasing arrangement" is defined in section 1.9003 of the Commission's rules, 47 C.F.R. § 1.9003.

[50] There is one exception to this general rule. In cases of *pro forma* assignments and transfers of control, the assignee (in the case of an assignment) and the licensee (in the case of a transfer) do not need to submit a petition for declaratory ruling if they certify and substantiate in their *pro forma* application that the licensee and assignee/transferee ultimately are wholly owned and controlled by the same U.S. parent and that the foreign ownership of the U.S. parent has been approved in a section 310(b)(4) ruling. *See Foreign Ownership Guidelines*, 19 FCC Rcd at 22639.

22. As discussed in Section I. above, practical application of the foreign ownership policies adopted in the *Foreign Participation Order* has proven to be complex. It has been our experience that, with the exception of companies that are closely held, U.S. parent companies face significant difficulties and costs in trying to ascertain the citizenship and principal places of their investors, which often hold their interests indirectly through multiple intervening investment vehicles and holding companies.[51] The current section 310(b)(4) review process has also required the Commission to commit considerable staff time and resources to confirm that non-WTO ownership of a wireless licensee's U.S. parent company does not exceed 25 percent. Our findings, moreover, necessarily are limited in time to the "snapshot" the licensee provides for the record of the section 310(b)(4) proceeding. Thus, a licensee may need to return to the Commission after issuance of an initial ruling to seek prior approval for changes in foreign ownership of its U.S. parent that would exceed the parameters of the licensee's ruling. As discussed further below, we propose to review and revise in certain respects the Commission's regulatory framework implementing the discretionary provision in section 310(b)(4) with respect to common carrier and aeronautical radio licensees.

III. DISCUSSION

23. We explore below several possible means to tailor the Commission's oversight of foreign investment in common carrier and aeronautical radio licensees to reduce the regulatory costs and burdens imposed on wireless carriers that seek to obtain Commission approval of foreign investment under section 310(b)(4), provide greater transparency and more predictability with respect to the Commission's filing requirements and review process, and facilitate capital formation, while preserving the Commission's discretion and ability to disallow foreign investment that may pose a risk of harm to competition or national security, law enforcement, foreign policy, or trade policy.[52] Our proposals and other options would modify certain aspects of the Commission's foreign ownership policies for common carrier and aeronautical radio licensees, adopted in the *Foreign Participation Order*, and certain procedures that have evolved since then on a case-by-case basis in the course of issuing section 310(b)(4) rulings. We discuss the proposed modified framework in detail below and also raise for comment other potential changes that may allow us to reduce the costs associated with section 310(b)(4).

24. We seek comment on the proposals and other options raised in this NPRM, including draft rules that are appended to the NPRM. We encourage commenters to discuss all aspects of the proposed framework and practical problems licensees may face in complying. We also seek suggestions on ways we can improve the proposed framework, and we invite the submission of alternative approaches. Proponents of a different or modified approach should provide detailed recommendations for specific rules to implement their proposals.

A. The Distinction Between WTO and Non-WTO Investment

25. As discussed in Section II.B. above, we determined in the *Foreign Participation Order* to distinguish between WTO and non-WTO Member investment in exercising our discretion under section 310(b)(4) to allow foreign investment in the controlling U.S.-organized parent companies of U.S. wireless carriers in excess of the 25 percent benchmark.[53] To the extent non-WTO Member investment in the controlling U.S. parent of a common carrier or aeronautical radio licensee would exceed 25 percent, we require the petitioner to submit an ECO showing for the relevant wireless service sector in each non-WTO

[51] *See supra* note 6 and accompanying text.

[52] As discussed in Section I. above, this NPRM does not address Commission policy with respect to the application of section 310(b)(4) to broadcast licensees. *See supra* note 3 and accompanying text.

[53] *See supra* ¶¶ 12-14.

Member country where an investor has its home market.[54] We will deny a section 310(b)(4) petition that does not contain the required ECO showing, in the absence of countervailing public interest considerations.[55] We concluded in the *Foreign Participation Order* that our goals of increasing competition in the U.S. telecommunications service market and opening foreign telecommunications service markets would continue to be served by opening the U.S. market to investors from non-WTO Member countries only to the extent that the investors' home markets are open to U.S. investors.[56]

26. The number of countries committing to open their markets to foreign competition for some or all basic telecommunications services has increased from 69 WTO Members at the time the WTO Basic Telecommunications Agreement entered into force on February 5, 1998 to a current total of 108 WTO Member countries.[57] In addition, 82 WTO Members have now committed to the pro-competitive regulatory principles spelled out in the "Reference Paper," up from the 55 WTO Members that initially appended the document, in whole or in part, to their schedules of commitments.[58] While the 152 countries that are currently Members of the WTO represented approximately 94 percent of the world's gross domestic product in 2009,[59] there remain a significant number of countries that have not yet joined the WTO or opened their markets to competition and foreign investment.[60]

27. We request comment whether there is a policy basis for retaining the distinction between WTO and non-WTO Member investment in its current form, modifying our application of the distinction, or eliminating the distinction. Commenters should identify changes that have occurred in U.S. and foreign wireless telecommunications markets since 1997 – when we last comprehensively examined our implementation of section 310(b)(4) in the *Foreign Participation Order* – that support their position. In particular, we seek comment on the extent of foreign ownership in the U.S. telecommunications market today and the trends over the last several years.

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[54] *Foreign Participation Order*, 12 FCC Rcd at 23944-45, ¶¶ 124-127.

[55] *Id*., 12 FCC Rcd at 23946, ¶ 131.

[56] *Id*.

[57] *See* http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm (visited on July 19, 2011). There are currently 152 WTO Member signatories (excluding the European Union which, in addition to its Member states, is a contracting party). *See* http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (visited July 26, 2011). Of the current 152 WTO Member signatories, 20 have joined the WTO since the WTO Basic Telecommunications Agreement entered into force on February 5, 1998. The WTO Member signatories represent governments or separate customs territories with full autonomy in the conduct of their trade policies. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 2 (GATT Secretariat 1994), 33 I.L.M. 1125 (1994), art. XII, which is publicly available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf. *See also* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org.3_e.htm#join (explaining the WTO's accession process) (visited on June 16, 2011).

[58] *See* http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm (visited on July 19, 2011). *See also* *Foreign Participation Order*, 12 FCC Rcd at 23893-94, ¶ 2, 23903-04, ¶¶ 27-28.

[59] We have derived this figure by comparing the aggregate gross domestic product (GDP) for WTO Member countries to the aggregate GDP for non-WTO Member countries, using GDP information from the World Bank's World Development Indicators. This information is available at http://data.worldbank.org/data-catalog.

[60] We calculate that, of the approximately 6.6 billion fixed and mobile telephone subscribers globally in 2010, approximately 10.5 percent were located in non-WTO Member countries. We have derived this figure based on country-specific information from the International Telecommunication Union's World Telecommunications Indicators, *available at* http://www.itu.int.

28. Maintaining the distinction between WTO and non-WTO Member investment in wireless carriers may continue to play an important role in promoting competition in the U.S. market and achieving a more competitive global market for all basic telecommunications services.[61] At the same time, our current policy imposes costs and burdens on U.S. wireless carriers and their U.S. parent companies to calculate non-WTO Member investment in the U.S. parent to ensure that it does not exceed 25 percent unless the parent is able to make an ECO showing for the relevant non-WTO Member countries.[62] It also has been our experience, in reviewing section 310(b)(4) petitions, that in many cases it is not possible for companies to ascertain with confidence their percentage of non-WTO Member investment, particularly where the company is publicly traded or is owned in whole or in part by other companies that are publicly traded. We therefore seek comment on the relative costs and benefits of maintaining the current distinction between WTO and non-WTO Member investment. Specifically, we ask that commenters provide for the record quantification of the costs and burdens currently associated with filing a section 310(b)(4) petition, complying with the limitations of the ruling, and the extent to which a change in policy would result in cost savings to U.S. wireless carriers and consumers. We ask that commenters also address to what extent any costs and burdens have either deterred foreign investment or added significant transaction costs to the flow of such investments.

29. If we were to eliminate the distinction between WTO and non-WTO Member investment, a U.S. wireless carrier would no longer be required to demonstrate in its section 310(b)(4) petition that non-WTO Member investment in its U.S-organized parent company does not exceed 25 percent or, alternatively, that non-WTO Member investment is from countries that satisfy the ECO test. All foreign investment would be accorded the review now applied to investment from WTO Member countries. The Commission would presume, subject to rebuttal, that direct or indirect foreign ownership of a wireless carrier's U.S. parent company does not pose competitive concerns in the U.S. market regardless of the nationality (in the case of an individual) or principal place(s) of business (in the case of a business entity) of the U.S. parent's foreign investor(s).[63] We seek comment on whether it is prudent to presume that non-WTO Member investment in U.S. parent companies does not raise competitive concerns in the U.S. market and the circumstances, if any, that would allow the leveraging of market power in foreign telecommunications services or facilities into U.S. wireless markets.

30. Commenters should also address whether maintaining the distinction between WTO and non-WTO Member investment, including the ECO test, focuses Commission resources on the most pressing international competitive concerns.[64] In addition, we seek input on whether eliminating the

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[61] *Foreign Participation Order*, 12 FCC Rcd at 23894, ¶ 3.

[62] All of the section 310(b)(4) petitions we have received since the 1998 implementation of the *Foreign Participation Order* have contained a showing that non-WTO ownership of the licensee's U.S. parent company does not exceed 25 percent. No petitioner has asked us to approve non-WTO ownership of the U.S. parent company based on an ECO showing.

[63] As discussed above, the Commission currently applies a rebuttable presumption with respect to WTO Member investment under section 310(b)(4). In adopting this presumption in the *Foreign Participation Order*, the Commission explained that it applies "only to competition concerns that may arise because of a foreign carrier's market power in a foreign market." *Foreign Participation Order*, 12 FCC Rcd at 23916-17, ¶ 57. The Commission stated that, because common carrier 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." *Foreign Participation Order*, 12 FCC Rcd at 23940, ¶ 112. *See also id*. at 23936, 23940, ¶¶ 102, 112 (noting that no commenter had argued that foreign investment in common carrier wireless markets could raise anticompetitive dangers).

[64] Membership in the WTO does not necessarily preclude the possibility that the United States may have competition issues with the member countries. *See, e.g.*, the 2011 Section 1377 Review on Telecommunications (continued….)

distinction between WTO and non-WTO Member investment and the ECO test would produce net public interest benefits by reducing asymmetries in regulation of wireless and wireline carriers, which are not subject to the foreign ownership restrictions in section 310(b) except to the extent they hold a common carrier radio license.

31. We also seek comment on whether there are ways to reduce the costs and burdens of ascertaining the level of non-WTO investment in U.S. parent companies while continuing to support our objectives to promote competition in the U.S. market and encourage market-opening in non-WTO Member countries. In particular, we request comment on allowing U.S. parent companies filing section 310(b)(4) petitions to exclude from their calculations of non-WTO investment those equity and voting interests that are held by a single non-WTO investor or "group" of non-WTO investors in an amount that constitutes 5 percent or less of the U.S. parent company's total capital stock (equity) and/or voting stock.[65] An equity and/or voting interest of 5 percent or less may be sufficiently non-influential as a general rule that it could be excluded from the 25 percent aggregate limit on non-WTO investment in U.S. parent companies without posing a realistic potential to affect the core operations of the parent or licensee or, in turn, a risk of harm to competition, national security, law enforcement, foreign policy, or trade policy. We seek comment on whether we should continue to issue section 310(b)(4) rulings subject to the standard condition that prohibits the U.S. parent from accepting non-WTO investment that exceeds, in the aggregate, 25 percent of the U.S. parent's equity interests or 25 percent of its voting interests. If so, should we allow the U.S. parent to exclude from the 25 percent amount those equity and voting interests that are held by a single non-WTO investor or "group" of non-WTO investors in an amount that constitutes 5 percent or less of the U.S. parent company's total capital stock (equity) and/or voting stock?

32. We also seek input on whether we should treat two or more non-WTO investors as a "group" when the investors have agreed to act together for the purpose of acquiring, holding, voting, or disposing of their equity and/or voting interests in the U.S. parent company or any intermediate company(ies) through which any of the investors holds its interests in the U.S. parent.[66] It would appear reasonable, as part of such an approach, to subject any individual or entity that, directly or indirectly, creates or uses a trust, proxy, power of attorney, or any other contract, arrangement, or device with the purpose of divesting itself, or preventing the vesting, of an equity interest or voting interest in the U.S. parent as part of a plan or scheme to evade the application of our policies that apply to non-WTO investment under section 310(b)(4) to enforcement action by the Commission, including an order requiring divestiture of the investor's direct or indirect interests in the U.S. parent.[67] We ask that commenters also address whether the 5 percent or less exclusion for non-WTO investments should apply

(Continued from previous page)
Trade Agreements issued by the Office of the United States Trade Representative, March 2011, *available at* http://www.ustr.gov/webfm_send/2788.

[65] We discuss the term "group" in paragraph 32 below. We emphasize that the 5 percent or less exclusion option would not permit U.S. parent companies to exclude 5 percent or less interests for purposes of determining whether their foreign ownership complies in the first instance with the 25 percent benchmark in section 310(b)(4). As explained in the *Foreign Ownership Guidelines*, Commission policy requires that any equity or voting interest held by an individual other than a U.S. citizen or by a foreign government or an entity organized under the laws of a foreign government be counted in the application of the statutory benchmarks. *See id*., 19 FCC Rcd at 22624 (citing *Wilner & Scheiner I*, 103 F.C.C.2d at 514-15).

[66] Rule 13d-5 of the Securities and Exchange Commission (SEC) takes a similar approach to defining the parameters of a "group" for purposes of implementing sections 13(d) and (g) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), 15 U.S.C. § 78m(d) & (g). *See* 17 C.F.R. § 240.13d-5(b)(1).

[67] SEC Rule 13d-3 contains a similar provision to address any plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Exchange Act. *See* 17 C.F.R. § 240.13d-3(b).

only when the U.S. parent or an entity that controls the U.S. parent is a publicly-traded company, or also when they are privately-held companies.

33. The Commission has long maintained, in the context of its mass media attribution rules, a 5 percent voting stock benchmark for broadcasters based on its finding that a stockholder with a smaller interest does not have the ability to influence or control core decisions of the licensee, regardless of whether the licensee is a closely held or widely held company.[68] We also find instructive section 13(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which informed the Commission's decision to adopt the 5 percent threshold for attribution of ownership interests in the mass media context. In general, section 13(d) of the Exchange Act requires that a person or "group" that becomes, directly or indirectly, the "beneficial owner" of more than 5 percent of a class of equity securities registered under section 12 of the Exchange Act must report the acquisition to the issuer of the security, to each exchange on which the security is traded, and to the Securities and Exchange Commission ("SEC").[69] The purpose of the disclosure requirements in section 13(d) of the Exchange Act is to ensure that investors are alerted to potential changes in control.[70] In most cases, SEC Rule 13d-1(a)[71] will obligate the acquiring person or group to file a Schedule 13D with the SEC, including the identity and citizenship of the direct and indirect beneficial owners of the equity securities and the purpose of the transaction – including whether it is to acquire control – within 10 days after the acquisition that triggered the reporting requirement.[72] By contrast, there is no requirement in the Exchange Act that beneficial owners of registered equity securities report their acquisition of interests of 5 percent or less. The absence of a reporting requirement for 5 percent interest holders also means that neither the identity nor citizenship of an issuer's 5 percent shareholders is readily available to a company whose shares are

[68] *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, Report and Order, MM Docket No. 83-46, FCC 84-115, 97 F.C.C.2d 997, 1003, ¶ 7 (1984) (*1984 Attribution Order*) (establishing a 5 percent voting stock interest as the benchmark amount for attributing ownership of a broadcast licensee's facilities to an individual corporate shareholder); 47 C.F.R. § 73.3555, Note 2a to § 73.3555 (codifying the 5 percent attribution standard). Prior to the *1984 Attribution Order*, the Commission had determined that for a "widely-held" corporation (fifty or more stockholders), an interest constituting 1 percent or more of the outstanding voting stock would be cognizable, whereas for a "closely-held" corporation (less than fifty stockholders), any voting interest would be cognizable. *See id.,* 97 F.C.C.2d at 999, ¶ 3 (citing *Amendment of Multiple Ownership Rules*, Docket No. 8967, 18 FCC 288 (1953)).

[69] *See* 15 U.S.C. § 78m(d)(1). In general, SEC Rule 13d-3 defines the term "beneficial owner," for purposes of section 13(d) of the Exchange Act, to include any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, has or shares voting power, including the power to vote, or to direct the voting of, an equity security; and/or investment power, including the power to dispose, or to direct the disposition of, such security. Thus, the disclosure requirements in section 13(d) of the Exchange Act will not necessarily apply to persons that hold only the pecuniary interest in an equity security. As a result, a publicly-traded company may need to make further inquiries with persons reporting under SEC Rule 13d-1 to determine whether a non-WTO investor holds an equity interest in a U.S. parent company exceeding 5 percent of the parent's total capital stock. *See also infra* note 73.

[70] *See Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross Interest Policy*, Report and Order, FCC 99-207, 14 FCC Rcd 12559, 12567, ¶ 15 (1999) (*1999 Broadcast Attribution Order*) (citing *Securities and Exchange Commission v. Savoy Industries, Inc*., 587 F.2d 1149, 1166 (1978)), *cert. denied*, 99 S.Ct. 1227 (1979)), *recon. granted in part*, 16 FCC Rcd 1097 (2001), *stayed*, 16 FCC Rcd 22310 (2001).

