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

In the Matter of	)	
	)	
Review of Foreign Ownership Policies for Broadcast, Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended	)	GN Docket No. 15-236

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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I. INTRODUCTION AND SUMMARY

The National Association of Broadcasters (NAB)[1] hereby responds to the *Notice of Proposed Rulemaking*[2] in the above captioned proceeding. The Commission stated in the *Notice* that it intends to simplify the broadcast foreign ownership approval process by "extending the streamlined rules and procedures" that apply to common carrier and aeronautical licensees ("wireless licensees") to broadcast licensees ("broadcasters").[3] NAB supports the Commission's stated goal and applauds the Commission's proposal to ease burdens faced by broadcasters. There is no legal or policy basis for broadcasters to be subject to disparate regulations that impede their ability to attract foreign investment.

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[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of free local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *Review of Foreign Ownership Policies for Broadcast, Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 80 F.R. 68815 (Oct. 22, 2015) ("*Notice*").

[3] *Id*. at ¶ 1.

Approximately 70 to 80 percent of publicly traded shares are held in "street name,"[4] which, under the Commission's current broadcast radio and TV foreign ownership rules, puts that sizeable capital off limits to broadcasters. Modernizing the foreign ownership rules will better account for this reality and its impact on today's communications marketplace, enhancing the ability of broadcasters to attract investment capital and compete in the marketplace, and encouraging diversity of ownership and greater innovation. As Commissioner Clyburn has observed, "[c]ompetition and innovation in media in the 21st century move at warp speed, and in order to keep pace, broadcasters need new and increased sources of capital."[5] The Commission should take this opportunity to adopt a number of proposals, including allowing aggregate foreign ownership of broadcasters of up to 100 percent, the presumption permitting nonattributable foreign ownership in broadcasters of up to 49.99 percent without prior commission approval, and the extension to broadcasters of Section 310(b)(4) of the Communications Act of 1934[6] declaratory ruling petition ("petition") procedures applicable to wireless licensees.

A more clearly defined review and approval process will provide licensees greater transparency and predictability. As the Commission has previously stated, providing a clearer statement about foreign ownership policies has "the potential to spur new and increased

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[4] *See* Comments of the National Association of Broadcasters, MB Docket 14-109, at 2 (Aug. 28, 2014) (citing Alan L. Beller and Janet L. Fisher, *The OBO/NOBO Distinction in Beneficial Ownership: Implications for Shareholder Communications and Voting*, Council of Institutional Investors, at 5 (Feb. 2010), *available at* http://www.sec.gov/comments/s7-14-10/s71410-22.pdf ("*CII Report*") (last visited Dec. 15, 2015).

[5] *See* Comments of the National Association of Broadcasters, MB Docket 15-126, at 3-4 (July 1, 2015) (quoting *Statement of Commissioner Mignon Clyburn*, *Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees*, Declaratory Ruling, 28 FCC Rcd 16244 (2013)).

[6] 47 U.S.C. § 310(b)(4).

opportunities for capitalization for broadcasters, and particularly for minority, female, and small business entities, and new entrants."[7] Uncertainty in the Commission's approach to reviewing broadcasters' foreign ownership petitions leads to risks that deter investments in broadcast companies.

NAB also supports the Commission's proposal to improve the methodology broadcasters use to assess compliance with the foreign ownership benchmarks. As the Commission recognized in the 2015 Pandora Radio, LLC ("Pandora") proceeding, the procedures currently required of broadcasters are unduly burdensome and unnecessary even when considered under a totality of the circumstances standard.[8] While NAB supports the general premise of bringing broadcast foreign ownership policies in line with wireless licensees, however, NAB encourages the Commission to further revise its compliance procedures. The Commission stated in the *Notice* that streamlining compliance practices is an issue that is "not limited to broadcasters," [9] and NAB proposes certain changes that will benefit all licensees, including wireless licensees.

II. REVISING THE CURRENT FOREIGN OWNERSHIP RULES AND POLICIES WILL ENCOURAGE COMPETITION IN THE COMMUNICATIONS MARKETPLACE, INCREASE INVESTMENT IN THE BROADCAST INDUSTRY, AND ENHANCE DIVERSITY OF SERVICES AND OWNERSHIP

Though the Commission's current rules under Section 310(b)(4) provide that the Commission will consider indirect foreign investment in broadcasters above the 25 percent threshold, practice has demonstrated that in today's economy the rules unduly restrict

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[7] *See Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees*, Declaratory Ruling, 28 FCC Rcd 16244, 16244 ¶ 10 (2013) ("*2013 Broadcast Clarification Order*").

[8] *Pandora Radio LLC Petition for Declaratory Ruling Under Section 310(b)(4)*, Declaratory Ruling, 30 FCC Rcd 5094, ¶ 10 (2015) ("*Pandora Declaratory Ruling*"), *recon. denied,* 30 FCC Rcd 6961 (2015).

[9] *Notice* at ¶ 27.

broadcasters' ability to compete in the communications marketplace and obtain needed investment.[10]

A. Modernizing the Restrictions on Foreign Ownership Will Allow Broadcasters to Better Compete in Today's Marketplace

When the Commission amended the foreign ownership rules in 2013 for wireless licensees, it recognized that "foreign investment has been and will continue to be an important source of financing for U.S. telecommunications companies, fostering technical innovation, economic growth and job creation."[11] The same rings true for broadcast TV and radio companies. Providing broadcast companies with the same opportunity as other Commission regulatees for new sources of financing is not only fair, but also it will promote robust competition in the communications marketplace, affording broadcasters needed resources to invest more in their existing program services and to finance new diverse offerings.[12]

Modernizing the Commission's foreign ownership rules also has the potential to promote increased diversity of ownership. Women and racial and ethnic minorities continue to be underrepresented in the ownership of broadcasters, and as NAB, minority organizations, the Commission and Congress have all recognized, access to capital is a leading – if not the

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[10] *See* Comments of the National Association of Broadcasters, MB Docket 14-109, at 2 (Aug. 28, 2014) (stating that the Commission's *Suggestions for Meeting Citizenship Requirements of Corporate Applicants* functions as a "*de facto* ban on investment by publicly-traded entities in broadcast licensees"); *see also* Comments of Adelante Media Group, MB Docket 13-50, at 2 (Apr. 15, 2013); Comments of Nexstar Broadcasting, Inc., MB Docket 13-50, at 2-3 (Apr. 15, 2013); Comments of National Association of Media Brokers, MB Docket 13-50, at 2-3 (Apr. 15, 2013).

[11] *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees Under Section 310(b)(4)*, Second Report and Order, 28 FCC Rcd 5741 at ¶ 3 (2013) (adopting 47 C.F.R. §§ 1.990-1.994) ("*2013 Foreign Ownership Second Report and Order*").

[12] *See id*. at 3; *see also* Comments of the National Association of Broadcasters, MB Docket 13-50, at 4-6 (Apr. 15, 2013).

leading – barrier to business ownership for women and minorities, in broadcasting and small businesses more generally.[13] As of 2013, women held a majority of voting interests in 6.3 percent of full power commercial television stations,[14] compared with men, who held a majority of voting interests in 72.5 percent of full power commercial television stations.[15] Racial minorities collectively or individually held a majority of the voting interests in 3.0 percent of full power commercial television stations,[16] compared with whites, who collectively or individually held a majority of the voting interests in 77.2 percent of full power commercial television stations.[17] Lack of access to capital in today's marketplace discourages new entrants to the marketplace, and it particularly discourages entry by women and minorities.

Amending foreign ownership limitations will also help foster reciprocal opportunities for American broadcasters to invest in foreign radio and television markets. The limitations on foreign ownership of American broadcasters under 310(b) "has been used over the years as an excuse by other nations to retain indefensible trade barriers that harm U.S. companies."[18] NAB, and the more than 30 national minority and civil rights organizations that have

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[13] *See* NAB Comments, MB Docket 13-50, at 5, n.13; *see also* Letter from Senator Sharon Weston Broome of the National Organization of Black Elected Legislative Women, MB Docket 13-50, at 1 (April 30, 2013); Letter from Minority Media and Telecommunications Council, MB Docket 13-50, at 1 (April 15, 2013); Letter from Jason T. Lagria, Asian American Justice Center, MB Docket 13-50, at 1 (April 15, 2013).

