Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	**IB Docket No. 02-286**
	)	File Nos. ISP-PDR-20020822-0029;
GLOBAL CROSSING, LTD.	)	ITC-T/C-20020822-00406
(Debtor-in-Possession), Transferor,	)	ITC-T/C-20020822-00443
	)	ITC-T/C-20020822-00444
and	)	ITC-T/C-20020822-00445
	)	ITC-T/C-20020822-00446
GC ACQUISITION LIMITED,	)	ITC-T/C-20020822-00447
Transferee	)	ITC-T/C-20020822-00449
	)	ITC-T/C-20020822-00448
Application for Consent to Transfer	)	SLC-T/C-20020822-00068
Control and Petition for Declaratory	)	SLC-T/C-20020822-00070
Ruling	)	SLC-T/C-20020822-00071
	)	SLC-T/C-20020822-00072
	)	SLC-T/C-20020822-00077
	)	SLC-T/C-20020822-00073
	)	SLC-T/C-20020822-00074
	)	SLC-T/C-20020822-00075
	)	
	)	

FURTHER COMMENTS OF ACN IN OPPOSITION TO APPLICANTS' PETITION FOR DECLARATORY RULING

I. INTRODUCTION

American Communications Networks, Inc. ("ACN") files these further Comments to update its Objections filed November 5, 2002 and in response to the Public Notice of February 19, 2003 herein to make the following points in light of subsequent developments:

- In considering licensing applications, the F.C.C. "is not expected to play procedural games with those who come before it in order to ascertain the truth." *RKO General, Inc.*

v. F.C.C., 670 F.2d 215, 229 (D.C. Cir. 1981). The International Bureau therefore is to be applauded for requiring Applicants to fully reveal the ownership structure and citizenship of the potential transferees as required by 47 C.F.R. §§ 64.04(4) and 63.18(h) and 47 U.S.C. § 310 (b)(4).[1] In light of the Applicants' inability, or refusal, to provide the requested information, the Commission has no choice but to:

1. Deny the requested relief; or

2. Continue to demand total disclosure; or

3. Dismiss the applications as insufficient.[2]

- Failure to achieve such full disclosure would prevent the Commission from meeting its congressionally mandated responsibility of determining the qualifications of proposed transferees to hold F.C.C. licenses. *See* 47 U.S.C. § 308 (1994); *see also AirTouch Communications, Inc.*, 14 F.C.C.R. 9430, 9432-34 at ¶¶ 5-9 (WTB 1999).

- The Commission, quoting from its *Foreign Participation Order*[3] in *Vodafone*[4], recently reaffirmed its position "that it will 'deny an application if we find 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

[1]This is information that should have been provided six months ago.
[2]Although not every failure to provide complete information subjects an applicant to disqualification, concealment of information, evasion of F.C.C. requirements or other *deliberate* failures to produce information can result in disqualification for lack of candor. *See Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 129 (1983).
[3]12 F.C.C.R. 23891 (November 25, 1997).
[4]*In the Matter of 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, 17 F.C.C.R. 12849 (July 1, 2002) [hereinafter *Vodaphone*].

countries. ...'" *Vodaphone*, 17 F.C.C.R. 12849 at ¶ 32. Since Applicants have failed, even when employing a flawed and unacceptable proposal of having a mailing address reflect citizenship, to provide full disclosure for what appears to be at least 74.53% of HWL and 71.38% of CKHL, ACN suggests the Commission must resist action or risk running counter to its own precedent. Further, the inability of the Commission to ascertain the citizenship, and therefore WTO status, of Applicants prevents the Commission from determining which public interest test to apply: the ECO[5] or the WTO rebuttal prescription. *See Foreign Participation Order*, 12 F.C.C.R. 23891 at ¶ 119 (1997).

- Applicants have failed to meet their burden of proof. Congress in the Communications and Administrative Procedure Acts, the Commission in its rules and precedents, and the federal courts have all made it clear that the Applicants bear the burden of demonstrating that a proposed transfer is in the public interest and meets the requirements of 47 U.S.C. §§ 214(a), 310(b)(4) and 310(d).[6] The Applicants' filings have failed to meet their burden and substantial compliance with these requirements is not sufficient.[7]

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[5]The ECO test requires, as a condition of foreign carrier entry into the U.S. market, that there be no legal or practical restrictions on U.S. carriers' entry into the foreign carrier's market. The ECO test was crafted to serve three goals for regulation of international telecommunications services: to promote effective competition in the U.S. telecommunications service market; to prevent anti-competitive conduct in the provision of international services or facilities; and to encourage foreign governments to open their telecommunications markets.