[71] 17 C.F.R. § 240.13d-1(a).

[72] *See* John C. Coffee, Jr. & Hillary A. Sale, SECURITIES REGULATION 721 (2009). The SEC regulation that requires copies of Schedule 13D to be disseminated to the issuer of the subject securities and to each national securities exchange where the securities are traded is contained in SEC Rule 13d-7, 17 C.F.R. § 240.13d-7.

publicly traded and widely held. The absence of an SEC reporting requirement for 5 percent interest holders may support adopting a 5 percent or less exclusion for foreign equity and voting interests held directly or indirectly in a U.S. parent that is requesting prior Commission approval to exceed the 25 percent benchmark in section 310(b)(4).[73]

34. We request comment on whether a 5 percent or less exclusion would allow the Commission to adequately screen and potentially disallow non-WTO investment that may be contrary to the public interest. Or, would the exclusion amount be more properly set at 10 percent, which is the current level at which the Commission requires disclosure of ownership interests in common carrier wireless licensees generally, or at some other level?[74] We also seek comment whether there are ways we can simplify the principal place of business test used to determine whether an investing entity's equity and/or voting interests in a U.S. parent are properly treated as non-WTO investment. Alternatively, should we eliminate the principal place of business test in favor of a different approach? For example, where a U.S. parent company has identified an individual or entity as holding, directly and/or indirectly, more than 5 percent of its equity and/or voting interests, should we require the U.S. parent to classify the investment as non-WTO only where the economic interests or voting rights are held by an individual citizen of a non-WTO Member country or by an entity that is controlled by one or more individual citizens of non-WTO Member countries (defining control to include *de facto* or *de jure* control)? In addition, we seek input on whether it is feasible and desirable to modify the ECO test to acknowledge and further encourage the efforts of non-WTO Member countries to open their markets to foreign investment and competition.

35. Regardless of whether we retain the current distinction between WTO and non-WTO Member investment in a modified form or eliminate the distinction, we would continue to coordinate all section 310(b)(4) petitions with the appropriate Executive Branch agencies and accord deference to their views in matters related to national security, law enforcement, foreign policy, or trade policy that may be raised by a particular transaction. We do not propose to adopt any change in policy that would affect the Commission's ability to condition or disallow foreign investment that may pose a risk of harm to important national policies.

B. Proposals To Revise and Codify Standards for Section 310(b)(4) Determinations

36. We begin this section by discussing two other aspects of our implementation of section 310(b)(4) that we do not propose to modify in this proceeding. First, we will continue to apply the Commission's policies that have governed the calculation of foreign equity and voting interests in

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[73] While the Commission has established a 5 percent voting stock interest as the benchmark amount for attributing ownership of a broadcast licensee's facilities to an individual corporate shareholder, the 5 percent or less exclusion option would address both equity and voting interests, reflecting the statute's concern, in section 310(b), with foreign economic interests and foreign voting interests in licensees and their U.S. parent companies. In addition, the proposed 5 percent or less exclusion option would apply regardless of the organizational form of the parent – whether a corporation, partnership, limited liability company, or other business entity. It would appear reasonable to set the exclusion amount at 5 percent or less (not at less than 5 percent as under the mass media attribution rules) so that the exclusion amount is aligned with the reporting requirement under SEC Rule 13d-1(a). *See supra* note 69 and accompanying text. We would not expect U.S. parent companies, however, to rely solely on the absence of a filing by a non-WTO investor under SEC Rule 13d-1 because that reporting requirement does not apply to all of a company's capital stock interests. For example, it does not apply to non-voting equity interests. We anticipate that publicly-traded (and privately-held) companies would still need to use their shareholder records, questionnaires, and other means to determine whether a non-WTO investor holds an equity and/or voting interest exceeding 5 percent of the parent's total capital stock (equity) and/ or voting stock.

[74] *See infra* note 125 and accompanying text.

wireless licensees and their controlling U.S. parent companies under section 310(b) of the Act.[75] As explained in the *Foreign Ownership Guidelines*, Commission policy requires that any equity or voting interest held by an individual other than a U.S. citizen or by a foreign government or an entity organized under the laws of a foreign government be counted in the application of the statutory benchmarks.[76] The list of cognizable interests includes nearly all forms of equity and voting interests held in and through the successive corporate parents of a licensee.[77]

37. Second, we do not propose any change in the requirement that common carrier and aeronautical radio station licensees file a petition for declaratory ruling under section 310(b)(4) of the Act to obtain Commission approval *before* direct or indirect foreign ownership of their controlling U.S. parent companies exceeds in the aggregate 25 percent, measured as a percentage of the U.S. parents' equity and/or voting interests. We maintain our long held view that the 25 percent benchmark may be exceeded only after the Commission affirmatively finds that the foreign ownership of a licensee's U.S. parent company in excess of that amount is in the public interest.[78] We propose to codify this requirement, as it applies to common carrier and aeronautical radio station licensees, as part of any rules ultimately adopted in this proceeding.[79]

38. At the same time, we recognize the difficulties involved in ascertaining the precise, actual extent of foreign investment, particularly if relevant interests are publicly traded. We seek to reduce unnecessary barriers to foreign investment and to accommodate the myriad forms of corporate governance and equity investment used to structure and finance business enterprises in global markets, while continuing to protect against harm to public interests. We propose below several measures to reduce the costs and burdens associated with filing a petition for declaratory ruling under section 310(b)(4) and maintaining compliance with the limitations and conditions of the ruling, particularly limitations related to future investment in U.S. parent companies that have already received Commission approval to exceed the 25 percent benchmark in section 310(b)(4).

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[75] These principles are explained in significant detail in the *Foreign Ownership Guidelines*, 19 FCC Rcd at 22624-22627 (Section D – Calculating Foreign Ownership Interests); *id*. at 22627 (Section E - Use of the "Multiplier"). *See also infra* Section III.C., ¶¶ 64-66.

[76] *See Foreign Ownership Guidelines*, 19 FCC Rcd at 22624 (citing *Wilner & Scheiner I*, 103 F.C.C.2d at 514-15). As discussed in Section II.A. above, section 310(b)(3) prohibits foreign governments, individuals and corporations from owning more than 20 percent of the stock of a broadcast, common carrier, or aeronautical radio station licensee. The Commission strictly applies the statutory restrictions of section 310(b)(3) and has no discretion to waive the 20 percent cap. Section 310(b)(4), by contrast, establishes a 25 percent benchmark for investment by foreign individuals, corporations and governments in entities that *control* U.S. broadcast, common carrier or aeronautical radio station licensees. This section expressly grants the Commission discretion to allow higher levels of foreign ownership in the licensee's direct or indirect controlling U.S. parent. Indeed, "[o]nce the issue is squarely presented by an applicant, the Commission is charged with determining whether alien ownership above the [25 percent] benchmark is or is not consistent with the public interest." *Fox I*, 10 FCC Rcd at 8475, ¶ 54.

[77] *See Foreign Ownership Guidelines*, 19 FCC Rcd at 22624-22627 (Section D – Calculating Foreign Ownership Interests); *id*. at 22627 (Section E - Use of the "Multiplier").

[78] *See Fox I*, 10 FCC Rcd at 8474, ¶ 52 ("Accordingly, we hold that applicant must specifically and directly inform the Commission that the ownership structure under consideration may exceed the foreign ownership benchmark, and that absent such explicit notification and an express finding by the Commission that allowing the applicant to exceed the benchmark is in the public interest, an applicant may not exceed the benchmark."). *See also supra* note 22 and accompanying text.

[79] As explained in paragraph 3 above, we propose to codify whatever measures we ultimately adopt in this proceeding to provide wireless carriers and potential investors with more predictability and transparency as to the section 310(b)(4) filing requirements and the Commission's review process.

1. Issuing Section 310(b)(4) Rulings to the Licensee's U.S. Parent

39. We propose to issue section 310(b)(4) rulings in the name of the controlling U.S.-organized parent company of the licensee(s) that are the subject of the petition. Where there are successive, controlling U.S. parent companies in the vertical ownership chain of the licensee, we would issue the ruling in the name of the lowest-tier, controlling U.S. parent. We propose this change to our current practice of issuing foreign ownership rulings in the name of the subject licensee for two reasons: first, to ensure that the Commission issues the foreign ownership ruling to the particular entity whose aggregate, direct and/or indirect foreign ownership would trigger the applicability of section 310(b)(4) to the extent it exceeds 25 percent, based on the company's ownership structure at the time the ruling is granted; and second, to accommodate other aspects of our proposed modified framework.[80]

40. As explained in Section II.A., section 310(b)(3) of the Act[81] prohibits greater than 20 percent foreign equity or voting interests in a common carrier or aeronautical radio station licensee. Section 310(b)(4), by contrast, establishes a 25 percent benchmark for foreign ownership in a U.S.-organized entity that controls the licensee.[82] Because the purpose of our section 310(b)(4) review is to evaluate foreign ownership of the U.S. parent before it exceeds 25 percent, we believe it is appropriate to issue the rulings in the name of the U.S. parent rather than the licensee.[83]

2. Approval of Named Foreign Investors

41. We propose to continue to entertain petitions that request authority for foreign individual(s) and entity(ies) named in the petition to hold specified percentages of equity and/or voting interests in the U.S. parent whether directly or indirectly through intervening U.S.-organized entities. We propose, however, several key changes to the Commission's current framework for authorizing ownership of the U.S. parent by named foreign investors and by other potential foreign investors. Our objective in proposing the changes discussed below is to reduce the need for U.S. parent companies to return to the Commission, *after receiving an initial ruling*, to obtain prior approval for subsequent changes in their foreign ownership, including increased interests by foreign investors that we have already approved in the parent's initial ruling and interests to be acquired by new foreign investors.[84]

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[80] As explained in Section III.B.5. below, we propose that a U.S. parent's section 310(b)(4) ruling automatically cover any of its subsidiaries or affiliates, whether existing at the time of the ruling or formed subsequently, provided that foreign ownership of the U.S. parent remains in compliance with the terms of its ruling. In Section III.B.6. below, we request comment whether to allow new, foreign-organized controlling parent companies to be inserted into the vertical ownership chain above the authorized, controlling U.S. parent without prior Commission approval provided that foreign ownership of the U.S. parent complies in all other respects with the terms of its ruling.

[81] 47 U.S.C. § 310(b)(3).

[82] 47 U.S.C. § 310(b)(4).

[83] While our practice has been to issue section 310(b)(4) rulings in the name of the subject licensee(s), we have evaluated in our decisions the direct and indirect foreign ownership of the licensee's controlling U.S. parent company. *See, e.g.*, *Mobile Satellite Ventures Subsidiary LLC and SkyTerra Communications, Inc.*, Order and Declaratory Ruling, FCC 08-77, 23 FCC Rcd 4436, 4441, ¶ 13 (2008).

[84] As discussed in Section II.C. above, the Commission currently issues foreign ownership rulings that authorize the U.S. parent to accept, in addition to any foreign ownership interests approved specifically in the ruling, up to and including an additional, aggregate 25 percent equity interest and/or 25 percent voting interest from the approved foreign investors and from other foreign investors without prior Commission approval. This 25 percent allowance, however, is subject to certain limitations. As relevant to this discussion, the U.S. parent may not use the allowance to permit any single foreign investor to acquire an equity and/or voting interest in the U.S. parent that exceeds 25 percent.

42. The proposed rules would require a U.S. parent company to include in its section 310(b)(4) petition a request for specific approval of any named foreign individual or entity that holds, or would hold upon closing of any transactions contemplated by the petition, a direct or indirect equity and/or voting interest in the parent in excess of 25 percent or a controlling interest at any level. The U.S. parent would not be required to request specific approval for a non-controlling foreign investor's interest of 25 percent or less.[85] The U.S. parent would be required, however, to monitor and stay ahead of changes in ownership of its approved foreign investors to ensure that the parent has an opportunity to obtain Commission approval before a change in ownership of an approved investor results in an unapproved investor acquiring an indirect interest in the U.S. parent that exceeds 25 percent.[86] Thus, as is the case under our current regulatory framework, the proposed modified framework may necessitate the placement of restrictions in the bylaws or other organic documents of the controlling U.S. parent and/or other entities situated above it in the vertical chain of ownership to ensure the parent is able to comply with the terms of its section 310(b)(4) ruling. We note that stock ownership restrictions are a common means of ensuring compliance with the foreign ownership limitations in section 310(b) of the Act and other federal statutory provisions that restrict foreign ownership of U.S. companies and assets.[87] We request comment on this aspect of the proposed modified framework, including whether it would present any new issues for U.S. common carrier and aeronautical radio licensees. We also request comment on whether our proposal would be consistent with the statute. We recognize that under our proposal the foreign ownership of a radio licensee could change without Commission knowledge, *i.e.*, where no individual change in ownership results in a change in control requiring our review under section 310(d). To the extent this raises a concern regarding our ability to monitor foreign investment in our regulated entities, we seek comment on how we should modify our proposed framework.

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[85] We emphasize that our proposal to require the U.S. parent to request specific approval in its section 310(b)(4) petition for only those foreign investors that would hold a direct or indirect equity and/or voting interest in excess of 25 percent – or a controlling interest at any level – would not modify Commission policy that requires licensees to count any foreign equity or voting interest, regardless of size, held directly or indirectly in their U.S. parent companies for purposes of determining whether the U.S. parent is in compliance with the statutory benchmarks in section 310(b) of the Act. *See supra* ¶ 36. Nor would our proposed approach modify Commission policy that requires U.S. parent companies to obtain Commission approval before aggregate direct or indirect foreign ownership of the U.S. parent company exceeds 25 percent. *See supra* ¶ 37. In addition, as discussed in Section III.C. below, we propose to require that the U.S. parent disclose in its section 310(b)(4) petition all of its 10 percent or greater direct or indirect interest holders, regardless of citizenship.

[86] For example, assume that an existing foreign shareholder ("A") of an approved foreign investor ("Foreign Company B") plans to acquire additional shares of Foreign Company B that would result in A acquiring an indirect, non-controlling 35 percent equity and/or voting interest in the U.S. parent. To the extent the U.S. parent has not previously received specific approval for A to hold an equity and/or voting interest in the U.S. parent of at least 35 percent, the parent would be required to obtain Commission approval before A acquires the additional shares of Foreign Company B.

[87] *See*, *e.g.*, *Applications of Kentucky Central Television, Inc., Lexington, Ky.,* Memorandum Opinion and Order, FCC 66-362, 5 F.C.C.2d 33 (1966). *See also* Leonard Egan and James B. Ellis II, *Federal Restrictions in the United States Maritime Industries*, § 18.10, MANUAL OF FOREIGN INVESTMENT IN THE UNITED STATES, 3rd Edition, J. Eugene Marans *et al*., eds., Thomson West (2009-2010 Supplement) (stating that, in order to comply with the statutory citizenship requirements for ownership of vessels operating in the coastwise trade, "[s]everal public companies have made the necessary amendments to their certificates of incorporation and arrangements with their transfer agents whereby their stockholders represent whether they are such citizens and no transfers of citizen-owned stock are permitted that would make the noncitizen percentage exceed a set threshold"); Finkelstein, Stock Transfer Restrictions Upon Alien Ownership Under Section 202 of the Delaware General Corporation Law, 38 Bus. Law. 573 (1982-1983).

a. The 49.99 Percent Approval Option for Named Foreign Investors

43. We propose to provide the petitioning U.S. parent with the option of requesting specific approval in its petition for any named foreign investor to increase its equity and/or voting interest in the U.S. parent from existing levels (or levels that would exist upon closing of any related transactions) up to a non-controlling, 49.99 percent equity and/or voting interest.[88] We would not, as a general matter, require the petitioner to demonstrate that the foreign investor has a contractual right or obligation, or, indeed, that it has any plan to acquire additional interests in the U.S. parent. However, we propose to reserve the right to require petitioners to submit supplemental information as to any matter that Commission staff, in its discretion, deems relevant to our public interest determination.[89] We do not propose to limit the number of named foreign investors for which the parent could request 49.99 percent approval – even if the aggregate of such interests would exceed 100 percent.[90]

44. We believe the proposed "49.99 percent approval option" would facilitate investment in wireless carriers by eliminating the need for U.S. parent companies to return to the Commission to allow an already-approved foreign investor to increase its minority investments incrementally. We request comment on the proposed 49.99 percent approval option. Specifically, we seek input whether, once we have reviewed and approved foreign ownership of a licensee's U.S. parent by a named foreign investor after coordination with relevant Executive Branch agencies, there is any public interest reason for the Commission to scrutinize additional investments by the same foreign individual or entity where the investment would not effectuate a transfer of control of the licensee. Commenters who oppose this approach should specify the potential harms such an approach may pose. For example, would the 49.99 percent approval option encourage the filing of speculative requests to an extent that the resulting administrative costs and burdens on the Commission and relevant Executive Branch agencies would outweigh the potential benefits to U.S. carriers and consumers? Or, are there reasons why a U.S. parent should only request 49.99 percent approval for a particular named foreign investor where the carrier has a reasonable expectation of needing such approval? Would the 49.99 percent approval option unduly hinder the Commission's ability to ascertain the shareholdings of foreign investors after they receive their initial approval? Would this option increase the likelihood of unauthorized transfers of control because *de facto* control may be implicated at ownership levels below 49.99 percent depending on the distribution of other shares? To the extent that foreign investment raises unique issues with regard to potential

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[88] As an example of how the "49.99 percent approval option" would work, assume that the U.S. parent of a common carrier wireless applicant files a petition for declaratory ruling that includes a request to approve a 15 percent equity and voting interest held in the U.S. parent by foreign citizen "A". The petition also requests authority for foreign citizen A to acquire additional interests, up to and including a non-controlling 49.99 percent equity and voting interest. Upon the completion of coordination with relevant Executive Branch agencies and in the absence of any countervailing public interest concerns, the Commission grants the petition, including the request to allow A to acquire additional interests, up to and including a non-controlling 49.99 percent interest in the U.S. parent. Two years after the grant, A acquires additional shares of the U.S. parent from another shareholder, which results in A holding a non-controlling 35 percent equity and voting interest in the parent. Because the U.S. parent's section 310(b)(4) ruling included specific approval for A to acquire up to and including a non-controlling 49.99 percent interest in the parent, A could complete its acquisition without the regulatory delay associated with filing a new section 310(b)(4) petition under the Commission's current prior approval process.