[14] *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*; *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*; *Promoting Diversification of Ownership in the Broadcasting Services*, Report on Ownership of Commercial Broadcast Stations, 29 FCC Rcd 7835, at ¶ 5 (June 27, 2014).

[15] *Id*. at 4, ¶ 5.

[16] *Id*. at 4, ¶ 7.

[17] *Id*. at 4-5, ¶ 7.

[18] Commissioner Michael O'Rielly, *Affirmatively Expand Permissible Foreign Ownership*, FCC Blog (Mar. 3, 2015, 4:03 PM), https://www.fcc.gov/news-events/blog/2015/03/03/affirmatively-expand-permissible-foreign-ownership.

previously commented, [19] echo the Commission's goal that by amending domestic restrictions on foreign investment, "other countries . . . will liberalize restrictions on investment in their media market" so that domestic entities may invest abroad.[20]

B. NAB Applauds the Commission for Recognizing that Broadcasters are Unduly Burdened Under the Current Broadcast Foreign Ownership Standards

The current rules unduly burden broadcasters with onerous foreign ownership standards that impede their ability to compete in the video distribution marketplace. As NAB previously noted, other media outlets offer content to consumers without any foreign ownership limitations, and other telecommunications companies, such as wireless providers, operate under the more flexible 2013 standard.[21] As the Commission recognized in its 2013 Second Report and Order, the 25 percent threshold, for instance, limits the flexibility of companies to sell their equity securities, unnecessarily impedes foreign investment and "may be unnecessary to protect against potential harms to competition or other relevant public interest concerns."[22]

The Commission was correct to amend the rules in 2013, and there is no rational basis for broadcasters to be subject to disparate regulations.[23] Previous Commission actions

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[19] *See* Comments of the Minority Media and Telecommunications Council, MB Docket 13-50, at 1 (Apr. 15, 2013); Comments of the Asian American Justice Center, MB Docket 13-50, at 1 (Apr. 15, 2013).

[20] *Notice* at ¶ 10, n.34.

[21] *See* Comments of the National Association of Broadcasters, MB Docket 15-126, at 2 (July 1, 2015)

[22] *2013 Foreign Ownership Second Report and Order*, at ¶ 80.

[23] *See e.g.*, *Fulton Corp. v. Faulkner*, 516 U.S. 325, 340-45 (1996) (disparate treatment of similarly situated companies resulted in striking down of an economic regulation on the basis of equal protection and rational basis review); *see also Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 969-70 (D.C. Cir. 1999) (finding FCC decision arbitrary and capricious where it failed to satisfactorily explain the disparate treatment of incumbent and new licensees, particularly why new licensees "should have a permanent advantage over incumbent" licensees); *Petroleum Commc'ns., Inc. v. FCC*, 22 F.3d 1164, 1172-73 (D.C. Cir. 1994) (finding FCC decision arbitrary and capricious where it failed to "provide adequate explanation before it treat[ed] similarly situated parties differently").

further support the move toward regulatory parity,[24] and NAB supports the Commission's proposal to achieve parity in this context.

C. Under Revised Foreign Ownership Rules, the Commission and Executive Branch Agencies Will Retain the Ability to Determine Whether Investments Pose Any Security Risks

The Commission has asserted that there are unique public policy and national security concerns in the broadcast context, and has used this rationale as justification for maintaining stricter foreign ownership policies for broadcast companies. This concern is misplaced for at least two reasons. First, the proposals in the *Notice* address standards for *indirect* foreign ownership under Section 310(b)(4), not direct ownership under Section 310(b)(3). Second, the revised rules will encourage investment by publicly-traded corporate investors, many of whom are domestic, and few of whom have a large enough share in any given company to exercise real power to influence content or operations decisions.

Ultimately, even in the context of revised foreign ownership rules, the Commission and Executive Branch agencies will retain the ability to evaluate transactions and protect against security threats. Broadcasters will still need to certify compliance. As Commissioner Rosenworcel noted, "just as horses and bayonets are not the tools of modern warfare, the cyber threats we face today are not especially well-guarded by this prohibition. Moreover, as scores of civil rights groups have acknowledged, this historical anomaly may have the effect of diminishing investment in small and minority-owned broadcasters."[25] Placing the burden on

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[24] *See, e.g.*, *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order in WT Docket 99-217, 23 FCC Rcd 5385, at ¶¶ 5, 10 (Mar. 21, 2008); *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, at ¶ 32 (Sept. 8, 2005); *Basic Service Tier Encryption*, Report and Order, 27 FCC Rcd 12786, at ¶¶ 8, 23 (Oct. 12, 2012).

[25] *Statement of Commissioner Jessica Rosenworcel*, *Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees*, Declaratory Ruling, 28 FCC Rcd 16244 (2013).

the Commission to demonstrate that a transaction resulting in 49.99 percent or less foreign ownership is not in the public interest appropriately balances national security interests with encouraging investments in broadcasters.

III. NAB SUPPORTS THE FCC'S STATED INTENT TO HARMONIZE BROADCAST FOREIGN OWNERSHIP POLICIES WITH COMMON CARRIER AND AERONAUTICAL RADIO LICENSEE POLICIES

NAB generally supports the Commission's goal to conform its analysis of broadcast foreign ownership to that of wireless licensees. As the Commission proposed in its *Notice*,[26] broadcasters should be permitted to utilize the same Section 310(b)(4) Petition procedures that have been available to wireless licensees since the Commission adopted the *2013 Foreign Ownership Second Report and Order*.[27]

A. Broadcasters Should be Permitted to Seek Commission Approval for up to 100 Percent Aggregate Foreign Ownership and for Approved Investors to Later Acquire a 100 Percent Controlling Interest

Specifically, the Commission should harmonize its petition requirements,[28] subject to the exceptions described herein and set forth in the *Notice*, by enabling broadcasters to file petitions seeking Commission approval for (i) up to 100 percent aggregate foreign ownership by unnamed and future, nonattributable foreign investors in the controlling U.S. parent of a broadcaster and (ii) any named foreign investor that proposes to acquire a less than 100

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[26] *See Notice* at ¶¶ 8-12.

[27] *See 2013 Foreign Ownership Second Report and Order*, 28 FCC Rcd 5741. The *2013 Foreign Ownership Second Report and Order* significantly streamlined the Petition process for wireless licensees, but the Commission first provided wireless licensees with procedures for seeking approval to exceed Section 310(b)(4)'s 25 percent foreign ownership threshold nearly 20 years ago. *See Market Entry and Regulation of Foreign-affiliated Entities*, Report and Order, 11 FCC Rcd 3873, 3943 ¶ 183 (1995).

[28] Section 310(b)(4), on its face, does not differentiate between broadcaster and common carrier wireless licensees, which further justifies the Commission's current proposal to increase the harmonization of the application of the statute to broadcasters and wireless licensees. 47 U.S.C. § 310(b)(4).

percent controlling interest to increase the interest to 100 percent at some time in the future.[29]

B. The Commission Should Adopt a New Presumption Permitting Nonattributable Foreign Ownership in Broadcasters Of Up to 49.99 Percent Without Prior Commission Approval

Consistent with its discussion in the *Notice*,[30] the Commission should permit broadcasters to have aggregate nonattributable foreign ownership of up to 49.99 percent without prior Commission approval. On its face, Section 310(b)(4) provides the Commission with a means of fundamentally reducing the regulatory burden imposed by the statute while fully achieving its public policy objectives.

As a result of the multitude of disparate media resources available to U.S. consumers today, Section 310(b)(4)'s foreign ownership limitations do not meaningfully limit the ability of foreign entities to make programming and information available to the American public. In addition to television and radio, which are subject to foreign ownership limitations under Section 310(b), U.S. consumers also regularly access programming, news, and other information via cable and satellite television, satellite radio, and an ever increasing variety of Internet audio and video streaming and download services, including smartphone and smart TV apps. None of these alternative media are subject to foreign ownership restrictions.