[6] *See* 47 U.S.C. §§ 214(a), 308(b)(4), 310(d) (1994); 5 U.S.C. § 556 (1994). *See also* 47 C.F.R. § 1.254 (2002) (providing that "[a]ny hearing upon an application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant except as otherwise provided in the order of designation.")

[7] The Commission, with judicial affirmation, has denied applications for as little as having the wrong party sign the application. *See James v. McCaw Cellular Communications, Inc.*, 988 F.2d 583, 25 Fed.3d 539 (5th Cir. 1993). *See also RKI General, Inc. v. F.C.C.*, 670 F.2d 215 (D.C. Cir. 1981), *AirTouch Communications*.

- The Commission recently stated: "In such circumstances, (complex ownership reviews under 310(b)(4)) it is particularly important that applicants give full and complete ownership information in their foreign ownership showings in accordance with the Commissions attribution criteria." *Vodafone,* 17 F.C.C.R. 12849 at ¶ 32. Applicants have yet to do so.

- The Applicants' refusal for more than six months, and after no less than three written and at least one verbal request by the Commission, to identify and reveal the nationality of large blocks of ownership and controlling interests is a *de facto*, if not *de jury* violation of the Communications and Administrative Procedure Acts, the Commission's regulations and judicial precedent. This disregard for the law in and of itself would be grounds for denial to the extent that it calls into question the character of the Applicants.[8]

- Additionally, the Commission and impacted parties are entitled to an adverse inference of the facts not revealed. *See In re Applications of Sandab Communications Ltd. P'ship II,* 11 F.C.C.R. 9040 at ¶ 12 (1996); *In re Applications of Liberty Cable Co., Inc.,* 13 F.C.C.R. 10716 (1998); *Tri-State Broadcasting Co., Inc.*, 5 F.C.C.R. 1156, 1173 (Review Board 1990); *NLRB v. Laredo Coca-Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980) ; *Arthurs v. Stern*, 560 F.2d 477 (lst Cir. 1977).

- ACN cautions the Commission that the Applicants' proposed use of "mailing addresses" as a means to identify citizenship is flawed and must be abandoned.[9] Applicants cite no

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[8] *See Lebanon Valley Radio, Inc. v. F.C.C.*, 503 F. 2d 196, 164 U.S. App. D.C. 105 (D.C. Cir. 1974); *WEBR, Inc. v. F.C.C.*, 420 F.2d 158, 136 U.S. App. D.C. 316 (1969); *Charles P.B. Pinson, Inc. v. F.C.C.*, 321 F.2d 372, 116 U.S. App. D.C. 106 (D.C. Cir. 1967). An applicant's deliberate attempt to conceal violations 47 U.S.C. § 310 (b) went to the character and qualification of an applicant.

[9] *See* February 6, 2003 declaration of Steven P Allen at 3 "HWL and CKHL have limited information about the individuals and entities that hold direct ownership interests in their respective shares.....[M]y conclusion as to where a shareholder is 'from' is based on the shareholders address....."

authority to the Commission upon which it might rely in employing mailing address and abandoning decades of congressional and judicial precedent in assigning citizenship. Nor do the Applicants provide the Commission with any authority to justify the Commission's ignoring its own precedents, rules and forms , all of which make clear that a mailing address's do not establish citizenship.[10] Further the Commission in 47 C.F.R. §§ 63.04(4)[11] and 63.18(h)[12] as well as the Congress in 47 U.S.C. § 310(b)(4) make clear that citizenship and not mailing address are the issue in question.[13]

- The Applicant's inability to identify with certainty the composition of its ownership structure, including all persons holding 5% or more of the outstanding stock or shares (voting and/or non voting) undermines the Applicants' ability to provide the Commission with the necessary certifications required pursuant to the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 862 and the Commissions regulations enacted pursuant to the legislation. *See* 47 C.F.R. §§ 1.2001, 1.2002, 1.2003 (2002).

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[10] *See, e.g*, F.C.C. Form 315 Application for consent to transfer control of entity holding broadcast station construction permit or license. The form provides numerous locations for mailing addresses to be supplied and goes on to specifically elicit from the applicant their citizenship at ¶¶ 6(1), 6(2), 6(a)1, 6(a)2.

[11] The sections requires a domestic 214 transfer application to contain "The name, address, citizenship and principal business of any person or entity that directly or indirectly owns at least ten (10) percent of the equity of applicant...." 47 C.F.R. § 63.04(4) (2002).