[89] For example, Commission staff may find it necessary to request additional information in circumstances where the record in a particular proceeding raises a question as to whether an equity investment may result in an unauthorized transfer of control of a wireless licensee.

[90] The proposed "49.99 percent approval option" would not apply to non-WTO investors in the U.S. parent company if we ultimately determine in this proceeding to retain the current distinction between WTO and non-WTO Member investment, which prohibits U.S. parent companies from accepting non-WTO investment that exceeds an aggregate 25 percent. *See supra* Section III.A.

unauthorized transfers of control, what mechanisms, if any, could we adopt or already have in place to minimize such transfers in the event we adopt the 49.99 percent approval option?

b. The 100 Percent Approval Option for Controlling Foreign Investors

45. We note that it is not uncommon for a petition to be filed in connection with an application for consent to transfer control of a wireless licensee where a named foreign investor (as "transferee") proposes to acquire a controlling interest in the U.S. parent company of the licensee at a level that constitutes less than 100 percent of the U.S. parent's total capital stock or voting stock. In some cases, the grant of the section 310(b)(4) ruling by its terms limits the foreign transferee's equity and voting interests in the U.S. parent to the precise levels proposed in the transfer of control application.[91] As a result, the U.S. parent must return to the Commission for additional, prior approval under section 310(b)(4) should the transferee later seek to increase its direct or indirect equity or voting stake in the U.S. parent. Similar to the "49.99 percent approval option" discussed above, we propose to provide foreign transferees with the option of seeking approval at the outset, in the section 310(b)(4) petition that is filed in connection with the transfer application, to acquire 100 percent of the equity and/or voting interests in the licensee's U.S. parent company. We request comment on this proposed "100 percent approval option."

3. The Aggregate Allowance for Unnamed Foreign Investors

46. We seek comment on whether, in addition to approving ownership interests held or to be held directly or indirectly in the U.S. parent by named foreign investors for which the petition requests specific approval, we should, as a general rule, authorize the U.S. parent to have, on a going-forward basis, 100 percent aggregate foreign ownership, including by foreign investors for which the parent did not request specific approval in its petition, *provided that* no single foreign investor or "group" of foreign investors[92] acquires, directly or indirectly, an ownership interest that exceeds 25 percent of the parent's equity interests or 25 percent of its voting interests, or a controlling interest at any level, without the Commission's prior approval.[93] If we ultimately determine in this proceeding to retain the current distinction between WTO and non-WTO Member investment, which prohibits U.S. parent companies from accepting non-WTO investment that exceeds an aggregate 25 percent, we would further condition

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[91] *See*, *e.g.*, *Global Crossing Transfer Order*, 18 FCC Rcd at 20328-29, ¶ 35 (approving under sections 310(b)(4) and 310(d) the acquisition of a 61.5 percent indirect controlling ownership interest in licensed subsidiaries of Global Crossing by Singapore-organized ST Telemedia; and denying under section 310(b)(4) ST Telemedia's request for approval to make additional "unlimited" indirect investments in the licensed subsidiaries).

[92] We request comment on whether to define the term "group" for this purpose in the same manner discussed in Section III.A. *See supra* ¶¶ 31-34.

[93] 47 U.S.C. § 310(d). The term "control" as used in the Act means "every form of control, actual or legal, direct or indirect, negative or affirmative." *WWIZ, Inc*., 36 FCC 561, 579 (1964), *aff'd sub. nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). *De jure* control (control as a matter of law) is typically determined by whether a shareholder owns more than 50 percent of the voting shares of a corporation. *Applications For Consent to the Transfer of Corporate Control from John W. Kluge (De Facto Control) to John W. Kluge (De Jure Control)*, Memorandum Opinion and Order, 98 F.C.C.2d 300, 306 (1984). Determining whether *de facto* control (control as a matter of fact) exists is more complex and is resolved with reference to the particular circumstances of each case. *Applications of Univision Holdings, Inc. (Transferor) and Perenchio Television, Inc. (Transferee) et al.*, Memorandum Opinion and Order, 7 FCC Rcd 6672, 6675 (1992) (quoting *Stereo Broadcasters, Inc.,* 55 F.C.C.2d 819, 821 (1975)). *See also Storer Communications, Inc.,* 101 F.C.C.2d 434, 441 (1985) ("corporate control varies from case to case and cannot be properly defined"). In the context of common carrier authorizations, we have found a variety of factors 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).

the ruling to require that non-WTO investment not exceed, directly or indirectly, in the aggregate, 25 percent of the parent's equity interests or 25 percent of its voting interests.[94]

47. We recognize that, if we were to adopt a 100 percent aggregate allowance as described in paragraph 46 above, the 25 percent aggregate allowance that we currently include in section 310(b)(4) rulings would effectively increase to 100 percent. The current 25 percent allowance generally has operated as a ceiling on the aggregate percentage of change in the foreign ownership of the U.S. parent that is permitted after issuance of its section 310(b)(4) ruling to accommodate investments by unnamed – and often unascertainable – foreign investors, including new foreign investors. The 25 percent aggregate amount, however, may not afford U.S. parent companies (particularly publicly-traded companies), or their controlling or minority stakeholders, sufficient flexibility to market or permit the resale of their equity securities and may create an unnecessary impediment to foreign investment in U.S. telecommunications networks and service providers. Maintaining the allowance at 25 percent also may be unnecessary to protect against potential harms to competition or other relevant public interests concerns. We seek comment on any burdens the 25 percent allowance may impose on U.S. wireless carriers and whether we can mitigate any such burdens by increasing the allowance in a manner that would not compromise our statutory obligations under the Act. For example, if we were to adopt a 100 percent aggregate allowance, should we provide public notice and an opportunity for comment when a foreign investor's interest would increase from a minority to a majority interest? Or, is it sufficient to rely on the Commission review process that would take place pursuant to section 310(d) of the Act? We request that commenters also address whether, if we were to adopt a 100 percent aggregate allowance, we should apply the allowance only to publicly-traded companies or also apply it to privately-held companies. In addition, we seek input on the feasibility of applying a 25 percent allowance to a U.S. parent that is wholly owned and controlled by a foreign public company that is traded only on foreign exchanges and that is owned substantially by foreign citizens and entities. Is it possible for such foreign public companies, with shares that trade daily, to comply with a 25 percent allowance? Other than including a 100 percent allowance in the U.S. parent's section 310(b)(4) ruling in these circumstances, is there another way to address the possibility that the foreign company may be wholly foreign owned on any given day?[95] If there is no alternative to using a 100 percent allowance in such a case, is there a policy basis for applying a more restrictive 25 percent allowance to U.S. parents that are owned in whole or in part by U.S. public companies? Would such an approach have the effect of treating foreign companies more favorably than U.S. companies? We request comment on each of these questions. We also seek comment whether, if we were to adopt a 100 percent aggregate allowance, we should include it in the petitioning U.S. parent's section 310(b)(4) ruling regardless of whether, under the proposed rules, the U.S. parent is required to, or otherwise chooses to, request specific approval for any named foreign investors.

4. Examples and Analysis of the Proposed Modified Framework for Authorizing Foreign Ownership under Section 310(b)(4)

48. The following hypothetical illustrates how the proposals described in Sections III.B.2. and the 100 percent aggregate allowance described in Section III.B.3. would apply in the context of a proposed transaction involving the acquisition of a controlling interest in a U.S. parent company by a foreign-organized company. Assume that a foreign-organized company proposes to acquire 100 percent

[94] In this regard, we discuss in Section III.A. the option of allowing U.S. parent companies to exclude from their calculations of non-WTO investment those equity and voting interests that are held by a single non-WTO investor or "group" of non-WTO investors in an amount that constitutes 5 percent or less of the U.S. parent company's total capital stock (equity) and/or voting stock. *See supra* ¶¶ 31-34.

[95] As noted in paragraph 19 above, we included a 100 percent allowance in the section 310(b)(4) rulings authorizing foreign ownership of U.S. wireless carriers by Inmarsat and TerreStar. *See 2009 Inmarsat Order*, 24 FCC Rcd at 480, ¶ 70; *2009 TerreStar Order*, 24 FCC Rcd at 14675, ¶ 24.

of the capital stock of a U.S.-organized company that controls a common carrier licensee. The foreign-organized acquiring company (the "transferee") files a transfer of control application under section 310(d) of the Act, and the U.S. parent of the licensee (or the transferee on behalf of the U.S. parent) files a companion request for declaratory ruling under section 310(b)(4). The foreign-organized transferee requests specific approval in its section 310(b)(4) petition for two of its existing foreign, WTO investors: a foreign individual that holds 9 percent of the transferee's equity and voting interests and a foreign-organized limited liability company that holds indirectly, through an intervening U.S.-organized company, 15 percent of the transferee's equity and voting interests. The transferee also requests specific approval for each of these foreign investors to hold up to and including a non-controlling 49.99 percent direct or indirect equity and/or voting interest in the transferee and, in turn, in the U.S. parent of the licensee. Assuming successful completion of Executive Branch coordination and that no competition or other relevant public interest concerns are raised in the course of the proceeding, we would issue a ruling authorizing foreign ownership of the U.S. parent by the foreign-organized transferee (100 percent of the parent's equity and voting interests) and by each of the identified, foreign investors (up to and including a non-controlling 49.99 percent equity and voting interest). If we were to adopt the 100 percent aggregate allowance described in Section III.B.3., the ruling would also authorize the U.S. parent to be 100 percent owned, at any point in time, by other foreign individuals and entities *provided that* no single foreign investor – other than those that have received specific approval – acquires directly or indirectly more than 25 percent of the U.S. parent's total capital stock or voting stock or a controlling interest at any level.[96] If we ultimately determine in this proceeding to retain the current distinction between WTO and non-WTO Member investment, we would further condition the ruling to require that non-WTO investment not exceed, directly or indirectly, in the aggregate, 25 percent of the parent's equity interests or 25 percent of its voting interests.[97]

49. In developing the proposed modified framework, we have endeavored to strike the proper balance between two competing objectives: reducing the regulatory hurdles that wireless carriers face in obtaining section 310(b)(4) approval and ensuring that foreign investment does not pose a risk of harm to competition, national security, law enforcement, foreign policy, or trade policy. As discussed above, the Commission requires licensees and their U.S. parent companies to count all equity and voting interests held in the U.S. parent, including interests held indirectly in the parent through intermediate companies, for purposes of ensuring that foreign ownership of the parent does not exceed 25 percent unless and until

[96] The petitioner's decision to request specific approval for the foreign-organized limited liability company (the "foreign LLC") to hold its 15 percent interest and to increase it to a non-controlling 49.99 percent interest would be at the discretion of the petitioner. Similarly, the petitioner's decision to request specific approval for the foreign individual to hold its 9 percent interest and to increase it to a non-controlling 49.99 percent interest would be at the discretion of the petitioner. If the petitioner had chosen not to request specific approval for either the foreign LLC or the foreign individual, their respective 15 percent and 9 percent interests would nonetheless be permissible, and each would be permitted to increase its interest in the U.S. parent up to and including a non-controlling 25 percent interest, unless we ruled otherwise for reasons specified in a decision on the merits of the initial petition. Any increase beyond 25 percent, however, would require the petitioner to return to the Commission for prior approval. (We note that the proposed ownership disclosure rule discussed in Section III.C. below, would require the petitioner in this example to identify in its petition, as its 10 percent disclosable interest holders, the foreign-organized transferee, the foreign LLC, and the latter's U.S.-organized subsidiary. (This example assumes there are no other persons or entities that hold, or would hold, directly or indirectly, 10 percent or more of the equity or voting interests of the U.S. parent.)

[97] In this regard, we discuss in Section III.A. the option of allowing U.S. parent companies to exclude from their calculations of non-WTO investment those equity and voting interests that are held by a single non-WTO investor or "group" of non-WTO investors in an amount that constitutes 5 percent or less of the U.S. parent company's total capital stock (equity) and/or voting stock. *See supra* ¶¶ 31-34.

it obtains a section 310(b)(4) ruling.[98] We do not propose to change this long-standing requirement that applies to a licensee's determination of basic compliance with the 25 percent statutory benchmark in section 310(b)(4).[99] At the same time, once we have issued a foreign ownership ruling to the U.S. parent of a licensee after coordination with Executive Branch agencies, there may be no public interest reason to require the parent subsequently to seek prior Commission approval for foreign capital investments that, as a general rule, pose little to no risk of harm to competition or other public interest concerns. In the *Foreign Participation Order*, we noted that "we cannot at this time envision a circumstance in which indirect foreign investment by entities from WTO Member countries that do not result in a transfer of control will pose a very high risk to competition."[100] There may be instances, however, when an increase in foreign ownership may raise potential competitive harms. Accordingly, the central inquiry for the Commission in this regard is how best to define the parameters of an initial ruling to permit foreign investment prospectively without posing an unacceptable risk of harm to relevant public interest concerns.

50. We recognize that section 310(b)(4) itself effectively establishes a 25 percent ceiling on both the aggregate amount of foreign ownership that a U.S. parent can have and the amount any single foreign investor can have in a U.S. parent without the parent first obtaining Commission approval. For example, a U.S. parent can have *either* multiple foreign investors with interests that do not exceed an aggregate 25 percent of the parent's equity and/or voting interests *or* one foreign investor with a 25 percent equity and voting interest. However, once we have completed review of a parent company's section 310(b)(4) petition in consultation with relevant Executive Branch agencies, it may not be necessary for the Commission to scrutinize subsequent incremental increases in the parent's aggregate foreign ownership. By contrast, substantial ownership interests acquired by a new foreign investor after issuance of a ruling may present public interest concerns warranting our prior review and possible disallowance of the investment or modification of the parent's existing security agreement or similar arrangement with Executive Branch agencies. For these reasons, we request comment whether to issue section 310(b)(4) rulings to allow, as a general rule, 100 percent aggregate foreign ownership of the U.S. parent company, *provided that* no single foreign investor or "group" of foreign investors acquires, directly or indirectly, an equity or voting interest in the U.S. parent that exceeds 25 percent, or a controlling interest at any level.[101] As discussed in Section II.C., recent rulings of the Commission and International Bureau have permitted 100 percent aggregate foreign ownership of U.S. parent companies subject to a 25 percent ceiling on interests acquired by a single foreign investor and the aggregate 25 percent limit on non-WTO investment, a limitation on which we seek comment.[102] We are not aware of any problems that have resulted from this approach or objections raised in the context of any particular proceedings.

51. We also seek comment whether a 25 percent ceiling on investments by a single foreign investor or "group" of foreign investors would best advance the goals of this proceeding. An investment greater than 25 percent may confer upon a foreign investor substantial influence over the core operations of a U.S. carrier and thus may warrant imposing additional conditions on the operations of the parent and licensee or disallowing the investment in whole or in part.[103] Requiring prior approval of interests above

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[98] *See supra* ¶ 36.

[99] *Id*. We note that these standards also apply to determinations of compliance with section 310(b)(3). *See*, *e.g.*, *Foreign Ownership Guidelines*, 19 FCC Rcd at 22627.

[100] *Id.* at 23940, ¶ 112.

[101] *See supra* ¶¶ 46-47.

[102] *See supra* ¶ 19.

[103] This same concern prompted the Commission in 1995 to adopt a 25 percent affiliation standard for purposes of authorizing foreign carrier entry into the U.S.-international services market under section 214 of the Act. Under (continued….)

25 percent by a single foreign investor also is consistent with the level at which foreign ownership in U.S. parent companies is scrutinized under the statutory directive of section 310(b)(4). We recognize that many factors besides the size of a stockholding contribute to the influence or control that a stockholder can or does exercise. Depending on a company's size, capital structure, and particular governance provisions, an investment at levels below 25 percent may provide the holder with substantial influence over the parent and its licensed U.S. operations.[104] However, it would appear that the potential for harm from a non-controlling interest at an equity and/or voting level of 25 percent or less can be addressed sufficiently at the time of the initial grant of the parent's ruling through the negotiation of a security agreement or similar arrangement between the parent and relevant Executive Branch agencies and pursuant to our authority to impose conditions on a ruling where we deem it is warranted in the public interest.[105]

52. For example, security agreements negotiated among Executive Branch agencies and U.S. wireless carriers typically provide the signatory agencies with the means to monitor changes in the carriers' ownership and control. Some of these agreements include a provision that requires the carriers to notify the agencies within 10 calendar days if any member of the carrier's management acquires information reasonably indicating that a foreign individual or entity, or foreign government–controlled entity, either singly or in combination with other such individuals or entities, other than those already identified, has or will likely obtain a direct or indirect ownership interest in the carrier of more than 10 percent or a controlling interest (as defined in the agreement).[106] We have, on a case-by-case basis, conditioned our grant of section 310(b)(4) authority on carriers' compliance with their security

(Continued from previous page)
rules adopted in the 1995 *Foreign Carrier Entry Order*, we treat a U.S. carrier as "affiliated" with a foreign carrier if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one. 47 C.F.R. § 63.09(e). We apply competitive safeguards to U.S. carrier provision of service on routes where it is affiliated with a foreign carrier possessing market power on the foreign end to monitor and detect anticompetitive conduct by the U.S. carrier and its affiliate. *Id*. § 63.10. Our purpose in the section 214 authorization context, as here, is to identify those instances where an investor's ownership interest in a U.S. carrier may provide it with sufficient influence over the carrier to raise potential public interest concerns. *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3902-06, ¶¶ 78-87.