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[29] *See Notice* at ¶¶ 8-15; *2013 Foreign Ownership Second Report and Order*, 28 FCC Rcd at 5758-85, ¶¶ 28-79; 47 C.F.R. §§ 1.990-994. In addition, if the Commission declines to adopt the presumption proposed herein, then, consistent with the wireless licensee petition rules, the Commission also should permit any non-controlling foreign investor named in a petition granted by the Commission to increase its voting and/or equity interest up to 49.99 percent without additional approval.

[30] *See Notice* at ¶ 36 (requesting comment on whether the FCC should "extend to a finding that the public interest would be served by permitting a U.S. public company to have up to an aggregate less than 50 percent (or some higher level) non-controlling foreign investment, even with individual investments that may be required to be reported under the Exchange Act Rule 13d-1, without individual review and approval").

Accordingly, any role that Section 310(b) may once have had in enabling the Commission to control the ability of foreign entities to disseminate programming in the United States[31] has been extremely diluted by past (cable and satellite television and radio) and more recent (Internet) technological advances. Moreover, as set forth in Part II herein, Section 310(b)'s foreign ownership restrictions competitively disadvantage broadcasters by restricting their access to foreign capital relative to these competitors.

Section 310(b)(4) provides the Commission with ample authority to take into account the evolution of the media landscape when implementing the statute. Rather than imposing a 25 percent cap on foreign ownership absent a Commission waiver of the cap, Section 310(b)(4) instead requires the Commission to affirmatively determine that the public interest would be served by the refusal or revocation of a license if the licensee has indirect controlling foreign ownership in excess of 25 percent.[32] Absent such a determination by the Commission, licensees presumptively may exceed the 25 percent indirect foreign ownership threshold set forth in the statute. Thus, the Commission should promulgate the proposed rule

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[31] *See 2013 Broadcast Clarification Order*, 28 FCC Rcd at 16244 (citing *Radio Communications: Hearing on S. 3620 and S. 5334 Before the H. Commerce Comm.*, 62nd Cong. 35-37 (912) for the proposition that Section 310(b) was originally conceived to "thwart the airing of foreign propaganda on broadcast stations"); *Request for Declaratory Ruling Concerning the Citizenship Requirements of Section 310(b)(3) and (4)*, Declaratory Ruling, 103 FCC.2d 511, 516-17 ("Section 310(b) reflects the broader purpose of 'safeguard[ing] the United States from foreign influence' in the field of broadcasting. The specific citizenship requirements governing positional, ownership and voting interests reflect a deliberate judgment on the part of Congress as to the limitations necessary to prevent undue alien influence in broadcasting.") (internal citations omitted).

[32] *See* 47 U.S.C. § 310(b)(4) ("No broadcast or common carrier or 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*.") (emphasis added).

that, on a generally applicable, blanket basis, nonattributable foreign ownership in a broadcast licensee of up to 49.99 percent is not contrary to the public interest.

Even if the Commission maintains that it has a continuing obligation under Section 310(b)(4) to protect the public interest by regulating the ability of foreign entities to influence the programming decisions of broadcasters,[33] the proposed blanket presumption does not undermine this objective because it only would be applicable to nonattributable interests. The Commission repeatedly has held that its broadcast attribution rules "seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions."[34] Accordingly, none of the nonattributable foreign interest holders in a broadcaster that would be newly permitted without prior Commission approval under this approach will have the capability to influence programming decisions. Therefore, this additional liberalization of the Commission's implementation of Section 310(b)(4) does not pose any potential public interest harms.[35]

In addition to not impeding the Commission's policy objectives under Section 310(b)(4), such a blanket presumption would provide affirmative and practical benefits to

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[33] *See, e.g.*, *Notice* at ¶ 21 ("The Commission's approach to the benchmark for foreign investments in broadcast licensees has reflected heightened concern for foreign influence over or control over broadcast licensees which exercise editorial discretion over the content of their transmissions.") (internal citations and quotations omitted); *2013 Broadcast Clarification Order*, 28 FCC Rcd at 16253, ¶ 16 ("[W]e do not believe that the historical statutory concern for foreign influence over broadcast stations has disappeared.").

[34] *Notice* at ¶ 14; *see also Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests et al.*, Report and Order, 14 FCC Rcd 12559, 12559 ¶ 1 (1999) ("The mass media attribution rules seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions.").

[35] *See* Comments of the National Association of Broadcasters, MB Docket No. 14-109, at 4-5 (Aug, 28, 2014).

broadcasters. First, it would clearly decrease the frequency with which broadcasters are required to file petitions, thus reducing unnecessary regulatory burdens on broadcasters and agency staff. Second, this approach will provide broadcasters with additional "headroom" when determining their compliance with Section 310(b)(4). Once a broadcaster has determined that it has no attributable ownership, which, as set forth in Part IV below, can be accomplished through publicly available Securities and Exchange Commission ("SEC") filings, and that it is more than 50 percent domestically owned and controlled (rather than the current 75 percent), the broadcaster will not need to continue to expend resources in an attempt to determine the identity and citizenship of any additional interest holders.

For these reasons, the Commission should adopt a blanket presumption that the public interest is not served by limiting to 25 percent the aggregate nonattributable foreign ownership in broadcasters. Instead, the Commission should permit nonattributable foreign entities to acquire aggregate voting and equity interests in broadcasters of up to 49.99 percent without prior Commission approval. Doing so will provide meaningful benefits to broadcasters, is permitted by Section 310(b)(4), and will not undermine the Commission's ability to achieve its policy objectives under Section 310(b)(4).

C. The Commission Should Extend to Broadcasters the Section 310(b)(4) Petition Procedures Applicable to Wireless Licensees

The Commission should provide broadcasters with concrete guidance regarding the procedures and substantive evaluation criteria that the Commission will apply to broadcaster petitions. Although the Commission explained in its *2013 Broadcast Clarification Order* that it is amenable to the filing of petitions by broadcasters, only a single such petition has been

filed to date —by Pandora.[36] As acknowledged by the Commission in the *Notice*,[37] this is in large part due to the regulatory uncertainty currently surrounding the procedures to be used by broadcasters when filing petitions, as well as uncertainty regarding the public policy considerations that will be used by the Commission to evaluate any such broadcast petitions. By contrast, the Commission provided and codified such guidance to wireless licensees, and thus a substantial number of petitions have been filed by wireless companies since the Commission issued the *2013 Foreign Ownership Second Report and Order*.[38] The Commission's experience in the wireless context demonstrates the benefit provided by the regulatory clarity of the wireless licensee petition procedures.

Unlike the *2013 Broadcast Clarification Order*, which stated only that broadcast petitions would be addressed on a case-by-case basis,[39] the detailed formal guidance

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[36] *See Pandora Declaratory Ruling*, 30 FCC Rcd 5094 (2015).

[37] *Notice* at ¶ 9 ("The [Pandora Petition] proceeding illustrated a need for greater clarity and certainty in the foreign ownership context for broadcasters ...."); *see id*. at ¶ 12 ("We believe this approach will reduce uncertainty regarding the treatment of foreign investment in broadcast properties and reduce burdens on filers by providing a streamlined, uniform process.").

[38] *See, e.g.*, *International Authorizations Granted*, Public Notice, 28 FCC Rcd 8006 (2013); *Applications of Softbank Corp. et al. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, Declaratory Ruling, and Order on Reconsideration, 28 FCC Rcd 9642 (2013); *Verizon Communications Inc. Seeks Foreign Ownership Ruling Pursuant to Section 310(b)(4)*, Public Notice, 28 FCC Rcd 16432 (2013); *International Authorizations Granted*, Public Notice, 29 FCC Rcd 140 (2014); *International Authorizations Granted*, Public Notice, 29 FCC Rcd 462 (2014); *International Authorizations Granted*, Public Notice, 29 FCC Rcd 1797 (2014); *International Authorizations Granted*, Public Notice, 29 FCC Rcd 5155 (2014); *International Authorizations Granted*, Public Notice, 29 FCC Rcd 1433 (2014); *International Authorizations Granted*, Public Notice, 30 FCC Rcd 3641 (2015); *International Authorizations Granted*, Public Notice, 30 FCC Rcd 4789 (2015); *Applications of LightSquared Subsidiary LLC for Consent to Assign and Transfer Licenses and Other Authorizations and Request for Declaratory Ruling on Foreign Ownership*, Memorandum Opinion and Order and Declaratory Ruling, IB Docket No. 15-126, 2015 FCC LEXIS 3716 (Dec. 4, 2015).