[12] This section requires an international 214 transfer application to contain "The name, address, citizenship and principal business of any person or entity that directly or indirectly owns at least ten percent of the equity of applicant.... The applicant shall also identify any interlocking directorates with a foreign carrier." 47 C.F.R. § 63.18(h) (2002).

[13] ACN questions whether the inability to identify the nationality of Applicant's ownership has been raised by the Committee on Foreign Investment in the United States? We ask this question as a recent New York Times article states that a number of members of the Committee have expressed their opposition to the merger proposal. *See Hutchison May Be Silent Partner in Global Crossing,* **N.Y. Times**, March 3, 2003; *Global Crossing Deal Shifts*, **N.Y. Times,** March 1, 2003. ACN notes that if the Committee on Foreign Investment has issued any statements on Applicants' eligibility for approval that Applicants have failed to update the record with same.

II. HISTORY OF NON-COMPLIANCE

A review of the docket provides a clear picture of the Applicants' failure to meet their disclosure requirements under 47 C.F.R. §§ 63.04(4) and 63.18(h) and the Herculean efforts of the International Bureau to ascertain the missing facts. The F.C.C. has on at least three occasions pointed out to the Applicants their deficiencies regarding ownership, control and nationality. One can only draw the conclusion that the refusal to disclose this information is because such disclosure would be prejudicial to the Applicants' interest.[14]

The docket[15] reveals:

- On August 22, 2002, Global Crossing Ltd., Debtor-in-Possession ("Global Crossing"), and GC Acquisition Limited ("New GX" and, with Global Crossing, the "Applicants") filed an application for Commission consent to transfer control of the radio licenses, cable landing licenses, and certificates of named subsidiaries of Global Crossing Ltd. to GC Acquisition Limited ("New GX") and a petition for declaratory ruling that the proposed indirect ownership in Applicant New GX by Hutchison Telecommunications Limited and Singapore Technologies Telemedia Pte Ltd is in the public interest under §§ 214(a) and 310(d) and complies with § 310(b)(4) of the Act.

[14] The Administrative Procedure Act leaves no doubt as to the burden borne by Applicants. 5 U.S.C. § 556 (d) states, "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof...." 5 U.S.C. § 556(d) (1994). *See also Bosma v. U.S. Dept. of Agriculture*, 754 F.2d 804 (9th Cir. 1984), which held that burden of proof means burden of going forward with evidence. *See also Mark Eden v. Lee*, 433 F.2d 1077 (9th Cir. 1970) which held proponent of order has the burden of proof.

[15] *See* http://www.F.C.C..gov/transaction/globalcrossing-gx.html#record. Not all of the docketed materials will be specifically referenced, but all may be found on the Commission's transactional page.

- On December 4, 2002, the Commission informed Applicants of certain deficiencies in their application and requested additional and specific information regarding ownership and nationality.[16]

- On December 18, 2002, Applicants, by their counsel, responded to the Commissions request and filed amendments to the August 22, 2002 applications.

- On January 16, 2003, Applicants, by their counsel, amended their December 18th supplement and again requested that the Commission move expeditiously on all matters under its jurisdiction.

- On January 23, 2003, the Commission informed Applicants that their filings of August, December and January were still lacking in detailed and specific information in at least three vitally important areas. Creditors nationality; the identify and ownership as well as nationality of over one half of the controlling interests of the

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[16] *See* December 4, 2002 letter of James L Ball of the F.C.C.'s International Bureau to Counsel for Applicants outlining deficiencies of application. In the letter the F.C.C. asked among other items:

> Ownership Information. To the extent not already provided in the applications, provide the following information for each individual or entity shown in the organizational chart: name; address; equity and voting interests held in the entity and voting interests held in the entity in the next lower tier of the ownership chain; identify which, if any, of these interests constitute a controlling interest in the company in the next lower tier; and provide the citizenship of each individual investor or, in the case of a corporation, partnership or other company or association, the principal place of business.
> Foreign Ownership Interests. In addition to the information requested in paragraph 4 above, provide the percentage of Hutchison Wampoa Limited's publicly traded shares that are held by or for the benefit of individuals or entities whose citizenship or principal place(s) of business are in countries other than the United States, Hong Kong or Singapore. Similarly, the principal place of business showing for Cheung Kong (Holdings) Limited (CKHL) should include, in addition to information as to CKHL's principal shareholders, an explanation as to how the remaining shares are held.

two leading applicants HWL and CKHL, and any foreign government investment in the Applicants.[17]

- On January 30, 2003, Applicants informed the Commission of a change in foreign affiliations.