[104] At the same time, as the Commission has recognized, "stockholding size does have a legitimate, if imprecise relationship to its holder's ability to exercise influence or control." *1984 Attribution Order*, 97 F.C.C.2d at 1003, ¶ 7 (establishing a 5 percent voting stock interest as the benchmark amount for attributing ownership of a broadcast licensee's facilities to an individual corporate shareholder); 47 C.F.R. § 73.3555, Note 2a to § 73.3555 (codifying the 5 percent attribution standard).

[105] We would continue to adhere to the Commission's position, as stated in the *Foreign Participation Order*, that any advice by the Executive Branch as to concerns relating to national security, law enforcement, foreign policy and trade policy "must be communicated in writing, and will be part of the public file in the relevant proceeding." 12 FCC Rcd at 23921, ¶ 66; *see also id*. at ¶ 66 n.121 ("To the extent the Executive Branch must share classified information with Commission staff, such information is not subject to public disclosure.").

[106] *See*, *e.g*., Section 5.2 of the Agreement between TerreStar Networks Inc., TerreStar Corp., and their affiliates (collectively, "TerreStar"), on the one hand, and the DOJ and DHS, on the other hand, dated December 18, 2009, appended to the *2009 TerreStar Order*, 24 FCC Rcd at 14679. *See also* Section 5.2 of the Agreement between Inmarsat Global Limited and its affiliates (collectively, "Inmarsat"), on the one hand, and DOJ and DHS, on the other hand, dated September 23, 2008, appended to the *2009 Inmarsat Order*, 24 FCC Rcd at 489. We note that the definition of the term "Control" in TerreStar's December 18, 2009 Agreement is similar to the definition of that term in the regulations implementing section 721 of title VII of the Defense Production Act of 1950 (50 U.S.C. App. 2170), as amended, which gives the President the authority, without judicial review, to block mergers, acquisitions, or takeovers of U.S. businesses by foreign persons if they threaten to impair U.S. national security. *See* 31 C.F.R. § 800.204.

agreements.[107] Consequently, a carrier's non-compliance with its agreement could result in enforcement action by the Commission, including potential fines and forfeitures.[108] Any unauthorized transfer of control of a carrier without prior Commission approval under section 310(d) of the Act would also constitute grounds for enforcement action by the Commission.[109]

53. It also appears that setting the standard for prior review at an equity and/or voting interest of less than 25 percent is likely to increase significantly the number of potential investments that would be subject to our prior approval and could defeat our intended purposes in this proceeding to reduce the costs and burdens that our review process imposes on licensees and to facilitate foreign investments that do not pose a risk of harm to relevant public interest concerns.[110] We request comment whether we should adopt a non-controlling, 25 percent standard for triggering prior approval of new or increased foreign investment by a foreign individual or entity, or by a "group" of foreign investors, that has not received specific approval in the U.S. parent's foreign ownership ruling.

54. To the extent a particular parent company's petition for declaratory ruling raises a question as to the reasonableness of applying the 100 percent aggregate allowance and/or the 25 percent ceiling for acquisitions by a single foreign investor or "group," the Commission has sufficient discretion and authority to impose special conditions or requirements on the ruling as it deems necessary in the public interest, including a requirement that the parent obtain prior approval for any foreign investment not identified in the parent's petition and specifically approved in its ruling.[111] In addition, the Executive Branch agencies would continue to have the opportunity, prior to Commission action on the petition, to engage in negotiations with the licensee and parent company with respect to the conditions of a security agreement or other negotiated arrangement. We also note that, regardless of the size of an investment, any ownership or other arrangement that confers on its holder the ability to exercise control of a licensee requires Commission approval pursuant to section 310(d) of the Act.

5. Expanding Beyond Carrier-Specific Rulings

55. As discussed in Section II.C. above, the Commission issues foreign ownership rulings to cover only the licensee(s) named in the underlying petition. An affiliated entity generally is not permitted to rely on a ruling issued to a parent, subsidiary or sister company for purposes of filing an application for a license or for consent to acquire a license by assignment from another carrier, or for purposes of

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[107] *See, e.g.*, *2009 TerreStar Order*, 24 FCC Rcd at 14675-76, ¶ 26 (conditioning grant of TerreStar's section 310(b)(4) petition on compliance with security agreement dated December 18, 2009); *2009 Inmarsat Order*, 24 FCC Rcd 449 (conditioning grant of Inmarsat's section 310(b)(4) petition on compliance with security agreement, dated September 23, 2008).

[108] 47 U.S.C. § 503(b)(2)(B).

[109] 47 U.S.C. § 310(d). As discussed in paragraph 20 above, even if a foreign investor's acquisition of an ownership interest in a licensee's U.S. parent company falls within the numerical parameters of the parent's ruling, the parent must file an application for consent to the acquisition if it would result in a *de facto* or *de jure* transfer of control of the licensee under section 310(d).

[110] *See, e.g.*, *Foreign Carrier Entry Order*, 11 FCC Rcd at 3905, at ¶ 85 (declining to adopt a 10 percent affiliation standard for purposes of authorizing foreign carrier entry into the U.S.-international services market under section 214 of the Act).

[111] It is our expectation that such a condition or requirement would be applied only rarely; for example, where the parties to a time-sensitive transaction seek to consummate before the Commission is prepared to issue the parent the broad authority encompassed by the 100 percent allowance. In such a case, the parent could later file a request to modify its ruling to remove the requirement or condition.

entering into a spectrum leasing arrangement.[112] The affiliated entity must submit its own petition for declaratory ruling pursuant to section 310(b)(4). Similarly, in circumstances where a licensee is the subject of a transfer of control application under section 310(d) of the Act, the fact that the Commission has previously approved the transferee's foreign ownership in the context of an earlier proceeding does not relieve the transferee of the obligation to obtain section 310(b)(4) approval in the name of the licensees in which it proposes to acquire a controlling interest.[113] Limiting our foreign ownership rulings in this manner may cause undue delay in the licensing process and may impose unnecessary administrative costs on both the carriers and the Commission to the ultimate detriment of U.S. consumers.

56. We believe we can address the problems associated with carrier-specific rulings by issuing section 310(b)(4) rulings in the name of the U.S. parent of the licensee(s) that are the subject of the petition.[114] We propose, in addition, to provide for automatic extension of the U.S. parent's ruling to cover any subsidiary or affiliate of the U.S. parent, whether existing at the time of the ruling or formed or acquired subsequently. We would define "subsidiary or affiliate" as any entity that is wholly owned and controlled by, or is under 100 percent common ownership and control with, the U.S. parent. Any subsidiary or affiliate of the U.S. parent, as so defined, would be covered by the parent's ruling, *provided* that the U.S. parent remains in compliance with the terms of its section 310(b)(4) ruling.[115] We propose to require that a subsidiary or affiliate attach to any common carrier or aeronautical wireless application a certification, signed by the U.S. parent, stating that the U.S. parent is in compliance with the terms and conditions of its section 310(b)(4) ruling(s) and providing citations to the ruling(s). In order to accommodate post-ruling internal reorganizations of the U.S. parent, which may result in a successor U.S. parent taking its place in the vertical chain of ownership, we also propose to automatically extend the U.S. parent's section 310(b)(4) ruling to its successor-in-interest, *provided* that foreign ownership of the successor-in-interest complies with the terms of the ruling. We propose to require that the successor-in-interest notify the Commission within 30 days of the reorganization.[116] We request comment on these

[112] *See supra* ¶ 21.

[113] *See id.*

[114] As explained in Section III.B.1. above, we propose to require that all petitions for declaratory ruling be filed by, or on behalf of, the lowest-tier, controlling U.S. parent of the licensee(s) that are the subject of the petition.

[115] As an example of how the automatic extension rule would work, assume that a common carrier earth station licensee's U.S. parent company ("U.S. Parent A") has previously received a ruling that approves its 100 percent foreign ownership by a foreign-organized company ("Foreign Company"). Subsequently, Foreign Company establishes a new, U.S.-organized subsidiary ("U.S. Parent B") to hold the shares of another U.S.-organized subsidiary ("New U.S. Subsidiary"). The proposed automatic extension rule would permit New U.S. Subsidiary to apply for a common carrier earth station license without U.S. Parent B (or New U.S. Subsidiary on its behalf) filing a petition requesting approval of U.S. parent B's 100 percent ownership by Foreign Company, *provided* that any changes in the direct or indirect foreign ownership of U.S. Parent A since issuance of its ruling are permissible under the terms of the ruling. The proposed rules would instruct New U.S. Subsidiary to cite to U.S. Parent A's ruling in the license application and attach a certification signed by U.S. Parent A stating that it is in compliance with its foreign ownership ruling.

[116] The notification would be filed with the International Bureau by or on behalf of the U.S. parent's successor-in-interest referencing the section 310(b)(4) ruling issued to the U.S. parent. The proposed automatic extension rule to accommodate U.S. parent reorganizations would work as follows: Assume the same basic facts used in note 115, *supra*. However, in advance of New U.S. Subsidiary filing its earth station application, U.S. Parent A merges with and into U.S. Parent B, with U.S. Parent B surviving. U.S. Parent B notifies the Commission of the *pro forma* reorganization under the proposed rules within 30 days of closing. When New U.S. Subsidiary files its application, it would cite to the ruling issued in the name of its former U.S. parent, U.S. Parent A, and attach a certification signed by U.S. Parent B stating that it is in compliance with the foreign ownership ruling.

two automatic extension proposals. In particular, are they likely to achieve our intended purpose of reducing the number of section 310(b)(4) petitions that wireless carriers must file under our current procedures?

6. Introducing New Foreign-Organized Entities into the Vertical Ownership Chain

57. It is our experience that the controlling U.S. parent of a licensee may itself have one or more controlling foreign-organized parent companies situated above it in the vertical chain of ownership. As a result of internal reorganizations, new foreign-organized parent companies may be added to the vertical chain of ownership over time. It would appear reasonable to allow these internal reorganizations to proceed without requiring that the U.S. parent return to the Commission, after receiving an initial ruling, for specific approval under section 310(b)(4). We therefore seek input on whether we should permit the insertion of new, controlling foreign-organized companies at any level in the vertical ownership chain above the U.S. parent that has received a foreign ownership ruling without prior Commission approval, *provided* that any new foreign-organized company(ies), either alone or together, are under 100 percent common ownership and control with the controlling foreign parent for which the U.S. parent has received prior Commission approval.[117] Similarly, we request comment on whether we should permit a U.S. parent company's approved, non-controlling foreign investors to insert new, foreign-organized companies into their vertical chains of ownership without the U.S. parent having to return to the Commission for prior approval, *provided* that the new foreign company is under 100 percent common ownership and control with the approved foreign investor.[118]

58. We request comment on the costs and benefits of allowing foreign-organized companies to be introduced into the vertical ownership chains of the U.S. parent company and its approved, non-controlling foreign investors without prior approval once the Commission has issued the U.S. parent a section 310(b)(4) ruling. If we determine to allow such post-ruling changes in foreign ownership,[119] should we require the U.S. parent company to notify the Commission about the changes in ownership and, if so, would 30 days be a reasonable timeframe within which to require the U.S. parent to notify the Commission?

7. Service- and Geographic-Specific Rulings

59. We request comment on whether to retain our general practice of issuing rulings on a service-specific and geographic-specific basis. Section 310(b)(4) rulings typically cover only the particular wireless service(s) referenced in the petition for declaratory ruling. The scope of the ruling

[117] As an example of this approach, assume that U.S. parent company ("U.S. Parent A") has received a section 310(b)(4) ruling that approves its 100 percent foreign ownership by a foreign-organized company ("Foreign Company"). Foreign Company is minority owned (20 percent) by U.S.-organized Corporation C, with the remaining 80 percent controlling interest held by Foreign Citizen D. After issuance of the section 310(b)(4) ruling to U.S. Parent A, Foreign Company forms a wholly-owned, foreign-organized subsidiary ("Foreign Subsidiary X") to hold all of Foreign Company's shares in U.S. Parent A. There are no other changes in the direct or indirect foreign ownership of U.S. Parent A. The insertion of Foreign Subsidiary X into the vertical ownership chain of U.S. Parent A would not require prior Commission approval.

[118] For example, assume that U.S. parent company ("U.S. Parent A") has received a section 310(b)(4) ruling that approves Foreign Citizen B's planned acquisition of a non-controlling, 30 percent common stock interest in U.S. Parent A. Two years after issuance of the section 310(b)(4) ruling to U.S. Parent A, Foreign Citizen B organizes a wholly-owned foreign corporation to hold Foreign Citizen B's common stock interest in U.S. Parent A. U.S. Parent A would not be required to seek Commission approval for this change.

[119] We do not propose any changes to service-specific licensing rules that may require licensees to obtain prior approval or notify the Commission of *pro forma* transfers of control pursuant to section 310(d) of the Act.

may also be limited to the geographic service area of the licenses or spectrum leasing arrangements referenced in the petition. For example, in the case of a petition filed by an existing licensee, the section 310(b)(4) ruling may cover only the particular wireless service (*e.g*., Personal Communications Service) authorized under the petitioner's existing license(s) and only within the geographic service area of the license(s). As a result, although the ruling authorizes the foreign ownership of the wireless licensee, the licensee is required to file additional petitions for declaratory ruling to "extend" its existing ruling to cover licenses or spectrum leasing arrangements in different wireless services and/or in different geographic service areas.

60. The Commission has previously recognized, in the *Secondary Markets Second Report and Order*, that service-specific and geographic-specific rulings might require carriers to make multiple filings for section 310(b)(4) approval, resulting in increased transaction costs and regulatory delay.[120] The Commission found, in particular, that the need to make multiple filings could undercut many of the efficiencies provided by the "immediate approval" (or "immediate processing") procedures adopted in the *Secondary Markets* proceeding for qualifying spectrum leasing arrangements and qualifying license assignments and transfers of control.[121] To address this concern, the Commission enunciated a policy of entertaining petitions that seek "blanket" approval, under section 310(b)(4), to cover future spectrum leasing arrangements and license assignments/transfers for services and geographic coverage areas specified in the petition.[122] The Commission found that this approach would eliminate unnecessary regulatory hurdles for carriers seeking maximum flexibility to expand the scope of their service offerings, while continuing to ensure that the Commission and the Executive Branch have a meaningful opportunity to review applications and petitions for potential harms to national security, law enforcement, foreign policy, and trade policy.[123]

61. We seek input on the public interest costs and benefits of issuing section 310(b)(4) rulings on a service-specific basis; and, similarly, on the costs and benefits of issuing section 310(b)(4) rulings on a geographic-specific basis. We request that commenters that advocate a change in policy

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[120] *See Secondary Markets Second Report and Order*, 19 FCC Rcd at 17515, ¶ 22.

[121] Among other things, the Commission determined in the *Secondary Markets Second Report and Order* that, to the extent certain categories of spectrum leasing arrangements and license assignments and transfers of control did not raise potential public interest concerns, including foreign ownership concerns, such transactions could be processed pursuant to immediate approval (or immediate processing) procedures. *Secondary Markets Second Report and Order,* 19 FCC Rcd at 17506-07, ¶ 4, 17509-46, ¶¶ 10-84, 17553-58, ¶¶ 100-111. To be eligible for immediate processing, the Commission explained, an applicant would need to certify either (1) that it does not have more than 25 percent indirect foreign ownership, or (2) that it has previously obtained a declaratory ruling from the Commission with respect to the same radio service(s) and geographic coverage area(s) involved in the application and that there has been no change in foreign ownership in the meantime. *Secondary Markets Second Report and Order,* 19 FCC Rcd at 17514-15, ¶¶ 21-22 (establishing policy for *de facto* transfer spectrum leasing arrangements), 17526-27, ¶ 47 (establishing same policy for spectrum manager leasing arrangements), 17554-56 ¶¶ 101-103 (adopting same policy for license assignments and transfers of control).

[122] In order to discourage the filing of speculative petitions, which would impose undue administrative burdens on Commission resources, the Commission stated that it would entertain petitions for such "blanket" rulings only in conjunction with applications that would be covered by the requested ruling. *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17515, ¶ 22.