[39] *2013 Broadcast Clarification Order*, 28 FCC Rcd at 16250, ¶ 11 ("We have given, and will continue to give, the fact-specific, individual case-by-case review the statute calls for to applications involving broadcast stations."). Recognizing that the case-by-case review described in the *2013 Broadcast Clarification Order* may not provide broadcasters with sufficient clarity regarding the Commission's filing and evaluation procedures applicable to broadcast Petitions, the Commission stated at the time

provided in the *2013 Foreign Ownership Second Report and Order* promotes efficiency and predictability, both of which are crucial to investors.[40] Absent such efficiency and predictability, potential foreign investors in the broadcast industry may be hesitant to commit the time and resources necessary to explore and negotiate broadcast investments. This is especially true given the dearth of Commission broadcast petition precedent on which potential foreign investors in the broadcasting industry can rely to assess the Commission's likely approach to evaluating their proposed investments. By adopting its *Notice* proposals to better harmonize the broadcaster and wireless licensee petition procedures, the Commission will provide potential foreign investors with the concrete guidance they need to justify expending the resources necessary to invest in the broadcast market. In turn, this will unlock new sources of capital for broadcasters.[41]

1. Broadcasters Only Should be Required to Disclose Attributable Interest Holders Consistent with the Existing Broadcast Attribution Rules in Petitions

As the Commission proposes,[42] broadcasters only should be required to disclose in petitions their attributable interest holders based on the existing broadcast attribution rules.[43]

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that it "may in the future elect to create a standardized review process similar to that adopted in the common carrier context." *Id.* at ¶ 15.

[40] *See Notice* at ¶ 10.

[41] *See supra* Part II(A) herein.

[42] *Notice* at ¶¶ 13-14.

[43] The petition disclosure requirement, however, should not extend to entities that are deemed to hold an attributable interest in a broadcaster but that do not hold an equity or voting interest in the broadcaster, such as (i) a broadcaster's officers and directors who do not otherwise hold attributable ownership interests in the broadcaster, (ii) lenders that are deemed attributable under the Equity Debt Plus rule, and (iii) programming and advertising brokers pursuant to time brokerage and joint sales agreements. *See* 47 C.F.R. § 73.3555 n.2(g), (i)-(k). In addition, broadcasters should be freely permitted to identify nonattributable interest holders in petitions so that they will not be required to seek additional Commission foreign ownership approval for these entities to become attributable in the future.

Note 2 of Section 73.3555 of the Commission's rules,[44] as well as a substantial body of precedent interpreting this provision, establish the attribution threshold for interest holders in broadcasters. These regulations and policies dictate which interest holders are required to be disclosed in FCC Form 323 biennial broadcast ownership reports and in assignment and transfer of control applications, FCC Forms 314, 315, and 316. The broadcast attribution rules also are used to apply the Commission's multiple ownership and cross-ownership rules.[45] Consequently, broadcasters already are very familiar with these rules and policies and already are required to know the identity of their attributable interest holders.

By contrast, if the Commission adopts a new and different threshold for petition disclosures, such as the 10 percent direct and indirect equity and voting threshold generally applicable to wireless licensees,[46] broadcasters would be required to maintain a separate and distinct understanding of their ownership solely for the purpose of filing petitions and monitoring their foreign ownership. Such an inconsistency between petition disclosure requirements and the Commission's longstanding broadcast attribution rules would be administratively cumbersome and would impose additional and unnecessary regulatory costs on broadcasters.[47]

In addition, the Commission has emphasized that its implementation of Section 310(b)(4) is focused on identifying interest holders that have the ability to influence the

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[44] 47 C.F.R. § 73.3555 n.2.

[45] *See* 47 C.F.R. §§ 73.3555(a)-(e) (setting forth the local radio ownership rule, the local television multiple ownership rule, the radio-television cross-ownership rule, the daily newspaper cross-ownership rule, and the national television ownership rule).

[46] *See* 47 C.F.R. § 1.991(e).

[47] *See Notice* at ¶ 14.

selection of programming by broadcasters.[48] Similarly, the broadcast attribution rules emphasize voting authority.[49] Under most circumstances, only stockholders with voting interests of 5 percent or more and uninsulated limited partners and limited liability company ("LLC") members deemed to be materially involved in the management or operation of a broadcaster are attributable.[50] Consequently, the broadcast attribution rules are ideally suited to serve as a threshold for determining which interest holders a broadcaster should be required to identify in a petition.

For these reasons, the Commission should not apply separate and different attribution standards to broadcasters in the attribution and petition contexts. However, as NAB has previously noted, the Commission should evaluate its broadcast attribution standards to determine whether they are overly broad.[51] Attributing holders of minority interests that have no realistic potential to influence a broadcast licensee unduly restricts passive investment opportunities.[52] Broadcasters should be permitted to benefit from an updated attribution standard for purposes of multiple and foreign ownership compliance.

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[48] *See 2013 Broadcast Clarification Order*, 28 FCC Rcd 16244.

[49] *See Notice* at ¶ 14 ("Our media attribution rules seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the programming decisions of licensees or other core operating functions.") (internal citations omitted).

[50] *See* 47 C.F.R. § 73.3555, n.2(a), (e)-(f); *see also id.* n.3.

[51] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Reply Comments and Comments in Support of NCTA's Petition for Rulemaking of the National Association of Broadcasters, CS Docket 98-82 (Feb. 19, 2002).

[52] *See The Commission's Cable Horizontal and Vertical Ownership Limits*, Comments of the National Association of Broadcasters, MM Docket 92-264, at 10 (Mar. 28, 2008) (many broadcasters have found that prospective investors in broadcasting entities view non-attribution of their interests as an attractive feature, and that these investors "seek to invest for the very opportunity to rely on management's judgment for a monetary return, and have no interest in influencing management").

2. *The Commission Should Permit Broadcasters to File Petitions Retroactively Under Limited Circumstances*

The Commission should permit a broadcaster to seek retroactive Commission approval for new or newly attributable foreign shareholders. Specifically, a broadcaster should be permitted to file a petition to seek retroactive Commission approval of the interest within 30 days of learning of the circumstance. For publicly traded broadcasters, this 30-day period should commence when the foreign investor files a notice with the SEC.[53] If the Commission declines to approve the petition, then the broadcaster should be required to have a mechanism available to render the foreign shareholder's interest nonattributable within 30 days following the Commission's decision.[54] The Commission should not deem a broadcaster to have violated Section 310(b) due to circumstances beyond its control that are not reasonably foreseeable to the broadcaster.

Due to the highly liquid nature of today's stock exchanges, it often is not possible for a publicly traded broadcaster to know in advance that a foreign entity will acquire a new five percent stock interest in the broadcaster or that an existing nonattributable foreign interest holder will increase its voting interest in the broadcaster above five percent. Indeed, a publicly traded broadcaster may first learn of the accumulation of such a five percent interest by the foreign investor when the investor discloses the interest in an SEC filing.[55] Similarly, a publicly traded broadcaster that has not previously filed a petition may newly learn that its foreign

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[53] *See supra* Part (IV)(A) for a discussion of applicable SEC filing requirements.

[54] For example, the broadcaster's organizational documents could include a provision that authorizes the broadcaster to redeem the shareholder's interest as necessary to comply with Section 310(b)(4).

[55] Under the petition procedures proposed in the *Notice*, this scenario would require prior Commission approval if the previously nonattributable investor was not disclosed in a prior-filed petition.

ownership exceeds 25 percent (or the proposed 49.99 percent) through an SEC filing made by a new foreign investor.[56]

Moreover, there is no way for a publicly traded broadcaster to police, and thereby affirmatively prevent, either of these scenarios. In light of the high-volume, rapid trading that is prevalent on today's stock exchanges, it is not realistic for a publicly traded broadcaster to obtain the visibility and control over the trading of its shares at the level of granularity that would be necessary to detect and prevent a violation of Section 310(b)(4) in advance.[57] And a broadcaster cannot adequately resolve these issues by inserting a prophylactic provision in its organizational documents that purports to limit the transferability of its stock to prohibit a foreign investor from causing the broadcaster to exceed the Section 310(b)(4) foreign ownership threshold. As an initial matter, the foreign investor has no way of knowing the broadcaster's current level of foreign ownership and therefore cannot know whether its investment will cause the broadcaster to exceed the 25 percent (or 49.99 percent) threshold. Moreover, a broadcaster has no way of enforcing such a prophylactic provision against an investor until it learns of the investor's violation of the provision, and at that stage the broadcaster may already have exceeded a permissible level of foreign ownership—either under Section 310(b)(4) or under a previously granted petition.