- On February 3, 2002, the Commission directed the Applicants to file an Amendment to their applications, which would then be placed on an abbreviated public notice.

- On February 6, 2003, Applicants responded to the Commissions letter of January 23, 2003.

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[17] *See* January 23, 2003 letter of James L Ball of the F.C.C.'s International Bureau to Counsel for Applicants again outlining deficiencies in the Application. The letter states:

> Foreign Ownership Interests in HWL and CKHL. We note that we asked, in question 5 of the December 4, 2002 letter, for the percentage of the shares of Hutchison Whampoa Limited (HWL) held by or for the benefit of individuals or entities whose citizenship or principal place(s) of business are in countries other than the United States, Hong Kong or Singapore. We also sought similar information for Cheung Kong (Holdings) Limited (CKHL). From information provided to date, applicants have represented that HWL is owned 49.97% by CKHL. Ownership of the remaining 50.03% is unidentified. Applicants have represented that CKHL is owned 36.17% by The Li Ka-Shing Unity Trust and companies controlled by Li Ka-Shing Trustee Company Limited as trustee of the trust. Ownership of the remaining 63.83% is not identified. Applicants stated that the information requested is not known to applicants, Hutchison Telecom, or HWL. (footnote omitted).
> * * *
> Accordingly, please provide the following information:
>
> In order to allow the Commission to complete its review of the foreign ownership aspects of this transaction, provide ownership details (identity, citizenship, and amount of holding) for each of the companies mentioned above (HWL and CKHL) where ownership information remains outstanding.
>
> Provide a complete principal place of business showing for CKHL.
>
> * * *
> 3. Foreign Government Investment. Please identify all foreign government ownership interests, direct or indirect, to be held in New GX (other than the ownership interest to be held by the government of Singapore through its ownership of Temasek, which interest applicants previously have identified).

- On February 13, 2003, the Applicants filed their amendments as requested by the Commission of February 3, 2003.

- On February 14, 2003 the Commission spoke with Applicants' counsel by phone to inform them of what one can only surmise where deficiencies in the Applicants' February 6th filing. We assume thus because the call was not reduced to an *ex parte* but referenced in a letter of that date by F.C.C. staff to Applicants informing them that the clock had been stopped in this matter until the requested information was received and reviewed.[18]

III. APPLICABLE LAW

Congressional intent and Commission precedent are clear that when asked to approve an assignment of a license(s) under 47 U.S.C. § 310, the F.C.C. must as a threshold matter determine whether a proposed transferee is qualified to hold such a license under 47 U.S.C. § 308:

> ...Any such application shall be disposed of as if the proposed transferee or assignee were making application under § 308 of this title for the permit or license in question....

47 U.S.C. § 310(d) (1994). *See also AirTouch Communications, Inc.*, 14 F.C.C.R. 9430, 9432-34 at ¶¶ 5-9 (WTB 1999).

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[18] *See* February 14, 2002 letter of James L Ball of the F.C.C. International Bureau to Counsel for Applicants informing them of stopping the clock for need of clarification. Mr. Ball states:

> Further, during a phone call with counsel of February 14, 2003, the staff requested clarification of the February 6 submission. Until clarification has been received and analyzed, and the applicable comment period has run with respect to the amended applications referred to above, we are stopping the 180-day clock, effective immediately, on February 14, 2003, day 149.

In the instant matter, the Commission must first determine whether Applicants qualify under 47 U.S.C. § 308's "Requirements for license." The continued failure, let alone what appears to be refusal, of Applicants to identify the nationality of major ownership and control blocks disqualifies the Applicants' under 47 U.S.C. §§ 214, 308 and 310.[19]

In 47 U.S.C. § 308, Congress mandated that an application, unless in an emergency, must be filed with the Commission in writing and "shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical and other qualifications of the applicant...." 47 U.S.C. § 308(b) (1994). Despite being asked on four separate occasions to do so, Applicants have yet to comply with this simple yet non-discretionary requirement of 47 U.S.C. § 308 rather they offer an unacceptable substitution of mailing addresses for a demonstration of citizenship.[20]

Commission precedent on the requirement to fully disclose is equally clear. 47 U.S.C. § 218 authorizes the Commission to inquire into the management of the business of all carriers and to "obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers ***full and complete information necessary to enable the Commission to perform*** the duties and carry out the objects for which it was created." *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Report and Order and Order on Reconsideration*, 12 F.C.C.R. 23891, 23896 at ¶ 294 (1997) (hereinafter *Foreign Participation Order*) (*emphasis added*), Order on Reconsideration,

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[19] *See* note 7, *supra*.