[123] The Commission also identified public safety and security of critical infrastructure as relevant public interest concerns. *Secondary Markets Second Report and Order*, 19 FCC Rcd at 17515, ¶ 22; *Second Order on Reconsideration*, 23 FCC Rcd at 15084, ¶ 6.

include specific proposals as to the appropriate service and geographic limitations of section 310(b)(4) rulings, if any.[124]

C. Contents of Section 310(b)(4) Petitions for Declaratory Rulings

62. We propose to require that all section 310(b)(4) petitions for declaratory ruling contain the name, address, citizenship, and principal business(es)of any individual or entity, regardless of citizenship, that directly or indirectly holds or would hold, after effectuation of any planned ownership changes described in the petition, at least 10 percent of the equity or voting interests in the controlling U.S. parent company or a controlling interest at any level. Petitioners would also be required to provide the percentage of equity and/or voting interest held or to be held by each such "disclosable interest holder" (to the nearest one percent). We propose a 10 percent ownership threshold for our disclosure requirement because it essentially mirrors the ownership disclosure requirements that currently apply to most common carrier wireless applicants under the Commission's licensing rules.[125] We believe that this ownership information is necessary for the Commission to verify the principal stakeholders and ultimate control of the U.S. parent company and that requiring its submission would impose a minimal burden on petitioners. A foreign investor holding a non-controlling equity and/or voting interest of less than 10 percent in the U.S. parent would not need to be identified in the petition, unless, as discussed in Section III.B.2. above, the parent seeks specific approval for that investor. We seek comment on the proposed ownership disclosure requirement. We also seek comment on whether a lower ownership percentage disclosure threshold, such as an interest that exceeds 5 percent, may be appropriate.[126] We also seek input

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[124] In the *Secondary Markets* proceeding, the Commission declined to adopt the service and geographic coverage criteria proposed by T-Mobile USA, Inc., finding the criteria "not sufficiently precise to allow us to rely upon an applicant's certification for purposes of our Section 310(b)(4) review." *Second Order on Reconsideration*, 23 FCC Rcd at 15084, ¶ 6. T-Mobile had proposed that no additional section 310(b)(4) ruling be required where the foreign ownership of an applicant's controlling parent would remain unchanged and the licenses that are the subject of the application would be utilized in the current business of the applicant and its affiliates, or used to augment or expand the existing business or to enhance current offerings, regardless of whether the licenses were in the same service that was the subject of the prior declaratory ruling of the applicant or its affiliates. As for the geographic coverage area of the prior ruling, T-Mobile proposed that the prior ruling suffice in all cases where a national carrier is supplementing its current business, and that new rulings be required only when a new transaction would result in a "fundamental increase in the scope of the operations of the applicant and its affiliates." *See id*., 23 FCC Rcd at 15083-84, ¶ 5 (quoting T-Mobile's Petition for Reconsideration or Clarification of the *Secondary Markets Second Report and Order*, at 8).

[125] *See* 47 C.F.R. §§ 1.919, 1.948, 1.2112(a) (specifying, *inter alia*, ownership disclosure requirements for Wireless Radio Services applicants), FCC Form 175 (Application to Participate in an FCC Auction), & FCC Form 602 (Ownership Disclosure Information for the Wireless Telecommunications Services, Schedule A). With respect to the Satellite Radio Services, applicants for new satellite space station licenses must disclose their 10 percent interest holders, while applicants for new satellite earth station licenses must file discrete ownership information only to the extent they have foreign ownership in excess of the 25 percent benchmark in section 310(b)(4). Applications to assign or transfer control of space and earth station licenses must also include discrete ownership information for the assignee/transferee. *See* FCC Form 312 (Application for Satellite Space and Earth Station Authorizations, Main Form – Questions 34 & 40; Schedule A – Question A8.). Applicants for aeronautical fixed and aeronautical en route station licenses are required to provide ownership information only to the extent they have foreign ownership in excess of the 25 percent benchmark in section 310(b)(4). *See* 47 C.F.R. § 87.19; FCC Form 601 (Main Form – Question 48b).

[126] For example, it may be appropriate to adopt a disclosure threshold for interests that exceed 5 percent if we ultimately determine to retain the current 25 percent aggregate ceiling on non-WTO Member investment in U.S. parent companies, but modify current policy to allow U.S. parent companies to exclude from their calculations of non-WTO investment those equity and voting interests that are held by a single non-WTO investor or "group" of non-WTO investors in an amount that constitutes 5 percent or less of the U.S. parent company's total capital stock (continued….)

whether to require a description of the control structure of the U.S. parent, including an ownership diagram and/or identification of the real party-in-interest disclosed in any companion licensing or spectrum leasing applications.

63. We also propose that section 310(b)(4) petitions include ownership information for each foreign individual or entity for which the petition seeks specific approval: specifically, their names, citizenship, principal businesses, and the percentage of equity and/or voting interest held or to be held by the foreign investor (to the nearest one percent). We also propose that, where the named foreign investor is a corporation or other business entity, the petition shall identify each of the named foreign investor's direct or indirect 10 percent interest holders, specifying each by name, citizenship, principal businesses, and percentage of equity and/or voting interest held in the named foreign investor. We believe that this ownership information is necessary for the Commission to verify the identity and ultimate control of the foreign investor for which the petitioner seeks specific approval.[127] We seek comment on these proposed information collection requirements, including whether to set the proposed disclosure threshold at interests of more than 5 percent. We believe that it will be particularly critical to obtain ownership information with respect to foreign investors for which a U.S. parent seeks specific approval to the extent we adopt our proposal to entertain a U.S. parent's request for specific approval to allow named foreign investors to increase their interests in the U.S. parent up to and including a non-controlling 49.99 percent equity and/or voting interest. Given the broad authority encompassed by that proposal, the cost to the U.S. parent to provide detailed ownership information for these named foreign investors would, in our view, be outweighed by the significant prospective benefits that would accrue to the parent; namely, the ability to allow incremental increases in ownership by the parent's approved foreign investors over time, without having to returning to the Commission for prior approval absent a transfer of control.

64. In support of the proposed ownership disclosure rules discussed above, we propose to adopt rules that set forth the methodology for calculating a petitioner's disclosable interest holders. We also propose that petitioners requesting specific approval for named foreign investors use the same methodology to calculate the foreign investors' equity and voting interests in the U.S. parent. The proposed rules largely track the methodology articulated in the *Foreign Ownership Guidelines* for determining the level of foreign equity and voting interests that are held directly and/or indirectly in the U.S. parent of a common carrier or aeronautical licensee that is the subject of a section 310(b)(4) petition. We request comment on the proposed calculation rules, which are appended to this NPRM. In particular, we request comment on whether to revise our current methodology for calculating voting interests held in U.S. parent companies of common carrier or aeronautical licensees through intervening limited partnerships. We also request comment on the appropriate methodology for calculating voting interests held in U.S. parent companies of common carrier or aeronautical licensees through intervening limited liability companies, an issue not addressed in the *Foreign Ownership Guidelines*. We discuss each of these issues below.

65. In *Wilner & Scheiner* and its progeny, the Commission set forth a standard for calculating both foreign equity interests and foreign voting interests held in a licensee's U.S. parent under section

(Continued from previous page)
(equity) and/or voting stock. *See supra* ¶¶ 31-34. In addition, as discussed in Section III.A., the Williams Act of 1968, which amended the Securities Exchange Act of 1934 (15 U.S.C. § 78a *et seq*.), requires beneficial owners of public company shares to disclose their acquisition of voting stock interests that exceed 5 percent of any class of registered securities of the company. *See supra* ¶ 33.

[127] We find that the statutory obligation of the Commission to pass upon the propriety of foreign investment under section 310(b)(4) amply justifies this information collection. *See supra* note 22.

310(b)(4), where such interests are held through intervening entities.[128] In calculating foreign equity interests in a parent company, the Commission uses a multiplier to dilute the percentage of each investor's equity interest in the parent when those interests are held through intervening companies. The multiplier is applied to each link in the vertical ownership chain, regardless of whether any particular link in the chain represents a controlling interest in the company positioned in the next lower tier.[129] The resulting product yields the *pro rata* equity holdings of the investors in the U.S. parent company separate from the voting power associated with the investors' shareholdings.[130]

66. By contrast, in calculating foreign voting interests in a parent company, the multiplier is not applied to any link in the vertical ownership chain that constitutes a controlling interest in the company positioned in the next lower tier.[131] In circumstances where voting interests in the U.S. parent are held through one or more intervening partnerships, the multiplier is not applied to dilute a general partnership interest or uninsulated limited partnership interest held by a foreign individual or entity. A general partner is considered to hold the same voting interest as the partnership holds in the company situated in the next lower tier of the vertical ownership chain. Similarly, in the absence of a specific demonstration that a limited partner effectively is insulated from active involvement in partnership affairs, a limited partner will be deemed to hold the same voting interest as the partnership holds in the company in the next lower tier of the vertical ownership chain.[132]

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[128] *See generally Wilner & Scheiner I*, 103 F.C.C.2d 511; *Wilner & Scheiner II,* 1 FCC Rcd 12; *BBC License Subsidiary L.P*., Memorandum Opinion and Order, 10 FCC Rcd 10968, 10973-74, ¶¶ 22-25 (1995) (*BBC License Subsidiary*).

[129] *BBC License Subsidiary*, 10 FCC Rcd at 10973-74, ¶¶ 24-25. For example, where a foreign entity holds a 20 percent equity and voting interest in Company A and Company A, in turn, holds a 40 percent equity interest in Company B, but has voting control of Company B, the percentage of Company B's equity capital supplied by Company A is 40 percent even if Company A controls Company B. The Commission has found that, in these circumstances, the percentage of that 40 percent equity capital reasonably attributable to the foreign investor is proportionate to the foreign investor's contribution to Company A, and use of the multiplier (20 percent x 40 percent = 8 percent) properly discounts the investor's participation in Company B. *See BBC License Subsidiary*, 10 FCC Rcd at 10973-74, ¶¶ 23-25 (overruling *Wilner & Scheiner II* insofar as it established a method of calculating foreign equity ownership or contributed capital interests which directly tracked that used to determine foreign voting interests).

[130] *BBC License Subsidiary*, 10 FCC Rcd at 10973-74, ¶ 25.

[131] Thus, in the example in note 129 above, the 20 percent foreign voting interest in Company A, which has voting control of Company B, would flow entirely to the next tier, and be attributed to Company B (20 percent x 100). Counting all of Company A's foreign interest is appropriate because, as the Commission has found, "actual control over the business … is unlikely to be significantly attenuated through intervening companies." *BBC License Subsidiary*, 10 FCC Rcd at 10973, ¶ 23. *See also Wilner & Scheiner I*, 103 F.C.C.2d at 522, ¶ 19.

[132] *See, e.g.*, *Intelsat, Ltd., Transferor, and Zeus Holdings Limited, Transferee*, Order and Authorization, IB Docket No. 04-366, DA 04-4034, 19 FCC Rcd 24820, 24829-30, ¶¶ 23-34 (Int'l Bur./WTB/OET 2004) (*Intelsat-Zeus*); *XO Communications*, 17 FCC Rcd at 19221, ¶ 22; *Foreign Ownership Guidelines*, 19 FCC Rcd at 22628-29. As the Commission has recognized in the context of adopting its mass media attribution rules, "[t]he partners in a limited partnership, through contractual arrangements, largely have the power themselves to determine the rights of the limited partners. As a consequence, certain limited partners may be insulated from material involvement in partnership affairs whereas other limited partners may actually have the power to participate in the control of the company." *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, Memorandum Opinion and Order, MM Docket No. 83-46, FCC 86-410, 1 FCC Rcd 802, 803-04, ¶ 9 (1986) (footnotes omitted). *See also id*., 1 FCC Rcd at 804, ¶ 10 (stating that "unlike the power of a voting stockholder, the powers of a limited partner are not necessarily dependent upon the extent of his or her equity holdings").

67. Where a foreign investor holds an ownership interest indirectly in the U.S. parent company of a common carrier or aeronautical licensee through an intervening limited partnership, and the investor is effectively insulated from active involvement in partnership affairs, the U.S. parent may apply the multiplier in calculating the foreign investor's voting interest in the U.S. parent under section 310(b)(4).[133] Thus, in such a case, the foreign investor's voting interest will be calculated as equal to its equity interest in the U.S. parent. Similarly, where the U.S. parent of a common carrier or aeronautical licensee is itself organized as a limited partnership, an insulated limited partner's voting interest in the U.S. parent will be calculated as equal to the limited partner's equity interest in the parent. A limited partnership interest will be treated as insulated where the section 310(b)(4) petition contains a showing that the foreign limited partner is prohibited by the relevant partnership agreement from participating in the day-to-day management of the partnership, and that only the usual and customary investor protections are contained in the limited partnership agreement.[134]

68. We request comment on whether the insulation standard that applies to foreign limited partners investing in U.S. parent companies of common carrier and aeronautical licensees is sufficient to support a presumption that an insulated limited partner will not be materially involved in managing partnership affairs.[135] In addition, to the extent such a presumption holds true, would it justify treating the limited partner as having no voting interest in the limited partnership under section 310(b)(4) – effectively affording the limited partner treatment akin to that of a holder of non-voting stock in a corporation?[136] Is

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[133] *See, e.g.*, *Intelsat-Zeus*, 19 FCC Rcd at 24829-30, ¶ 24; *XO Communications*, 17 FCC Rcd at 19221, ¶ 22, 19222-23**,** ¶ 25; *Foreign Ownership Guidelines*, 19 FCC Rcd at 22628-29.

[134] *See Foreign Ownership Guidelines*, 19 FCC Rcd at 22628. For example, assume that a foreign individual holds a 40 percent limited partnership interest in U.S. Limited Partnership A, which plans to acquire 20 percent of the total capital stock and voting stock of U.S. Parent Corporation B from an existing U.S. shareholder. (U.S. individuals hold all other partnership interests in U.S. Limited Partnership A.) Existing foreign shareholders would continue to hold an aggregate 20 percent of the equity and voting interests in U.S. Parent Corporation B, which files a section 310(b)(4) petition in advance of closing. Assuming the U.S. parent demonstrates in its petition that the foreign limited partner's interest in Limited Partnership A is properly insulated, the foreign limited partner's post-closing equity and voting interest in the U.S. parent would be calculated, using the multiplier, as 8 percent (40 percent x 20 percent). If the U.S. parent was unable to make an insulation showing, the multiplier would not apply in calculating the foreign limited partner's voting interest in the U.S. parent. As a result, the foreign limited partner would be deemed to hold, post-closing, a 20 percent voting interest in the U.S. parent (*i.e*., the same voting interest as U.S. Limited Partnership A).

[135] We note that, in the context of broadcast licensees and applicants, we apply a different insulation standard. We assume adequate insulation of a foreign limited partner for purposes of calculating compliance with the section 310(b) foreign ownership benchmarks if the licensee or applicant demonstrates that the foreign limited partner conforms to the specific insulation criteria for exemption from attribution under the media ownership rules. *See Wilner & Scheiner I*, 103 F.C.C.2d at 521-22, ¶¶ 20-21. Our insulation criteria for purposes of attributing ownership and other interests in broadcast licensees are codified in Note 2(f) to section 73.3555 of the rules, 47 C.F.R. § 73.3555, Note 2(f). *See also, e.g*., FCC Form 301 – Application for Construction Permit for a Commercial Broadcast Station, Instructions for FCC 301, at 5 (specifying seven criteria for insulation of a limited partner from "the management or operation of the media-related businesses of the partnership"), *available at* http://www.fcc.gov/Forms/Form301/301.pdf.

[136] As discussed in paragraph 67 above, under the *Foreign Ownership Guidelines*, we include insulated limited partnership interests in calculating foreign equity *and* voting interests held in U.S. parent companies of common carrier and aeronautical licensees through intervening limited partnerships. The U.S. parent may apply the multiplier in calculating both foreign equity and voting interests, so long as the U.S. parent demonstrates in its section 310(b)(4) petition that the limited partners are properly insulated – essentially treating them in the same manner as minority shareholders of a corporation's voting stock.

there a need to relax or clarify the standard: for example, to require insulation only with respect to the telecommunications-related businesses of the partnership? Alternatively, is there a perceived legal or policy reason to tighten our insulation standard, particularly if we determine to treat insulated limited partnership interests as non-voting interests under section 310(b)(4)? For example, should we codify in our rules a list of investor protections which would not, in themselves, result in a limited partner being deemed an uninsulated limited partner?

69. In this regard, we request comment on whether the following matters are underinclusive or overinclusive of matters properly considered to be usual and customary investor protections: (1) the power to prevent the sale or pledge of all or substantially all of the assets of the limited partnership or a voluntary filing for bankruptcy or liquidation; (2) the power to prevent the limited partnership from entering into contracts with majority investors or their affiliates; (3) the power to prevent the limited partnership from guaranteeing the obligations of majority investors or their affiliates; (4) the power to purchase an additional interest in the limited partnership to prevent the dilution of the partner's *pro rata* interest in the event that the limited partnership issues additional instruments conveying interests in the partnership; (5) the power to prevent the change of existing legal rights or preferences of the limited partners, as provided in the limited partnership agreement or other operative agreement; (6) the power to vote on the removal of a general partner in situations where the general partner is subject to bankruptcy, insolvency, reorganization, or other proceedings relating to the relief of debtors; adjudicated insane or incompetent by a court of competent jurisdiction (where the general partner is a natural person); convicted of a felony; or otherwise removed for cause, as determined by an independent party; (7) the power to prevent the amendment of the limited partnership agreement or other organizational documents of the partnership with respect to the matters described above. Regardless of our determination on this issue, we would, of course, continue to calculate the *pro rata* equity holdings of insulated limited partners investing in a U.S. parent directly, where the parent is itself organized as a limited partnership, or indirectly through intervening limited partnerships, as required by section 310(b)(4).[137]

70. We also request comment as to how we should calculate the voting interests held in U.S. parent companies of common carrier or aeronautical licensees through intervening limited liability companies (and, to the extent they may be used, registered limited liability partnerships). Depending upon the requirements of the applicable state statute, limited liability companies generally afford their members broad flexibility in organizing their management structure and permit members to actively participate in the management of the entity without losing limited liability. Thus, with some variation depending upon the applicable state statute, limited liability companies may be organized with centralized management authority residing in one or a few managers (who may or may not be members) or decentralized management by members.[138] The Commission has previously determined, in the context of its broadcast attribution rules, to treat limited liability companies in the same manner as limited partnerships.[139] The Commission found in its *1999 Broadcast Attribution Order* that limited liability companies were comparable to limited partnerships in terms of organization flexibility and that, even where a company elected a "corporate form" of governance, owners of the enterprise were still afforded sufficient discretion under state law to retain some level of operational control on their own part.[140] The Commission thus declined to differentiate its treatment of limited liability companies based on whether

[137] *See BBC License Subsidiary*, 10 FCC Rcd at 10973, ¶ 22 (stating that compliance with section 310(b) is a two-pronged analysis, one pertaining to voting interests and the second to ownership (*i.e.*, equity) interests).