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[56] In its *Notice*, the Commission proposes to require broadcasters to proactively report to the Commission within 30 days any non-compliance by the broadcaster with a petition previously granted by the Commission. The Commission further proposes for the reporting broadcaster to be subject to enforcement action with respect to such noncompliance. *Notice* app. at 40-41 (proposing new rule 47 C.F.R. § 1.5004(f)(1)). As set forth herein, NAB believes that it is inappropriate to hold a broadcaster responsible for any such noncompliance that was not reasonably foreseeable to the broadcaster.

[57] It also is not feasible for a privately held broadcaster with disperse indirect ownership, such as a broadcaster owned by multiple private equity firms, to continually monitor the citizenship of all of its indirect owners, each of which may change from U.S. to foreign at any time given the global reach of today's investors.

3. *Grant of a Broadcast Licensee's Petition by the Commission Should Provide Authority to its Affiliates, Should Apply to Radio and Television, and Should Not be Market-Specific*

For purposes of ensuring the efficiency of Commission processes and avoiding the transaction costs involved in the filing of duplicative petitions, a broadcast petition granted by the Commission should apply broadly, consistent with the application of petitions filed by wireless licensees. First, the Commission should apply to broadcast petitions the "automatic extension rule" applicable to wireless licensee petitions.[58] Specifically, any petition granted by the Commission to a broadcast licensee should also cover any then-current or subsequently formed or acquired subsidiaries and affiliates of the petitioner,[59] provided that the foreign ownership of the petitioner and its subsidiaries and affiliates remain within the parameters of the petition.[60] As explained by the Commission in its *2013 Foreign Ownership Second Report and Order*, "adopting the automatic extension rule will eliminate the filing of duplicative petitions for declaratory ruling."[61]

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[58] *See 2013 Foreign Ownership Second Report and Order*, 28 FCC Rcd at 5789-93, ¶¶ 88-96; 47 C.F.R. § 1.994(b).

[59] For purposes of the automatic extension rule, the Commission defines the term "subsidiary" to mean "any entity in which a [petitioner] licensee owns or controls, directly and/or indirectly, more than 50 percent of the total voting power of the outstanding voting stock of the entity, where no other individual or entity has *de facto* control, and defines the term "affiliate" to mean "any entity that is under common control with a [petitioner] licensee, defined by reference to the holder, directly and/or indirectly, of more than 50 percent of total voting power, where no other individual or entity has *de facto* control." 47 C.F.R. § 1.990(d)(2), (10). The Commission requires all then-current subsidiaries and affiliates of a petitioner to be listed in its petition and requires all subsidiaries and affiliates, subsequently acquired or formed subsidiaries and affiliates, in relevant applications to specify and attach the applicable petition under which they are covered and to certify that their foreign ownership complies with the parameters of the petition. *See 2013 Foreign Ownership Second Report and Order*, 28 FCC Rcd at 5790-91, ¶ 92.

[60] *See 2013 Foreign Ownership Second Report and Order*, 28 FCC Rcd at 5790-91, ¶ 92.

[61] *Id.* at ¶ 94. The Commission explained in the *2013 Foreign Ownership Second Report and Order* the procedures that it will use to ensure that the Executive Branch has an opportunity to review the foreign ownership of subsidiaries and affiliates in light of the automatic extension rule, and these procedures also should be applicable to broadcast petitions. *Id.* at ¶¶ 94-96.

Second, as with wireless licensee petitioners, the Commission should permit broadcast petitioners to introduce new, foreign-organized entities into their vertical ownership chain above the controlling U.S. parent of the petitioner, under Section 310(b)(4), provided that such new foreign-organized entities are under 100 percent common ownership and control with the foreign investor approved in the ruling.[62] Such internal reorganizations of a petitioner's vertical ownership chain should be subject only to a notice requirement rather than requiring new Commission approval.[63] NAB agrees with the Commission, "it [is] reasonable to allow . . . internal reorganizations to proceed without requiring the [petitioner] licensee to return to the Commission, after receiving an initial ruling, for specific approval to insert the new, foreign-organized company in the previously approved vertical ownership chain."[64]

Third, just as wireless licensee petitions are no longer granted on a service-specific or geographic-specific basis, the grant of a broadcast petition should apply to all radio and television broadcast stations then owned or subsequently acquired by the petitioner and its covered subsidiaries and affiliates, irrespective of the markets that they serve.[65] There is no reasonable justification for the Commission to apply a different standard to the review and

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[62] *See id.* 97-104; 47 C.F.R. § 1.994(c). Because the Commission's limited forbearance of the application of Section 310(b)(3) to wireless licensees does not extend to broadcasters, the Commission has not proposed to permit the introduction of a new, foreign-organized entity in the non-controlling vertical ownership chain above a broadcast licensee. *See 2013 Foreign Ownership Second Report and Order*, 28 FCC Rcd at 5745, ¶ 4 n.18 (citing *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees Under Section 310(b)(4)*, First Report and Order, 27 FCC Rcd 9832 (2012)).

[63] *See 2013 Foreign Ownership Second Report and Order*, 28 FCC Rcd at 5796-97, ¶ 104; 47 C.F.R. § 1.994(c)(2).

[64] *See 2013 Foreign Ownership Second Report and Order*, 28 FCC Rcd at 5796, ¶ 102.

[65] *See Notice* at ¶ 22.

approval of a broadcast petition based on whether the petitioner holds, or proposes to acquire, a radio station or a television station. Similarly, there is no reasonable basis for the Commission to determine that a broadcast petitioner is qualified to hold a broadcast station in one market but not another.

4. The Current Broadcast Insulation Criteria Should Be Used for Broadcast Petitions

The Commission should utilize its existing seven-factor broadcast insulation standard for purposes of determining whether limited partners in limited partnerships and members in LLCs[66] are required to be disclosed in broadcast petitions.[67] This approach will maintain consistency between the broadcast attribution standards and the petition disclosure requirements. As set forth above, by maintaining such consistency, the Commission will

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[66] For convenience, the discussion in Part III(4)-(5) herein primarily refers to limited partners in broadcasters that are structured as limited partnerships, but the insulation considerations discussed in these Parts of the instant comments apply equally to members in broadcasters that are structured as LLCs.

[67] *See Notice* at ¶¶ 17-19; 47 C.F.R. § 73.3555 n.2(f). The broadcast insulation criteria require that (i) an insulated limited partner may "not [be] materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies," and that (ii) the limited partnership's organizational documents contain the following, specific insulation provisions: "(1) the limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the media enterprises of the company; (2) the limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's media enterprises; (3) the limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its business; (4) the rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions; (5) the limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter; (6) the limited partner may not perform any services for the partnership materially relating to its media activities, except that a limited partner may make loans to or act as a surety for the business; and (7) the limited partner may not become actively involved in the management or operation of the media businesses of the partnership." *See Implementation Cable Television Consumer Protection and Competition Act of 1992 et al.*, Report and Order, 14 FCC Rcd 19014, 19038 ¶ 57 n.163 (1999) (citing *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, Report and Order, 97 FCC.2d 997, 1005-08 (1984), *on recon*., 1985 FCC LEXIS 3081 (1985), *on further recon*., 1 FCC Rcd 802 (1986)).

enable broadcasters to utilize for petition purposes the same ownership information that broadcasters are required to compile to complete certain Commission applications and to comply with the Commission's multiple ownership and cross-ownership rules.