[138] *See* L. Ribstein & R. Keatinge, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES ¶¶ 7.02-7.04 (1997). *See also 1999 Broadcast Attribution Order*, 14 FCC Rcd at 12618, ¶ 134.

[139] *See 1999 Broadcast Attribution Order*, 14 FCC Rcd at 12619-20, ¶¶ 138-140.

[140] *Id*., 14 FCC Rcd at 12619-20, ¶¶ 139-140.

their management form is centralized or decentralized. It also concluded in the *1999 Broadcast Attribution Order* that it would treat registered limited liability partnerships in the same manner as limited partnerships and limited liability companies.[141] We ask that commenters address whether the Commission should apply to limited liability companies and registered limited liability partnerships the same principles that we ultimately adopt for calculating voting interests in limited partnerships.

71. We additionally request comment whether it is reasonable for the Commission to rely on a petitioner's certification that it has calculated the ownership interests disclosed in its petition based upon its review of the Commission's rules and that the interests disclosed satisfy each of the pertinent standards and criteria required by the rules. We note that the Commission relies on certifications of compliance with its rules in numerous licensing and related contexts, including compliance with the foreign ownership limitations in section 310(b), reporting of disclosable interest holders under the rules for wireless applicants, and disclosure of attributable interests under the media ownership rules.[142] We find preliminarily that it is reasonable to adopt a certification approach in the context of our section 310(b)(4) ownership disclosure rules as well. We seek input on the draft certification that is included in the proposed rules that are appended to this NPRM.

72. We request comment regarding the nature of any other information which the Commission should require to be submitted in support of section 310(b)(4) petitions.

D. Filing and Processing of Section 310(b)(4) Petitions for Declaratory Rulings

73. We propose to continue to place section 310(b)(4) petitions on public notice as accepted for filing after International Bureau staff has reviewed the petition for completeness; ensure that the appropriate Executive Branch agencies receive a copy of the petition; and act on the petition after the Executive Branch agencies have completed their review and in light of any comments or objections that the agencies or other interested parties file for the record.[143] We would continue to act on section 310(b)(4) petitions by public notice or formal written order. Unless we specify otherwise in the ruling, the ruling would be issued subject to the standard terms and conditions that we adopt in this proceeding and codify in the Commission's rules.

74. In the *Foreign Participation Order,* the Commission adopted "streamlined" processing procedures for certain types of section 310(b)(4) petitions, including "(1) any petition for declaratory ruling that it would not serve the public interest to deny a Title III common carrier license to a particular entity; (2) permission for an existing common carrier radio licensee to exceed 25 indirect foreign ownership; and (3) permission to increase a licensee's level of non-controlling indirect foreign ownership

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[141] *Id*., 14 FCC Rcd at 12619-20, ¶¶ 138-140.

[142] *See e.g.,* FCC Form 312, Application for Satellite Space and Earth Station Authorizations, Main Form – Questions 29-33 (foreign ownership certification); FCC Form 601, Application for Radio Authorization: Wireless Telecommunications Bureau, Public Safety and Homeland Security Bureau, Main Form – Questions 44-48 (foreign ownership certification); FCC Form 602, FCC Ownership Disclosure Information for the Wireless Telecommunications Services, Main Form – pg. 1 (requiring certification of applicant's disclosable interest holders); FCC Form 301, Application for Construction Permit for Commercial Broadcast Station, pg. 2, Section II, Legal (requiring certification that the application satisfies each of the pertinent standards and criteria set forth in the application instructions and worksheets, including identification of all parties to the application and compliance with the foreign ownership limitations in section 310 of the Act).

[143] The Executive Branch agencies contact the petitioner directly, request any additional information the agencies deem necessary to their review, and, in particular cases, will engage in discussions and the negotiation of a security agreement or other arrangement, such as a letter of assurances, with the petitioner and affiliated entities. These procedures are not subject to notice and comment or modification in this proceeding.

when permission to exceed 25 percent has already been granted."[144] The Commission stated that it would not streamline petitions that also involve an assignment of license or a transfer of control or any initial licensing applications, which involve service-specific rules and other portions of Title III of the Act.[145] Commission staff retained the discretion to deem a petition ineligible for streamlined processing either because it raised market power concerns or because an Executive Branch agency raised concerns with respect to issues within its expertise.[146]

75. It has been our experience that, as a practical matter, very few section 310(b)(4) petitions are eligible for streamlined processing under the standards established in the *Foreign Participation Order* because most petitions are filed in connection with an application for an initial license or to assign or transfer control of a license, or in connection with a spectrum leasing arrangement. However, several considerations may weigh in favor of retaining the Commission's current approach to streamlining section 310(b)(4) petitions. First, we anticipate that adoption of the rules proposed in this NPRM will reduce the need for U.S. parent companies to return to the Commission for additional section 310(b)(4) approvals after receiving an initial ruling.[147] Second, where a petition is filed in connection with a Title III application, it would appear imprudent for the Commission to act on the petition before the pleading cycle has closed on the related Title III application(s). Issues relevant to the petition may be raised in comments submitted in the licensing proceeding. Third, the streamlined 14-day public notice period normally does not afford sufficient time for Executive Branch review. We seek input on whether extending our streamlined processing procedures is likely to result in more efficient and timely Commission processing of section 310(b)(4) petitions while continuing to ensure that Executive Branch agencies have sufficient opportunity to engage in a meaningful review.

76. We believe that the streamlining proposals and other options discussed above will reduce burdens on licensees and accelerate the foreign ownership review process. We also seek comment on whether there may be additional ways to accelerate the section 310(b)(4) review process. For instance, are there any procedures the staff could adopt to further streamline review of a section 310(b)(4) petition? We request that commenters addressing ideas for modernizing the current process discuss how any new approach would affect our public interest review.

E. Continued Compliance with Section 310(b)(4) Declaratory Rulings

77. We also request comment whether we should require the U.S. parent to file periodically with the Commission a certification to demonstrate that it is in compliance with its foreign ownership ruling. For example, should we require the U.S.-organized parent company that has received the section 310(b)(4) ruling to file a certification of compliance every four (4) years after the anniversary of the

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[144] *Foreign Participation Order*, 12 FCC Rcd at 24033, ¶ 323. Streamlined petitions have a 14-day public notice period and, unless a formal opposition is filed or the petition is removed from streamlined processing in the discretion of Commission staff, they are granted automatically, effective on the 15th day after public notice. Petitions that are not eligible for streamlined processing have a 28-day public notice period. Non-streamlined petitions and petitions that are removed from streamlined processing within the 14-day public notice period are granted by public notice or formal written order.

[145] *Id*.

[146] *Id*. at 24033, ¶ 324.

[147] For example, the proposals discussed in Section III.B.5. & 6. would appear to eliminate the need to file section 310(b)(4) petitions in connection with *pro forma* transfer or assignment applications. To the extent we determine not to adopt the proposed automatic extension rules, we request comment whether we should nonetheless specifically allow for streamlined processing of petitions that accompany the filing of *pro forma* transfer or assignment applications.

effective date of the ruling? Alternatively, should we require that licensees include a certification in their license renewal applications?

F. Transition Issues

78. We do not propose to change retroactively the terms and conditions of any section 310(b)(4) ruling issued prior to the effective date of the rules adopted in this proceeding. At the same time, we propose to permit the controlling U.S. parent companies of wireless carriers with an existing ruling to file a new petition for declaratory ruling under the rules adopted in this proceeding. We request comment on this proposed approach. We also seek comment on alternative approaches that would extend the benefits of the rules adopted in this proceeding to U.S. parent companies in a way that minimizes the need for them to return to the Commission for a new ruling. For example, to the extent we modify or eliminate current policy with respect to non-WTO Member investment, should we adopt a rule that modifies all existing section 310(b)(4) rulings to incorporate the new policies? In addition, if we adopt a 100 percent aggregate allowance, should we adopt a rule that would incorporate this provision in all wireless carriers' section 310(b)(4) rulings in place of the current, standard 25 percent aggregate allowance? Or are there public policy reasons to require in all cases that a U.S. parent company return to the Commission for a new ruling to obtain the benefits of the rules adopted in this proceeding?

IV. PROCEDURAL ISSUES

A. *Ex Parte*

79. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[148] 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.

B. Initial Regulatory Flexibility Analysis

80. The Regulatory Flexibility Act of 1980, as amended (RFA),[149] requires that an initial 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

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[148] 47 C.F.R. §§ 1.1200 *et seq.*

[149] *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 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

substantial number of small entities."[150] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[151] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[152] 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).

81. In this NPRM, the Commission seeks comment on proposed changes and other options to revise and simplify its policies and procedures implementing section 310(b)(4) of the Act , 47 U.S.C. § 310(b)(4), for common carrier and aeronautical radio station licensees while continuing to ensure that we have the information we need to carry out our statutory duties. The proposals in this NPRM are designed to reduce to the extent possible the regulatory costs and burdens imposed on wireless common carrier and aeronautical applicants, licensees, and spectrum lessees; provide greater transparency and more predictability with respect to the Commission's filing requirements and review process; and facilitate investment from new sources of capital, while continuing to protect important interests related to national security, law enforcement, foreign policy, and trade policy.

82. We estimate that the rule changes discussed in this NPRM, if adopted, would result in a more than 70 percent reduction in the number of section 310(b)(4) petitions for declaratory ruling filed with the Commission annually, as compared to the current regulatory framework.[153] We also anticipate a reduction in the time and expense associated with filing petitions under the proposed framework. For example, we propose that U.S. parent companies of common carrier and aeronautical licensees that seek Commission approval to exceed the 25 percent benchmark in section 310(b)(4) no longer be required to request, in their section 310(b)(4) petitions for declaratory ruling, specific approval of named foreign investors unless a foreign investor proposes to acquire a direct or indirect equity and/or voting interest in the U.S. parent that exceeds 25 percent, or a controlling interest at any level. Another proposal would, if adopted, allow the U.S. parent to request specific approval for foreign investors named in the section 310(b)(4) petition to increase their direct or indirect equity and/or voting interests in the U.S. parent at any time after issuance of the section 310(b)(4) ruling, up to and including a non-controlling 49.99 percent equity and/or voting interest. Under another proposal, if adopted, the Commission would issue section 310(b)(4) rulings in the name of the U.S. parent of the licensee, and allow for automatic extension of the U.S. parent's ruling to cover any of the U.S. parent's subsidiaries or affiliates, whether existing at the time of the ruling or formed or acquired subsequently, *provided* that the U.S. parent remains in compliance with the terms of its ruling.

83. We believe that the streamlining proposals and other options on which we seek comment in this NPRM will reduce costs and burdens currently imposed on licensees, including those licensees that are small entities, and accelerate the foreign ownership review process, while continuing to ensure that we have the information we need to carry out our statutory duties. Therefore, we certify that the proposals in this NPRM, if adopted, will not have a significant economic impact on a substantial number of small

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[150] 5 U.S.C. § 605(b).

[151] 5 U.S.C. § 601(6).

[152] 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 definitions(s) in the Federal Register."

[153] This estimate is based on the International Bureau staff's review of the 21 section 310(b)(4) petitions filed with the Commission during a randomly-selected period (September 1, 2007 through August 31, 2008).

entities. The Commission will send a copy of the NPRM, including a copy of this Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.[154] This initial certification will also be published in the Federal Register.[155]

C. Initial Paperwork Reduction Act of 1995 Analysis

84. This document contains proposed new and modified information collection requirements. The Commission, as a part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

D. Filing of Comments and Reply Comments

85. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) at http://fjallfoss.fcc.gov/ecfs2/. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- 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.

86. 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, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- 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, SW, Washington DC 20554.

87. 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).

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[154] 5 U.S.C. § 605(b).

[155] *Id*.

88. All parties must file one copy of each pleading electronically or by paper to each of the following:

(1) The Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

(2) James Ball, Chief, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail: James.Ball@fcc.gov.

(3) Susan O'Connell, Attorney, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail Susan.OConnell@fcc.gov.

89. Filings and comments will be 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. They will also be accessible through the Commission's Electronic Filing System (ECFS) on the Commission's website, www.fcc.gov.

90. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules.[156] All parties are encouraged to utilize a table of contents, and to include the name of the filing party and the date of the filing on each page of their submission. We also strongly encourage that parties track the organization set forth in the Notice of Proposed Rulemaking in order to facilitate our internal review process.

91. Written comments by the public on the proposed and/or modified information collections are due 60 days from the date of publication of the Notice in the Federal Register. Written comments must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on the proposed and/or modified information collections on or before 60 days after the date of publication in the Federal Register of the Notice. In addition to filing comments with the Secretary, Marlene H. Dortch, a copy of any comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, S.W., Washington, D.C. 20554, or via the Internet to Judith-B.Herman@fcc.gov. and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, D.C. 20503 or via the Internet to Kim_A._Johnson@omb.eop.gov.

92. Commenters that file what they consider to be proprietary information may request confidential treatment pursuant to section 0.459 of the Commission's rules. Commenters should file both their original comments for which they request confidentiality and redacted comments, along with their request for confidential treatment. Commenters should not file proprietary information electronically. *See Examination* of *Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816 (1998), Order on Reconsideration, 14 FCC Rcd 20128 (1999). Even if the Commission grants confidential treatment, information that does not fall within a specific exemption pursuant to the Freedom of Information Act (FOIA) must be publicly disclosed pursuant to an appropriate request. *See* 47 C.F.R. § 0.461; 5 U.S.C. § 552. We note that the Commission may grant requests for confidential treatment either conditionally or unconditionally. As

[156] 47 C.F.R. § 1.49.

such, we note that the Commission has the discretion to release information on public interest grounds that falls within the scope of a FOIA exemption.

V. ORDERING CLAUSES

93. IT IS ORDERED that, pursuant to the authority contained in 47 U.S.C. Sections 151, 152, 154(i), 154(j), 211, 303(r), 309, 310 and 403, this *Notice of Proposed Rulemaking* is ADOPTED.

94. IT IS FUTHER ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes to Commission policy and rules described in this Notice of Proposed Rulemaking and that comment is sought on these proposals.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Proposed Rules

It is proposed that Parts 1 and 25 of the Commission rules be amended as follows:

PART 1 – PRACTICE AND PROCEDURE

1. **The authority citation for part 1 continues to read as follows:**

AUTHORITY: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. **Section 1.907 of Subpart F is amended to include the following definitions:**

Spectrum leasing arrangement. An arrangement between a licensed entity and a third-party entity in which the licensee leases certain of its spectrum usage rights to a spectrum lessee, as set forth in Subpart X of this Part (47 C.F.R. §§ 1.9001 *et seq.*). Spectrum leasing arrangement is defined in § 1.9003.

Spectrum lessee. Any third party entity that leases, pursuant to the spectrum leasing rules set forth in Subpart X of this Part (47 C.F.R. §§ 1.9001 *et seq.*), certain spectrum usage rights held by a licensee. Spectrum lessee is defined in § 1.9003.

3. **Subpart F is amended to add sections 1.990-1.994 to read as follows:**

FOREIGN OWNERSHIP OF U.S.-ORGANIZED ENTITIES THAT CONTROL COMMON CARRIER, AERONAUTICAL EN ROUTE, AND AERONAUTICAL FIXED RADIO STATION LICENSEES

§ 1.990 Filing requirements under section 310(b)(4) of the Communications Act of 1934, as amended.

(a)(1) The controlling U.S.-organized parent company of a common carrier, aeronautical en route or aeronautical fixed radio station applicant, licensee, or spectrum lessee shall file a petition for declaratory ruling to obtain Commission approval *before* the parent company's aggregate foreign ownership exceeds, directly or indirectly, 25 percent of its equity interests and/or 25 percent of its voting interests.

(a)(2) Where there are successive, controlling U.S.-organized parent companies in the vertical ownership chain of the applicant, licensee or spectrum lessee, the petition for declaratory ruling required by paragraph (a)(1) of this section shall be filed by, or on behalf of, the lowest-tier, controlling U.S.-organized parent company.

Example 1. U.S.-organized Licensee A is wholly owned and controlled by U.S.-organized Corporation B, that is, in turn, wholly owned and controlled by U.S.-organized Corporation C. Foreign-organized Corporation D plans to acquire a non-controlling 30% equity and voting interest in U.S.-organized Corporation C. The petition for declaratory ruling required by paragraph (a)(1) of this section should be filed by or on behalf of U.S.-organized Corporation B.

Example 2. U.S.-organized Licensee A is wholly owned and controlled by U.S.-organized Corporation B, that is, in turn, wholly owned and controlled by U.S.-organized Corporation C. U.S.-organized Corporation C is 51% owned and controlled by U.S.-organized Corporation D, which is, in turn, wholly owned and controlled by Foreign-organized Corporation E. The remaining 49% equity and voting interests in U.S.-organized Corporation C are owned by U.S.-organized Corporation F, which is, in turn, wholly owned and controlled by Foreign-organized Corporation G. The petition for declaratory ruling

required by paragraph (a)(1) of this section should be filed by or on behalf of U.S.-organized Corporation B.

(b) The petition for declaratory ruling required by paragraph (a)(1) of this section shall be filed electronically on the Internet through the International Bureau Filing System (IBFS). For information on filing your petition through IBFS, see Part 1, Subpart Y and the IBFS homepage at http://www.fcc.gov/ib.

(c) The U.S. parent filing the petition for declaratory ruling required by paragraph (a)(1) of this section shall certify to the information contained in the petition in accordance with the provisions of § 1.16.

(d) The following definitions shall apply to this section and §§ 1.991-1.994 of this part.

(1) *Individual* refers to a natural person as distinguished from a partnership, association, corporation, or other organization.

(2) *Entity* includes a partnership, association, estate, trust, corporation, limited liability company, governmental authority or other organization.

(3) *Control* includes actual working control in whatever manner exercised and is not limited to majority stock ownership. *Control* also includes direct or indirect control, such as through intervening subsidiaries.

§ 1.991 Contents of petitions for declaratory ruling under section 310(b)(4) of the Communications Act of 1934, as amended.

The petition for declaratory required by § 1.990(a)(1) shall contain the following information:

(a) The name(s) and FCC Registration Number(s) (FRN) of the applicant(s), licensee(s), or spectrum lessees for which a ruling is requested.

(b)(1) For each named licensee or spectrum lessee, specify:

(i) the Call Sign(s) or, in the case of a spectrum leasing arrangement, the File No(s). under which the licensee or spectrum lessee is authorized to provide common carrier, aeronautical fixed or aeronautical en route service; and

(ii) the type(s) of radio service authorized (e.g., cellular radio telephone service; microwave radio service; mobile satellite service; aeronautical fixed service).

(b)(2) If the petition is filed in connection with an application for a radio station license or a spectrum leasing arrangement, or an application to acquire a license or spectrum leasing arrangement by assignment or transfer of control, specify for each named applicant:

(i) the File No(s). of the associated application(s), if available at the time the petition is filed; otherwise, specify the anticipated filing date for each application; and

(ii) the type(s) of radio services covered by each application (e.g., cellular radio telephone service; microwave radio service; mobile satellite service; aeronautical fixed service).

(c) With respect to the petitioning U.S.-organized parent company, its name; FCC Registration Number (FRN); mailing address; place of organization; telephone number; facsimile number (if available); electronic mail address (if available); type of business organization (e.g., corporation, unincorporated association; trust; general partnership; limited partnership; limited liability company; trust; other (include description of legal entity); name and title of officer certifying to the information contained in the petition.

(d) If the petitioning U.S.-organized parent company is represented by a third party (e.g., legal counsel), that person's name, the name of the firm or company, mailing address and telephone number/electronic mail address may be specified.

(e) With respect to the petitioning U.S.-organized parent company, the name of any individual or entity that holds *directly* 10 percent or more of the U.S. parent's equity interests and/or voting interests, or a controlling interest at any level as follows:

(e)(1) In the case of a U.S. parent that is organized as a corporation, the name of any individual or entity that holds 10 percent or more of the U.S. parent company's total capital stock and/or voting stock, or a controlling interest at any level.

(e)(2) In the case of a U.S. parent that is organized as a general partnership, the names of its constituent general partners.

(e)(3) In the case of a U.S. parent that is organized as a limited partnership, the name(s) of the general partner(s), any uninsulated limited partner(s), and any insulated limited partner(s) with an equity interest in the U.S. parent of at least 10 percent (calculated according to the percentage of the limited partner's capital contribution). With respect to each named limited partner, state whether its partnership interest is insulated or uninsulated, based on the insulation criteria specified in § 1.993.

(e)(4)(i) Except as otherwise provided in paragraph (e)(4)(ii) of this section, in the case of a U.S. parent that is organized as a limited liability company, the name(s) of each uninsulated member, regardless of its equity interest in the U.S. parent, any insulated member with an equity interest in the U.S. parent of at least 10 percent (calculated according to the percentage of the member's capital contribution), and any non-member manager(s). With respect to each named member, state whether its membership interest is insulated or uninsulated, based on the insulation criteria specified in § 1.993, and whether the member is a managing member.

(e)(4)(ii) Where a U.S. parent is organized as a limited liability company and demonstrates in its section 310(b)(4) petition that the company is governed in a manner similar to a corporation, the name of any individual or entity that holds 10 percent or more of the U.S. parent company's total equity interests and/or voting interests, or a controlling interest at any level. For purposes of this paragraph, equity interests shall be calculated according to the percentage of the member's capital contribution, and voting interests shall be calculated based on the governance provisions of the particular limited liability company agreement and other operative documents. The demonstration required by this paragraph shall include a description of the members' respective voting rights and roles in managing the affairs of the company.

(f) With respect to the petitioning U.S.-organized parent company, the name of any individual or entity that holds *indirectly*, through one or more intervening entities, 10 percent or more of the U.S. parent's equity interests and/or voting interests, or a controlling interest at any level. Equity interests and voting interests held indirectly shall be calculated in accordance with the principles set forth in § 1.992.

(g) For each 10 percent interest holder named in response to paragraphs (e) and (f) of this section, specify the equity interest held and the voting interest held (each to the nearest one percent); in the case of an individual, his or her citizenship; in the case of a business organization, its place of organization, type of business organization (*e.g*., corporation, unincorporated association; trust; general partnership; limited partnership; limited liability company; trust; other (include description of legal entity)), and principal business(es).

Note to paragraph (g): For purposes of this paragraph, where the petitioning U.S. parent is organized as a limited partnership or limited liability company, any limited partner or member that is insulated as specified in § 1.993 shall be deemed to hold no voting interest in the U.S. parent. Thus, the U.S. parent is not required to calculate any voting interest for its insulated limited partners or insulated members.

(h) Attach an ownership diagram illustrating the vertical ownership structure of the applicant(s), licensee(s), or spectrum lessee(s) that are the subject of the petition, including the direct and indirect ownership (equity and voting) interests held in the petitioning U.S. parent by the person(s) and/or entity(ies) named in response to paragraphs (e) and (f) of this section, each of which should be depicted in the ownership diagram. All controlling interests should be labeled as such.

(i) Provide the name of each foreign individual and/or entity for which the petitioning U.S. parent company requests specific approval, if any, and the respective percentages of equity and/or voting interests that each holds, or would hold, upon consummation of any transactions described in the petition, directly or indirectly in the U.S. parent company. Equity and voting interests shall be calculated in accordance with the principles set forth in paragraphs (e) and (f) of this section and in § 1.992.

Note 1 to paragraph (i): The petitioning U.S. parent must request specific approval for any foreign individual and/or entity that holds, or would hold, upon consummation of any transactions described in the petition, a direct and/or indirect equity and/or voting interest in the U.S. parent in excess of 25 percent, or a controlling interest at any level. The U.S. parent may, but is not required to, request specific approval for any other foreign individual or entity that holds, or would hold, a direct and/or indirect equity and/or voting interest in the U.S. parent.

Note 2 to paragraph (i): The Commission will not authorize a U.S. parent to have aggregate, direct or indirect investment exceeding 25 percent of the parent's equity interests or 25 percent of its voting interests from individuals or entities that have their "home markets" in countries that are not Members of the World Trade Organization (WTO), *unless* the petitioning U.S. parent demonstrates in its petition that the non-WTO Member country(ies) offer effective competitive opportunities to U.S. investors in the particular service sector in which the parent competes, or seeks to compete, in the U.S. market, or that countervailing public interest considerations weigh in favor of authorizing the non-WTO investment.

a. For purposes of calculating its non-WTO Member investment, the U.S. parent may exclude those equity and/or voting interests that are held by a single non-WTO investor or "group" of non-WTO investors in an amount that constitutes 5 percent or less of the U.S. parent's total capital stock (equity) and/or voting stock. For this purpose, two or more non-WTO investors will be treated as a "group" when the investors have agreed to act together for the purpose of acquiring, holding, voting, or disposing of their equity and/or voting interests in the U.S. parent company or any intermediate company(ies) through which any of the investors holds its interests in the U.S. parent.

b. The Commission generally considers a foreign individual's "home market" to be its country of citizenship. Where the interest would be held by a foreign corporation, partnership, or other business organization, the petition must establish the investing entity's principal place of business by specifying

the following information: (1) the country of a foreign entity's incorporation, organization, or charter; (2) the nationality of all investment principals, officers, and directors; (3) the country in which the world headquarters is located; (4) the country in which the majority of the tangible property, including production, transmission, billing, information, and control facilities is located; and (5) the country from which the foreign entity derives the greatest sales and revenues from its operations.

c. In applying the effective competitive opportunities (ECO) test, the Commission will consider the legal and practical limitations on U.S. investment in the foreign investor's home market for the particular wireless service (or analogous service) in which the investor seeks to participate in the U.S. market. The ECO analysis compares restrictions on U.S. participation in the home market for the particular wireless service in which the foreign investor seeks to participate in the U.S. market. If the services in the U.S. and home markets are not precisely matched, we will use the most closely substitutable wireless service in the home market, as determined from the consumers' perspective. The petition should demonstrate the existence and extent of any legal restrictions on U.S. investment in the relevant market(s) and the absence of practical limitations on U.S. participation, including the price, terms and conditions of interconnection, competitive safeguards, and the regulatory framework of the relevant market(s).

(j) The petitioning U.S. parent company may, but is not required to, request advance approval in its petition for any foreign individual or entity named in response to paragraph (i) of this section to increase its direct and/or indirect equity and/or voting interests in the petitioning U.S. parent above the percentages specified in response to paragraph (i) of this section. Requests for advance approval shall be made as follows:

(j)(1) Where a foreign individual or entity named in response to paragraph (i) of this section holds, or would hold upon consummation of any transactions described in the petition, a *de jure* or *de facto* controlling interest in the U.S. parent, the U.S. parent may request advance approval in its petition for the foreign individual or entity to increase its interests up to any amount, including 100 percent of the direct and/or indirect equity and/or voting interests in the U.S. parent. Specify for the named controlling foreign person(s) the maximum percentages of equity and/or voting interests for which advance approval is sought or, in lieu of a specific amount, state that the petitioner requests advance approval for the named controlling foreign person to increase its interests up to and including 100 percent of the U.S. parent's direct and/or indirect equity and/or voting interests.

(j)(2) Where a foreign individual or entity named in response to paragraph (i) of this section holds, or would hold upon consummation of any transactions described in the petition, a non-controlling interest in the U.S. parent, the U.S. parent may request advance approval in its petition for the foreign individual or entity to increase its interests up to any non-controlling amount. Specify for the named foreign person(s) the maximum percentages of equity and/or voting interests for which advance approval is sought or, in lieu of a specific amount, state that the petitioner requests advance approval for the named foreign person(s) to increase their interests up to and including a non-controlling 49.99 percent direct and/or indirect equity and/or voting interest in the U.S. parent. See Note 2 to § 1.990(i).

§ 1.992 How to calculate indirect equity and voting interests under section 1.991.

(a) The criteria specified in this section shall be used for purposes of calculating equity and voting interests held indirectly in a petitioning U.S. parent under § 1.991.

(b)(1) *Equity interests held indirectly in the petitioning U.S. parent.* Equity interests that are held by any individual or entity indirectly in a petitioning U.S.-organized parent company through one or more

intervening entities shall be calculated by successive multiplication of the equity percentages for each link in the vertical ownership chain, regardless of whether any particular link in the chain represents a controlling interest in the company positioned in the next lower tier.

Example. Assume that a foreign individual holds a 30 percent equity and voting interest in Corporation A which, turn, holds a non-controlling 40 percent equity and voting interest in U.S. Parent Corporation B. The foreign individual's equity interest in U.S. Parent Corporation B would be calculated by multiplying the foreign individual's equity interest in Corporation A by that entity's equity interest in U.S. Parent Corporation B. The foreign individual's equity interest would be 12 percent (30% x 40% = 12%). Even if Corporation A's 40% voting interest in U.S. Parent Corporation B constituted a *controlling* interest, the foreign individual's equity interest would still be calculated as 12 percent (30% x 40% = 12%).

(b)(2) *Voting interests held indirectly in the petitioning U.S. parent*. Voting interests that are held by any individual or entity indirectly in a petitioning U.S.-organized parent company through one or more intervening entities will be determined depending upon the type of business organization(s) through which the person or entity holds a voting interest as follows:

(b)(2)(i) Voting interests that are held through one or more intervening corporations shall be calculated by successive multiplication of the voting percentages for each link in the vertical ownership chain, except that wherever the voting interest for any link in the chain is equal to or exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

Example. Assume that a foreign individual holds a 30 percent equity and voting interest in Corporation A which, turn, holds a *controlling* 40 percent equity and voting interest in U.S. Parent Corporation B. Because Corporation A's 40 percent voting interest in U.S. Parent Corporation B constitutes a *controlling* interest, it is treated as a 100 percent interest. The foreign individual's 30 percent voting interest in U.S. Parent Corporation B would flow through in its entirety to U.S. Parent Corporation B and thus be calculated as 30 percent (30% x 100% = 30%).

(b)(2)(ii) Voting interests that are held through one or more intervening partnerships shall be calculated depending upon whether the individual or entity holds a general partnership interest, an uninsulated limited partnership interest, or an insulated limited partnership interest as specified in paragraphs (b)(2)(ii)(A)-(B) of this section.

(b)(2)(ii)(A) G*eneral partnership and uninsulated limited partnership interests*. A general partner and uninsulated limited partner shall be deemed to hold the same voting interest as the partnership holds in the company situated in the next lower tier of the vertical ownership chain. A limited partner shall be treated as uninsulated unless the limited partnership agreement or other operative agreement satisfies the insulation criteria specified in § 1.993.

(b)(2)(ii)(B) *Insulated limited partnership interests*. A limited partner that satisfies the insulation criteria specified in § 1.993 shall be treated as an insulated limited partner that has no voting interest in the limited partnership. Thus, the petitioning U.S. parent is not required to calculate any voting interest for the insulated limited partners of any limited partnership situated above the petitioning U.S. parent in its vertical chain of ownership.

(b)(2)(iii) Voting interests that are held through one or more intervening limited liability companies shall be calculated depending upon whether the individual or entity is a non-member manager, an uninsulated member or an insulated member as specified in paragraphs (b)(2)(iii)(A)-(B) of this section.

(b)(2)(iii)(A) *Non-member managers and uninsulated membership interests*. A non-member manager and an uninsulated member of a limited liability company shall be deemed to hold the same voting interest as the limited liability company holds in the company situated in the next lower tier of the vertical ownership chain. A member shall be treated as uninsulated unless the limited liability company agreement satisfies the insulation criteria specified in § 1.993.

(b)(2)(iii)(B) *Insulated membership interests*. A member of a limited liability company that satisfies the insulation criteria specified in § 1.993 shall be treated as an insulated member that has no voting interest in the limited liability company. Thus, the petitioning U.S. parent is not required to calculate any voting interest for the insulated members of any limited liability company situated above the petitioning U.S. parent in its vertical chain of ownership.

§ 1.993 Insulation Criteria for Interests in Limited Partnerships and Limited Liability Companies.

(a) (1) Where the petitioning U.S. parent is organized as a limited partnership, the U.S. parent's limited partners shall be treated as uninsulated within the meaning of § 1.992(b)(2)(ii)(A) unless the petitioning U.S. parent's limited partners are prohibited by the limited partnership agreement or other operative agreement from participating in the day-to-day management of the partnership and only the usual and customary investor protections are contained in the limited partnership agreement or other operative agreement.

(a)(2) Where there is one or more limited partnerships situated above the U.S. parent in its vertical chain of ownership, the limited partners of each such partnership shall be treated as uninsulated within the meaning of § 1.992(b)(2)(ii)(A) unless the petitioning U.S. parent's limited partners are prohibited by the limited partnership agreement or other operative agreement from participating, and in fact do not participate, in the day-to-day management of the partnership and only the usual and customary investor protections are contained in the limited partnership agreement or other operative agreement.

(b)(1) Where the petitioning U.S. parent is organized as a limited liability company, members of the limited liability company shall be treated as uninsulated for purposes of § 1.992(b)(2)(iii)(A) unless a member is prohibited by the limited liability company agreement from participating, and in fact does not participate, in the day-to-day management of the company and only the usual and customary investor protections are contained in the agreement.

(b)(2) Where there is one or more limited liability companies situated above the U.S. parent in its vertical chain of ownership, the members of each such company shall be treated as uninsulated for purposes of § 1.992(b)(2)(iii)(A) unless a member is prohibited by the limited liability company agreement from participating, and in fact does not participate, in the day-to-day management of the company and only the usual and customary investor protections are contained in the agreement.