Applying the wireless licensee insulation standards to broadcasters for purposes of the petition process, while in parallel requiring broadcasters to use the broadcast insulation criteria for all other attribution purposes, will create significant administrative complexities and uncertainty for broadcasters. These burdens are likely to outweigh any benefits to broadcasters generated by the more flexible and less prescriptive wireless licensee insulation standard.[68]

As noted by the Commission, in order for a broadcaster to benefit from the additional flexibility provided by the wireless licensee insulation standard, it would have to modify its organizational documents to effectively create two different levels of insulation.[69] The renegotiation of broadcast limited partnership agreements industry-wide is a herculean task. In addition, this approach would add further complexity to such agreements. Each broadcaster's organizational documents would need to apply traditional broadcast insulation to limited partners that cannot hold an attributable interest in the broadcaster due to multiple ownership or cross-ownership issues. Concurrently, with respect to foreign limited partners that are permitted to hold an attributable interest in a broadcaster but that must be insulated for purposes of complying with Section 310(b)(4), a broadcaster's organizational documents

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[68] *See* 47 C.F.R. § 1.993. Rather than requiring wireless licensees that are structured as limited partnerships to include in their organizational documents the type of highly specific insulation criteria that are applicable to broadcasters, a wireless licensee merely is required to stipulate in its organizational documents that its insulated limited partners are prohibited from "active involvement in the management or operation of the partnership" or LLC and that its organizational documents may contain "only the usual and customary investor protections" set forth in Section 1.993(c) of the Commission's rules. *See id.*

[69] *See Notice* at ¶ 19.

also would need to apply insulation consistent with the more flexible wireless licensee insulation requirement. A foreign limited partner that also may not hold an attributable interest in a broadcaster may be required to be insulated pursuant to both standards.

Similarly, broadcasters have relied on the significant body of Commission broadcast precedent governing permissible minority investor protections when negotiating the terms of their limited partnership agreements with their insulated investors. Minority investor protections are heavily negotiated between general partners and their insulated investors and cannot easily be revised in isolation without affecting other aspects of a broadcaster's limited partnership agreement. The Commission precedent relied upon by broadcasters when negotiating their insulated partners' minority investor protections, however, may not be fully consistent with the "usual and customary investor protections" permitted under the wireless licensee insulation standards.[70] Consequently, it may be necessary for numerous broadcasters to renegotiate the minority investor protections provided to their insulated investors in order for the broadcasters to utilize the wireless licensee insulation requirements for petition disclosure purposes. Such industry-wide renegotiation of investor protections by broadcasters probably is not feasible and certainly would be disruptive.

For these reasons, the Commission should not apply a separate and different insulation standard to broadcasters in the attribution and petition contexts. However, the Commission should consider commencing a rulemaking proceeding to fully harmonize the insulation requirements applicable to wireless licensees and broadcasters. Broadcasters should be permitted to benefit generally from the enhanced flexibility offered by the wireless

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[70] *See* 47 C.F.R. §§ 1.993(c)-(d). Notably, Section 1.993(d) permits the Commission to consider the permissibility of investor protections not otherwise expressly set forth in Section 1.993(c).

licensee insulation standard, but such standards need to be applied to broadcasters for all purposes—general attribution and foreign ownership compliance—to be practical.

5. The Commission Should Revise its Approach to Calculating the Voting Interest Attributed to Uninsulated Limited Partners

The Commission should modify its approach to calculating the indirect foreign voting contribution of uninsulated limited partners to broadcasters in which the limited partners' limited partnerships hold intervening interests. As explained by the Commission in the *Notice*, an uninsulated limited partner currently is imputed to hold the same voting interest as the limited partnership in the entity situated in the next lower tier of the vertical ownership chain of a broadcaster.[71] This policy can lead to unintended and often absurd results when calculating foreign voting control.

For example, it is not unusual for an uninsulated foreign limited partner to hold a 0.05 percent interest in a U.S.-organized private equity fund that is structured as a limited partnership and for the limited partner to have no real voting rights in the fund other than the right to vote for the removal and replacement of the fund's general partner under certain circumstances.[72] If the fund, in turn, wholly owns and controls a U.S.-organized broadcaster, then the domestic broadcaster is treated as 100 percent foreign for voting purposes even

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[71] *See Notice* at ¶ 17. Although the Commission did not directly request comment on this issue in its *Notice*, the *Notice* contains a significant discussion of the matter.

[72] The Commission's broadcast insulation criteria permit insulated limited partners to vote for the removal of a limited partnership's general partner, but only if the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter. In addition, the insulation criteria permit an insulated limited partner to vote for a new or additional general partner, but only if the limited partners' vote is subject to veto by the existing general partner. *See supra* note 67 and accompanying text. For this reason, it is not uncommon for limited partners to decline insulation in order to secure the broader rights to vote for the removal or addition of general partners that would be available to the limited partner were it not for the limitations set forth in the Commission's broadcast insulation criteria.

though, in fact, no foreign entity has any actual voting control over the broadcaster and the broadcaster's equity is only 0.05 percent foreign-owned. This result makes little sense.

Accordingly, the Commission should modify its approach to evaluating the indirect voting interests of uninsulated limited partners in broadcasters in which the limited partners' limited partnerships hold interests. Rather than the overly formulaic approach set forth above, the Commission should focus on the actual voting rights of a limited partner in a limited partnership. To the extent that a passive limited partner does not have voting rights over the day-to-day management or operations of a limited partnership, the limited partner should not be attributed with the limited partnership's entire voting interest in a broadcaster.

IV. NAB AGREES THAT A NEW METHODOLOGY FOR DETERMINING THE CERTIFYING FOREIGN OWNERSHIP LEVELS WILL PROVIDE NEEDED CLARITY AND REDUCE BURDENS ON LICENSEES

A. The Commission Should Adopt a Practical, Workable and Realistic Mechanism by Which a Broadcaster Can Determine its Section 310(b)(4) Compliance

The Commission should adopt a practical, workable and realistic mechanism by which broadcasters can determine their foreign ownership for purposes of certifying compliance with Section 310(b)(4). As acknowledged by the Commission in the *Notice*,[73] publicly traded broadcasters currently face substantial obstacles in determining the identity of certain of their shareholders. To facilitate stock market liquidity by improving the clearing and settlement of trades, legal title to most stock of publicly traded companies is held by broker-dealers in "street name" on behalf of their customers, who are the ultimate beneficial owners of the stock.[74] As

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[73] *See Notice* at ¶¶ 31-32.

[74] *See CII Report* at 5 ("In the United States, few ultimate beneficial owners are holders of record. Instead, a chain of custodial ownership, which can be complex and operates through multiple levels, separates the record and beneficial owners. Under custodial ownership, a broker or bank intermediary holds legal title to shares on behalf of the beneficial owner, who retains full economic ownership.").

a result, publicly traded companies generally do not maintain information about the identity of the vast majority of their shareholders. Instead, this information is held only by broker-dealers.

Further, the SEC's shareholder privacy regulations permit shareholders to choose whether to permit or prohibit their broker-dealers to disclose information about the shareholders to a company in which they hold stock.[75] Companies can request information from broker-dealers about their shareholders who have not objected to the disclosure of their identities, *i.e.,* non-objecting beneficial owners ("NOBOs"). However, broker-dealers are not permitted to disclose to companies the identity of their shareholders that object to such disclosure—*i.e.*, objecting beneficial owners ("OBOs"),[76] and it has been estimated that a majority of the stock of U.S. companies is held by shareholders electing OBO status.[77]

As a result, broadcasters have no means of determining the identity, much less the citizenship, of the beneficial ownership of stock held by broker-dealers in street name on behalf of OBOs.[78] Therefore, to the extent that the Commission requires these unknown shareholders

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Indeed, unless instructed otherwise by their customers many brokerage firms automatically put their customers stock in street name; *See also* SEC, *Holding Your Securities – Get the Facts*, http://www.sec.gov/investor/pubs/holdsec.htm (last visited Aug. 27, 2014) (discussing street name registration).

[75] *See CII Report* at 5.

[76] *See* 17 C.F.R. §§ 240.14b-1-2, 13; *see also CII Report* at 10.

[77] *See CII Report* at 5.

[78] The Commission has acknowledged this challenge:

> Publicly traded companies typically do not know the identities of all beneficial owners of their shares. In many cases, a nominee, such as a broker or bank, holds the shares in accounts with The Depository Trust Company, which appears as the record holder of the shares in the company's books. Securities and Exchange Commission (SEC) rules prohibit intermediaries between the company and the beneficial owner from disclosing to a company the identity of beneficial owners who object to such disclosure.

Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases and Petitions for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) et al., Order on Reconsideration, 26 FCC Rcd 11763, 11776 n.99 (2011) ("*2011 Verizon Petitions*"); *see also Notice*

to be treated as foreign,[79] which is not a rational assumption, most publicly traded broadcasters will find it difficult, if not impossible, to demonstrate that they have indirect domestic ownership in excess of 75 percent.

In addition, the Commission's current methodologies for monitoring compliance with Section 310(b)(4) do not take into account electronic trading and resulting liquidity of modern stock exchanges. Publicly traded broadcasters have little visibility and no control over the overall ownership of their stock by investors at any moment in time. Their ownership literally changes on a moment-by-moment basis, which makes the use of stockholder surveys to determine foreign ownership impractical at best.

B. Broadcasters Should be Permitted to Rely on Information That They Know or Should Reasonably Know to Determine Their Compliance with Section 310(b)

NAB agrees that it is consistent with Section 310(b)(4) to permit licensees to rely on information they know, or should reasonably know, to certify compliance. Thus, broadcasters should be permitted to utilize reasonable measures to determine the citizenship of all their interest holders that are reasonably identifiable.[80]

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at ¶ 29 (acknowledging "the unique burdens [the Commission's] processes may exert on widely-held publicly traded companies, which do not necessarily have adequate means to ascertain and certify the citizenship of their shareholders.").

[79] *See, e.g.*, Letter from Peter H. Doyle, Chief, Audio Div., Media Bureau, FCC, to John M. Pelkey and Melodie A. Virtue, Counsel to Pandora, KXMZ(FM) (Sept. 23, 2013), app. ("*Attachment A: Suggestions for Meeting Citizenship Requirements of Corporate Applicants*.").

[80] *See Application of WWOR-TV, Inc*., Memorandum Opinion & Order, 6 FCC Rcd 6569, 6572, ¶ 13 (1991) (requiring a broadcaster to use "reasonable methods to insure compliance with section 310(b)"); *HLT Corporation and Hilton Hotels Corporation For Consent to Interim Transfer of Control of ITT Broadcasting Corporation and HLT Corporation and Hilton Hotels Corporation For Consent to Transfer of Control of ITT Broadcasting Corporation*, Memorandum Opinion & Order, 12 FCC Rcd 18144, 18152-53, ¶ 28 (MMB 1997) (approving a foreign ownership certification based on information similar to that discussed in Part(IV)(B)(2)-(3) of these comments).

1. *Broadcasters Participating in SEG-100 Should be Presumed to be Compliant with Section 310(b)(4)*

One reasonable measure that broadcasters should be permitted to use to maintain compliance with Section 310(b)(4) is participation in the SEG-100 program conducted by The Depositary Trust Company ("DTC"). Broadcasters that enroll in SEG-100 should not be required to separately undertake periodic evaluations of their foreign ownership. SEG-100 is designed by the DTC to assist publicly traded companies in complying with applicable foreign ownership regulations, and publicly traded broadcasters should be permitted to rely on this program to monitor their Section 310(b) compliance.

DTC's SEG-100 program provides regulated companies with a mechanism through which they can track their foreign ownership and promptly correct any detected noncompliance with Section 310(b) or any aggregate foreign ownership thresholds imposed by the Commission in a petition grant.[81] In the *Notice,* the Commission explained that SEG-100 "allows firms, through their transfer agents, to monitor changes in foreign ownership levels and, if [an applicable foreign ownership] threshold is exceeded, to notify DTC of the number of shares that must be transferred out of SEG-100 accounts" in order to bring the

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[81] Under the SEG-100 program, shares of a participating company are held on a custodial basis by DTC on behalf of DTC's member banks and broker-dealers. DTC periodically tracks and reports to each participating company the percentage of its shares that are held in the banks and broker-dealers' SEG-100 accounts. If this percentage exceeds a threshold specified by the company, the company's transfer agent provides notification to DTC which, in turn, reverses credits made by participants on a last in, first out basis and communicates this action to the affected participants. DTC then requires the affected bank(s) or broker-dealer(s) on whose behalf DTC is holding the shares to reverse the last trades in their SEG-100 accounts to the extent necessary to maintain the company's foreign ownership below the specified level. *See* Depository Trust & Clearing Corp., *SEG-100 Account*, https://www.dtcclearning.com/learning/settlement/products/settlement/business-information/inventory-management/sub-accounting-segregation-of-securities/seg-100-account.html (last visited Dec. 17, 2015); *see also Notice* at ¶¶ 33 n.60, 34.

participating company back into compliance.[82] In addition, the Commission expressly recommended in the *Pandora Declaratory Ruling* that Pandora enroll in the SEG-100 to monitor and ensure its compliance with the foreign ownership requirements that the Commission imposed on Pandora in the proceeding.[83]

Consistent with this Commission guidance, participation in SEG-100 should be affirmed by the Commission to be a reasonable measure for determining and maintaining compliance with Section 310(b)(4). As a result, participating broadcasters should be permitted to certify their compliance with, Section 310(b)(4) based solely on the participation of the broadcaster in DTC's SEG-100 program.

2. *Only Certain Categories of Shareholders Should Be Deemed to be Reasonably Identifiable*

With respect to publicly traded broadcasters, the Commission should deem the following categories of shareholders to be reasonably identifiable:

- *Registered Shareholders.* Shareholders identified on a broadcaster's registered shareholder list generally include officers, directors, and employees to which the broadcaster directly issued shares.

- *SEC Filers.* Stockholders that accumulate more than 5 percent of a publicly traded company's stock are required to file a SEC Schedule 13D within 10 days of the acquisition. SEC Schedule 13G may be filed in lieu of Schedule 13D by stockholders that acquire shares in the ordinary course of business and that do not intend to change or influence the control of a company. In addition, SEC Schedule 13-F is required to be filed by institutional investment managers that exercise investment discretion (*i.e.,* the power to determine which securities are bought or sold for an account) over $100 million or more of a broad range of publicly traded stocks.[84]

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[82] *Notice* at ¶ 33 n.60.

[83] *Pandora Declaratory Ruling*, 30 FCC Rcd at 5101-02, ¶ 21.

[84] Schedule 13F filings can be used to determine voting control of a company's stock but not the stock's beneficial owners; whereas a publicly traded broadcaster's NOBO list can be used to identify beneficial owners of the company's stock but is not ideally suited for determining who has voting control of the stock. Because it is exceedingly difficult to reconcile a company's NOBO list against a list of Schedule 13F filers to prevent double counting of stock, broadcasters should be permitted to

- *NOBOs.* Lists of shareholders electing NOBO status can be obtained by a broadcaster from the individual banks and brokers who hold the shares on behalf of their NOBO clients, and aggregate lists may be available through proxy solicitation and financial relations consulting firms.

Shareholders who have elected OBO status, by contrast, should not be considered to be reasonably identifiable. Pursuant to the SEC's shareholder privacy regulations, broadcasters have no ability to determine the identity of these shareholders.

3. Broadcasters Should be Permitted to Use Reasonable Measures to Determine Citizenship

With respect to each of the foregoing categories of reasonably identifiable shareholders, broadcasters should be permitted to use reasonable measures to determine their citizenship, rather than "best efforts" as referenced in the *Notice*.[85] The citizenship of registered shareholders generally can be determined by direct communications with the shareholders because most registered shareholders are likely to be officers, directors, and employees. The citizenship of filers of Schedules 13D and 13G is listed directly on the schedules. With respect to Schedule 13F filers and NOBOs, it should be considered a reasonable measure for a broadcaster to use publicly available resources to determine their foreign ownership.[86]

If the citizenship of an identifiable shareholder cannot be obtained from a publicly available source and the shareholder cannot be reasonably queried directly, then a

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separately calculate their foreign equity and voting interests using different data sources to identify their stockholders—*i.e.,* NOBO lists for equity and Schedule 13Fs for voting.

[85] *Notice* at ¶ 32.