(c) The usual and customary investor protections referred to this paragraphs (a)-(b) of this section shall consist of:

(1) The power to prevent the sale or pledge of all or substantially all of the assets of the limited partnership or limited liability company or a voluntary filing for bankruptcy or liquidation;

(2) The power to prevent the limited partnership or limited liability company from entering into contracts with majority investors or their affiliates;

(3) The power to prevent the limited partnership or limited liability company from guaranteeing the obligations of majority investors or their affiliates;

(4) The power to purchase an additional interest in the limited partnership or limited liability company to prevent the dilution of the partner's or member's pro rata interest in the event that the limited partnership or limited liability company issues additional instruments conveying interests in the partnership or company;

(5) The power to prevent the change of existing legal rights or preferences of the limited partners or members, as provided in the limited partnership or limited liability company agreement or other operative agreement;

(6) The power to vote on the removal of a general partner or managing member in situations where the general partner or managing member is subject to bankruptcy, insolvency, reorganization, or other proceedings relating to the relief of debtors; adjudicated insane or incompetent by a court of competent jurisdiction (where the general partner or managing member is a natural person); convicted of a felony; or otherwise removed for cause, as determined by an independent party;

(7) The power to prevent the amendment of the limited partnership agreement or limited liability company agreement, or other organizational documents of the partnership or limited liability company with respect to the matters described in paragraph (c)(1)-(6) of this section.

§ 1.994 Routine terms and conditions.

Section 310(b)(4) rulings issued pursuant to §§ 1.990 *et seq*. shall be subject to the following terms and conditions, except as otherwise specified in the U.S. parent's particular ruling:

(a)(1) In addition to the foreign ownership interests approved specifically in the declaratory ruling, the U.S.-organized parent company named in the ruling (or a U.S.-organized successor-in-interest formed as part of a *pro forma* reorganization) may have up to and including an additional, aggregate 25 percent direct or indirect equity and/or voting interests from other foreign individuals or foreign-organized entities without prior Commission approval, *provided* that no foreign person or foreign-organized entity acquires a direct or indirect equity and/or voting interest in excess of 25 percent, or a controlling interest at any level, unless approved specifically in the ruling *and provided that* aggregate investment from individuals or entities that have their "home markets" in countries that are not Members of the World Trade Organization (WTO) does not exceed, directly or indirectly, 25 percent of the U.S.-organized parent company's equity and/or voting interests.

Note to paragraph (a): For purposes of calculating compliance with the 25 percent aggregate ceiling on foreign investment from non-WTO Member countries, the U.S.-organized parent may exclude those equity and/or voting interests that are held by a single non-WTO investor or "group" of non-WTO investors in an amount that constitutes 5 percent or less of the U.S. parent's total capital stock (equity) and/or voting stock. For this purpose, two or more non-WTO investors will be treated as a "group" when the investors have agreed to act together for the purpose of acquiring, holding, voting, or disposing of their equity and/or voting interests in the U.S. parent company or any intermediate company(ies) through which any of the investors holds its interests in the U.S. parent.

(a)(2) Any individual or entity that, directly or indirectly, creates or uses a trust, proxy, power of attorney, or any other contract, arrangement, or device with the purpose of divesting itself, or preventing the vesting, of an equity interest or voting interest in the U.S. parent as part of a plan or scheme to evade the application of the Commission's rules or policies that apply to non-WTO investment under section

310(b)(4) shall be subject to enforcement action by the Commission, including an order requiring divestiture of the investor's direct or indirect interests in the U.S. parent.

(b) The section 310(b)(4) ruling issued to the U.S. parent named in the ruling shall cover the applicant(s), licensees(s), and spectrum lessee(s) that are the subject of the ruling *and* any other subsidiary or affiliate of the named U.S. parent, whether existing at the time the ruling is issued or formed or acquired subsequently, *provided* that the U.S. parent remains in compliance with the terms and conditions of its ruling.

Note 1 to paragraph (b): For purposes of this paragraph, "subsidiary or affiliate" is defined as any entity that is wholly-owned and controlled by, or is under 100 percent common ownership and control with, the U.S. parent.

Note 2 to paragraph (b): A subsidiary or affiliate filing an application for an initial common carrier, aeronautical en route, or aeronautical fixed radio station license or spectrum leasing arrangement, or an application to acquire such license or spectrum leasing arrangement by assignment or transfer of control, shall attach to its application a certification, signed by the U.S. parent, stating that the U.S. parent is in compliance with the terms and conditions of its section 310(b)(4) ruling(s). The certification shall also provide the citation(s) of the U.S. parent's section 310(b)(4) ruling(s) (*i.e*., the DA or FCC Number, FCC Record citation when available, and release date).

(c) The section 310(b)(4) ruling issued to the U.S. parent named in the ruling shall cover any successor-in-interest to the U.S. parent that takes the place of the U.S. parent in the vertical ownership chain of the applicant(s), licensee(s), or spectrum lessee(s) covered by the U.S. parent's section 310(b)(4) ruling, *provided* that the foreign ownership of the successor-in-interest complies with the terms of the ruling. The successor-in-interest shall notify the Commission within 30 days of the reorganization. The notification shall include a certification, signed by the successor-in-interest, stating that it is in compliance with the terms and conditions of the section 310(b)(4) ruling(s) issued to the former U.S. parent, which shall be named in the certification. The certification shall also provide the citation(s) of the section 310(b)(4) ruling(s) (*i.e*., the DA or FCC Number, FCC Record citation when available, and release date). The notification shall be filed electronically on the Internet through the International Bureau Filing System (IBFS). For information on filing the notification through IBFS, see Part 1, Subpart Y and the IBFS homepage at http://www.fcc.gov/ib.

(d) The section 310(b)(4) ruling issued to the U.S. parent named in the ruling shall permit the insertion of new, foreign-organized companies at any level in the vertical ownership chain above the U.S. parent *provided* that any new foreign-organized company(ies), either alone or together, are under 100 percent common ownership and control with the controlling foreign parent for which the U.S. parent has received prior Commission approval

Example. U.S. parent company ("U.S. Parent A") receives a section 310(b)(4) ruling that approves its 100% foreign ownership by a foreign-organized company ("Foreign Company"). Foreign Company is minority owned (20%) by U.S.-organized Corporation B, with the remaining 80% controlling interest held by Foreign Citizen C. After issuance of the section 310(b)(4) ruling to U.S. Parent A, Foreign Company forms a wholly-owned, foreign-organized subsidiary ("Foreign Subsidiary ") to hold all of Foreign Company's shares in U.S. Parent A. There are no other changes in the direct or indirect foreign ownership of U.S. Parent A. The insertion of Foreign Subsidiary into the vertical ownership chain of U.S. Parent A would not require prior Commission approval.

(e) The section 310(b)(4) ruling issued to the U.S. parent named in the ruling shall permit the insertion of new, foreign-organized companies into the vertical ownership chains of non-controlling foreign investors for which the U.S. parent has received specific approval under §1.991(i) *provided* that any new foreign company is under 100 percent common ownership and control with the approved foreign investor.

Example. U.S. parent company ("U.S. Parent A") receives a section 310(b)(4) ruling that specifically approves Foreign Citizen B's planned acquisition of a non-controlling, 30% common stock interest in U.S. Parent A. Two years after issuance of the section 310(b)(4) ruling to U.S. Parent A, Foreign Citizen B organizes a wholly-owned foreign corporation to hold Foreign Citizen B's common stock interest in U.S. Parent A. U.S. Parent A would not be required to seek Commission approval for this change.

(f) The U.S.-organized parent company named in the ruling (or a U.S.-organized successor-in-interest formed as part of a *pro forma* reorganization) shall file a new petition for declaratory under § 1.990 to obtain Commission approval *before* its direct or indirect foreign ownership exceeds the routine terms and conditions of this section and any specific terms or conditions of its ruling.

(g) (1) A U.S.-organized parent company that has received a section 310(b)(4) ruling from the Commission shall file with the Commission a certification of compliance with the section 310(b)(4) ruling every four (4) years after the anniversary of the effective date of the ruling. The U.S. parent shall base its certification of compliance on information that is current at least as of 8 months prior to the date the certification must be filed with the Commission. Its certification of compliance with respect to the calculation of ownership interests disclosed in its petition shall be based upon its review of the Commission's rules, such that it is able to certify that the interests disclosed satisfy each of the pertinent standards and criteria required by the rules.

(g)(2) If at any time the U.S. parent knows, or has reason to know, that it is no longer in compliance with its ruling, the U.S. parent shall file a statement with the Commission explaining the circumstances within 30 days of the date the U.S. parent knew, or had reason to know, that it was no longer in compliance with its ruling. Subsequent actions taken by or on behalf of the U.S. parent to remedy its non-compliance shall not relieve the U.S. parent of the obligation to notify the Commission of the circumstances (including duration) of non-compliance. The U.S. parent, any affiliated licensees or spectrum lessees covered by the section 310(b)(4) ruling, and any controlling companies, whether U.S.- or foreign–organized, shall be subject to enforcement action by the Commission for non-compliance with the section 310(b)(4) ruling.

PART 25 – SATELLITE COMMUNICATIONS

4. **The authority citation for part 25 is amended to read as follows:**

AUTHORITY: 47 U.S.C. 701–744. Interprets or applies Sections 4, 301, 302, 303, 307, 309, 310 and 332 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 302, 303, 307, 309, 310 and 332, unless otherwise noted.

5. **Section 25.105 of Subpart A is added to read as follows:**

§ 25.105 Citizenship.

The Commission will not grant an authorization governed by this part to any individual or entity that is precluded from holding such authorization by section 310(a)-(b) of the Communications Act of 1934, as amended (47 U.S.C. § 310(a)-(b)). The rules that establish the requirements and conditions for obtaining the Commission's prior approval of foreign ownership in common carrier licensees that would exceed the

25 percent benchmark in section 310(b)(4) are set forth in §§ 1.990-1.994 of this chapter.

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

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

Today, we take another step in the FCC's agency-wide regulatory reform efforts, focused on eliminating unnecessary regulations, and improving the transparency and predictability of the Commission's work.

This is an effort that goes back to the first day of my tenure. And we have made substantial progress on regulatory reform. We've already eliminated more than 50 unneeded regulations, and we're working toward eliminating 25 unnecessary data collections. We've removed, or are in the process of removing, outmoded restrictions on spectrum use, including in the WCS, BRS, and EBS bands – and, this morning, we eliminated needless restrictions on wireless backhaul. In our white spaces proceeding last year, we removed restrictions in order to free up the largest amount of unlicensed spectrum in 25 years. We've moved to reduce regulatory barriers to broadband build-out in connection with tower siting and pole attachments.

We've also taken steps to reduce burdens on broadcast radio licensees by allowing them to rely on previous technical filings instead of having to submit a whole new set of filings. And we've begun eliminating the requirements to submit most of the reports currently collected on international communications, which will remove reporting requirements from hundreds of small businesses.

Our work over the past years has been consistent with the President's January Executive Order on improving regulation and regulatory review. When the President issued an Executive Order in July asking independent agencies to comply with the basic substance of the January Order, I welcomed it. And last week I was pleased to say to FCC staff that we would comply with the request in the Executive Order, and that we would perform our responsibilities consistent with the Order.

I'd like to thank Ruth Milkman for heading up our efforts on regulatory reform – and also for her blog post this morning with more detail on steps forward. I'm grateful to Ruth as well as Marius Schwartz, Austin Schlick, and Jessica Almond for ensuring that our processes and analyses continue to be consistent with the very best practices in government, and that they promote innovation, investment, and competition; benefit our economy; and benefit consumers.

In today's NPRM, we continue these efforts by proposing to eliminate unnecessary reporting obligations on U.S. wireless companies that have some foreign shareholders. We estimate that this will mean a 70 percent reduction in the number of foreign ownership filings by affected companies, and also significantly reduce the time and cost of each filing.

It will also provide greater certainty and transparency regarding the Commission's requirements and review process for wireless common carrier and satellite applicants. The Commission now has no rules clearly explaining the information it requires from these applicants when they seek approval of their foreign ownership. Adopting the approach we propose would increase transparency and predictability for companies seeking to invest in the United States.

Importantly, we propose to do this in a way that ensures we can meet our obligations regarding national security, law enforcement, and other issues involving foreign licensees. We will continue to collect all information needed to protect U.S. national security, law enforcement, foreign policy, and trade

policy interests.

This NPRM originated with the staff of the International Bureau, which developed and drove the proposed reforms based on their many years of experience with foreign ownership reviews. I thank them for their good ideas and hard work on this item.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

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 support today's Notice asking questions about the Commission's processes regarding foreign ownership matters under section 310(b) (4) of the Telecommunications Act. Foreign ownership is an important issue that can go to matters of national security and national competitiveness, and this is truer than ever in this age of technology revolution. So we need to be sure, in whatever we do going forward on this item, that we understand the extent of foreign ownership in our telecommunications industries, what impact it has had, what direction it is tending, and what have been its benefits and costs to American consumers, American businesses and America's well-being. We need to be sure the right questions get asked here and that we avoid any outcome that might not be in the interests of our trade policy and other national interests.

So while I do not oppose exploring reasonable ways to relax unnecessary filing requirements, I don't want us to assume going in that they are patently or unnecessarily onerous. Some of the proposals here may make good sense: for example, issuing foreign ownership decisions in the name of the U.S. parent of the licensee, the entity to whom section 310(b)(4)'s foreign ownership requirements applies, rather than the licensee. But there are several others where we must be cautious and thoughtful: the current distinction between WTO and non-WTO countries is a good example. Any proposal to do away with this distinction in the name of making life easier on applicants strikes me as not without some risk. The number of WTO countries has shot up from 69 in 1998 to 153 today. The relatively few remaining non-WTO countries include Iran and Libya. I will keep an open mind as we analyze the record, but it is not at all clear to me that we should be giving these countries the presumption of open markets that we have accorded WTO countries.

As to the cost to parties to comply with our filing requirements, I'll be looking for specific, credible evidence. Anecdotal evidence suggests to me that the regulatory burdens associated with our foreign ownership reviews have hardly discouraged foreign investment in the United States telecom market, but it is critical that we have the hard information before us in order to make good and accurate determinations. Reducing corporate costs in a worthy goal, but it must never come at the expense of ignoring our clear Congressional mandate. I also want to emphasize the importance of Commission coordination with our federal partners in this area. We must continue to work closely with our fellow expert agencies such as the Department of Justice and the United States Trade Representative to properly evaluate the effects of proposed foreign ownership of licensees. We bring an expertise to that dialogue that no one else possesses. Additionally we must always be cognizant of our special FCC charge to regulate the *public* airways in the *public* interest.

Congress put serious and I think generally clear obligations on the FCC to probe deeply all aspects of foreign ownership, and we need to be vigilant that nothing we do in any of these proceedings ham-strings us from conducting the depth and breadth of analysis necessary to ensure that the intent of Congress in section 310 is met.

My thanks to Mindel De La Torre and our fine International Bureau team for bringing this item to us. I look forward to a fulsome record and to working with my Bureau and Commission colleagues to craft workable and effective processes in this important area.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

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

Our globe is shrinking. As economic and political freedom proliferates, the economies of the world are becoming increasingly inter-dependent. As such, investment capital flows more freely across borders than at any time in history. Capital is attracted to opportunity, and the U.S. offers tremendous economic opportunities to investors of all nations, especially in the information, communications and technology (ICT) sector.

Foreign investment continues to be an important source of equity financing for U.S. telecommunications companies, and ultimately fosters technical innovation, economic growth and job creation within America's own borders. Yet, in most instances, wireless licensees face significant regulatory hurdles in obtaining approval of foreign ownership under Section 310(b)(4) of the Act. These include considerable time commitments and an investment of significant expenses, to name just two. This fact-intensive and time-consuming process is also a strain on the Commission's own scarce resources. Regulatory barriers such as these inhibit investment in U.S. companies and our economic resilience is what suffers most as a result. Thankfully, Congress has given us the flexibility to modernize our policies and rules in this area. And, I applaud Chairman Genachowski for bringing this review forward.

I also thank the Chairman for his willingness to accept edits that allow for detailed comment on the levels of foreign ownership in the wireless marketplace, the benefits associated with foreign equity, as well as the distinction between WTO and non-WTO Member investment established by the Commission in 1997. Although we do not seek to modify the Commission's ability to condition or disallow foreign investment that may pose a risk of harm to national policies, the array of questions in the notice will significantly improve our ability to analyze these important issues in a granular and meaningful way.

I am hopeful that this notice will eventually produce new policies that will promote additional investment in the American ICT sector, thus expanding our economy while spurring innovation and job growth. Many thanks to the talented International Bureau team for your thoughtful efforts. I am eager to engage with you and all interested parties as our review moves forward.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

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

This item is another example of how the Commission is working hard to comply with both the spirit and language of President Obama's Executive Order, instructing federal agencies to remove regulations that unnecessarily impede investment and business development. Section 310(b)(4) of the Communications Act, sets a 25 percent benchmark for investment by foreign entities in U.S.-organizations that directly or indirectly control certain FCC licensees. That statute also requires the Commission to review foreign ownership levels, which exceed that benchmark, to ensure such ownership would not harm our Nation's interest in competition, security, law enforcement, foreign policy, or trade policy. But as the item recognizes, the legal and other administrative costs that U.S. parent companies face, when trying to comply with 310(b)(4), are not mandated by Congress. Therefore, I commend the International Bureau for crafting proposals that could cut the number of 310(b)(4) petitions, filed each year, by more than 70 percent.

The streamlining measures proposed in this NPRM are not just important because they comply with a Presidential directive. In fact, private investment, both domestic and foreign, furthers our interests in maximum broadband adoption and in economic growth. As the National Broadband Plan pointed out, investment in information and communications technologies, accounted for almost two-thirds of all economic growth, attributed to capital investment in the United States between 1995 and 2005. Therefore, we need to find ways that companies, who are interested in investing in the U.S. communications industry, will spend less money on legal fees and more money financing our companies.

I again thank Mindel De La Torre, and her staff, for their leadership on these issues.