[86] *See e.g.,* Petition for Declaratory Ruling of Pandora Radio, LLC Under Section 310(b)(4) of the Communications Act of 1934, as Amended, MB Docket No. 14-109 (filed June 27, 2014), Appendix A (K&L Gates Report), at 8-9 (describing various publicly available resources that may be used to determine the citizenship of a Schedule 13F filer).

broadcaster should be permitted to use alternative proxies for their citizenship. First, broadcasters should be permitted to use street addresses as a proxy for citizenship, which the Commission has permitted in the wireless licensee context.[87] Second, broadcasters should be permitted to assign citizenship to stockholders using the five-factor "principal place of business" test previously utilized by the Commission to determine the "home market" of foreign entities seeking to invest in common carrier licensees.[88] Both of these tests constitute reasonable proxies for citizenship in the absence of other available resources by which an entity's actual citizenship can be determined.

In addition, under no circumstances should the Commission require a broadcaster to determine (or impute via a proxy) separate domestic and foreign citizenship percentages for its *indirect* interest holders that hold indirect equity or voting interests of less than 10 percent. Instead, broadcasters only should be required to calculate the separate percentages of equity and voting citizenship for indirect interest holders that hold interests of 10 percent or more. When assigning ten percent-or-greater interest holders separate foreign and domestic equity and voting ownership percentages, a broadcaster already effectively is incorporating into its foreign ownership calculation the citizenship of the owners of such interest holders. This should be deemed by the Commission to be a sufficiently reasonable measure.

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[87] *See*, *e.g.*, *2011 Verizon Petitions* 26 FCC Rcd at 11772 ¶ 21 (citing Commission precedent for the proposition that "prior Commission decisions have permitted the use of shareholder addresses of record as proxies for citizenship on a fact-specific, case-by-case basis").

[88] The principle place of business test is based on the following five factors: "(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." *See 2013 Foreign Ownership Second Report and Order*, 28 FCC Rcd at 5751, ¶ 13 n.43.

Although the Commission's policies governing foreign ownership evaluations are sometimes interpreted to require a broadcaster to determine the "up-the-chain" ownership of each indirect shareholder that is not a natural person, this simply is unrealistic. It is patently unreasonable to require broadcasters to attempt to calculate separate domestic and foreign ownership percentages for every indirect interest holder that is an organization throughout the broadcaster's entire chain of ownership until the broadcaster reaches natural persons. Given the challenges discussed herein that broadcasters face when attempting to determine their own percentages of domestic and foreign equity and voting ownership, it is unrealistic to expect a broadcaster with disperse ownership to conduct a similar analysis for each and every one of its indirect interest holders *ad infinitum*, which could number in the hundred, thousands, or, for the largest corporations, the hundreds of thousands.

Finally, broadcasters should be permitted to determine the citizenship of stockholders that are not reasonably identifiable, including OBOs, through extrapolation—*i.e.,* by assigning these shareholders the same relative domestic and foreign equity and voting ownership as the foreign ownership determined by the broadcaster for its reasonably identifiable shareholders. As explained above, due to SEC privacy regulations, publicly traded broadcasters are unable to identify shareholders that elect OBO status. Rather than treating each of these "unknown" shareholders as foreign, a broadcaster should be permitted to estimate their citizenship based on the foreign ownership of the broadcaster's known shareholders. The Commission's current policy of treating such unidentifiable shareholders as foreign is certain to drastically overstate the actual foreign ownership of a broadcaster given the high percentage of the shares of most public companies that are held by OBOs. Moreover, no public harm can result if this approach somewhat overstates the actual level of foreign ownership of the unknown shareholders because these shareholders have no ability to

influence the operations of a broadcaster. As discussed in Part III(B)(1) above, the Commission has determined that Section 310(b)(4) is intended to prevent foreign entities from influencing the programming decisions of broadcasters. Clearly, OBOs have no ability to do so if they are required by law to remain anonymous to the broadcasters in which they hold beneficial interests.

C. The Commission Should Provide Express Guidance Regarding How Often a Broadcaster is Required to Conduct Foreign Ownership Studies

The Commission has provided very little guidance to date regarding the frequency with which broadcasters are required to evaluate their foreign ownership for purposes of confirming their ongoing compliance with Section 310(b). Additional direction is warranted. NAB believes that the Commission should require broadcasters to conduct an evaluation of their foreign ownership at least once every four years. However, publicly traded broadcasters that participate in the DTC's SEG-100 program should not be required to separately undertake periodic evaluations of their foreign ownership.

1. Publicly Traded Broadcasters Should Be Permitted to Rely on DTC's SEG-100 Program to Monitor Their Foreign Ownership

As set forth above, a broadcaster's participation in the DTC's SEG-100 program provides a mechanism by which the broadcaster can maintain compliance with Section 310(b). Therefore, publicly traded broadcasters that participate in SEG-100 should not be required to also conduct separate periodic foreign ownership assessments. Instead, they should be permitted to rely on the SEG-100 program to monitor and maintain their Section 310(b) compliance on an ongoing basis. However, the Commission should allow broadcasters individually to determine whether to enroll in SEG-100 or to conduct periodic foreign ownership studies, rather than mandating SEG-100 participation by all broadcasters.

2. *Broadcasters Should Be Required to Conduct Foreign Ownership Evaluations Every Four Years*

Although the Commission has been clear that licensees have a continuing obligation to monitor their compliance with Section 310(b),[89] the Commission has provided little guidance regarding what this means in practice.[90] As explained above, in light of the liquidity of modern stock exchanges and the SEC's shareholder privacy requirements, it is not possible for a publicly traded broadcaster to maintain a real-time understanding of its ownership at all times. Instead, publicly traded broadcasters must conduct periodic evaluations of their foreign ownership. The Commission, however, has not expressly stated how often a broadcaster is required to conduct such an assessment. Given the time and expense of this endeavor, NAB proposes that a broadcaster fulfill its foreign ownership monitoring obligations by conducting an evaluation of the citizenship of its reasonably identifiable interest holders every four years.

Further, provided that a broadcaster conducts such a study at least every four years, it should be permitted to determine when during the evaluation year to conduct the study. The Commission should not mandate that the study be conducted at any particular time, such as within a specified period of time prior to a Section 310(b) compliance certification by the broadcaster in a Commission application. By allowing individual broadcasters to determine when to conduct their foreign ownership evaluations, the Commission will enable

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[89] *See, e.g.*, *id.* at ¶ 135 ("We remind licensees that they have a continuing to monitor their foreign ownership and ensure that they remain compliant with the requirements of the Act, the rules we adopt today, and a licensee's particular foreign ownership ruling."); *Petition of TelCove, Inc. for a Declaratory Ruling Pursuant to Section 310(b)(4)*, Order and Declaratory Ruling, 21 FCC Rcd 3982, 3993-94 ¶ 30 (2006) ("Licensees have a continuing obligation, however, to remain in compliance with the foreign ownership provisions of section 310 of the Act.").

[90] *See Notice* at ¶ 32 (requesting comment on how frequently a company should be required to assess its foreign ownership).

broadcasters to reduce the cost and increase the effectiveness of their ownership studies by choosing to conduct them in conjunction with other shareholder outreach and management activities that the broadcasters otherwise may be required to undertake.[91] Further, this will enable broadcasters to appropriately time their ownership assessments, by, for example, conducting them after events that are likely to cause significant changes in the broadcaster's ownership, such as stock buybacks and mergers.

V. CONCLUSION

The NAB applauds the Commission for taking this important step to modernize the broadcaster foreign ownership policies. Adoption of these proposals will allow broadcasters the opportunity to better compete in the communications marketplace, leading to increased diversity of services and ownership, while fulfilling the Commission's public interest obligations under Section 310(b). For these reasons, the NAB encourages the Commission to adopt these proposals.

Respectfully submitted,

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[91] The Commission also should consider permitting publicly traded broadcasters to limit the scope of their foreign ownership analyses to shareholders that actually cast votes, rather than requiring broadcasters to evaluate the citizenship of all of their shareholders. Doing so is consistent with the Commission's focus in the broadcast context on shareholders that actually have the ability to influence the operations of a broadcaster. Shareholders that do not exercise their voting authority have no ability to affect a broadcaster's operations and thus do not raise public policy concerns under Section 310(b)(4). Under this approach, a broadcaster can collect citizenship information from its shareholders in connection with its proxy forms.

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