[20] We state "on four separate occasions" for, in addition to the three direct requests from the Commission outlined in Section II, Background above, there is the request in the form of 47 C.F.R. §§ 63.08 and 63.18, which outline the specific requirements of such a transfer.

15 F.C.C.R. 18158 (2000); 47 U.S.C. § 218 (1994).[21] At least one court has construed this section to mean: "'Full information would encompass anything and everything which would or might affect the Commission's decision as to whether or not the public interest would be served." *Mester v. US*, 70 F.Supp. 118, 120 (E.D.N.Y. 1947).

The D.C. Circuit Court of Appeals has also addressed the impact of failing to fully disclose as required by both statute and regulation. In *Great Western Broadcasting Assoc., v. F.C.C.*, 94 F.2d 244, 247, 68 U.S. App. D.C. 119, 122 (1937), the Court found:

> Undoubtedly the act contemplates that the applicant for a license shall establish those qualifications for the license which would make its grant serve the public interest, and this necessarily presupposes a frank, candid, and honest disclosure of the facts as to its qualifications deemed by the commission essential to enable the commission to act within its powers.

The Court has also held:

1. An applicant's misrepresentation to the Commission on an application is a reflection of the applicant's character and can result in the applicant's disqualification. *See Lebanon Valley Radio v. F.C.C.*, 503 F. 2d 196, 164 U.S. App. D.C 105 (1974); WEBR v. F.C.C., 420 F.2d 158, 136 U.S. App. D.C. 316 (1969).

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21 Applicants will likely cite to *In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Order, 17 F.C.C.R. 22633 at ¶ 7 (November 6, 2002), as a justification for substantial compliance which stated the F.C.C., while noting that "[i]t is incumbent upon the Commission to include in the public record documents or evidence of decisional significance," to its public interest determination under § 310, stated that "[t]he Commission's authority to use its administrative discretion in determining which documents and materials are necessary to, or otherwise most relevant and probative to, its public interest analysis is well-established." ACN would simply point out to the Commission and the Applicants that Comcast decision did not involve foreign interest subject to the clear limitations outlined by the Congress in 47 U.S.C. § 310(b)(4) (1994).

2. An applicant's deliberate attempt to conceal violations 47 U.S.C. § 310(b) goes to the character and qualification of an applicant. *See Charles P.B. Pinson v. F.C.C.*, 321 F.2d 372, 116 U.S. App D.C. 106 (1967).

3. The Commission must "supply a reasoned analysis indicating that prior policies and standards are being deliberately changes, not casually ignored." *Greater Boston TV Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970).

A. Foreign Ownership Benchmark: ECO or WTO??

In the instant matter, the Commission, in addition to its standard inquiries under 47 U.S.C. § 308,[22] must determine what level of interest foreign governments, individuals or corporations may have in the Applicants.[23] If the level of indirect, attributable investment by foreign individuals, corporations, and governments in U.S. common carrier radio licensees exceeds twenty-five percent, the assignment may be permitted only if the F.C.C. determines that such ownership is not inconsistent with the public interest. Before the Commission can make such a determination, it must first determine the citizenship of the various owners and directors of the Applicant and whether their countries of origin are members of the WTO or not. It is only after these two threshold tests have been applied, with the answer typically found in the properly executed Form 533, that the Commission may assign the standard (ECO or WTO) for determining whether the transfer is in the public's interest.

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[22] 47 U.S.C. § 310(d) (1994) (stating, in pertinent part "[a]ny such application shall be disposed of as if the proposed transferee or assignee were making application under section 308. . . ")

[23] 47 U.S.C. § 310(b)(4) (1994) (stating, "[n]o 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

Applicants have provided neither the Commission, nor interested parties such as ACN, with sufficient data to determine whether the foregoing interest rules are, or are not, in effect. Since the Commission does not have such information, it can not infer such information, nor fill the gap for applicants, or permit Applicants' counsel to develop a novel approach of assigning citizenship based upon mailing address. The requested relief must be denied.

As a practical matter, because the Applicants either lack the necessary citizenship information, or refuse to part with such information, the F.C.C. can not ascertain what level of review is required under 47 U.S.C. § 310. Should it be the ECO test applied when a 25% ownership interest would flow to a non-WTO citizen, or are Applicants entitled to the WTO rebuttal presumption in favor of transfer?

IV. DETERMINING FOREIGN OWNERSHIP

The F.C.C. must, pursuant to Section § 310(b)(4) of the Act, calculate the foreign equity and voting interests attributable to the transferee and, in turn, to the transferee's ultimate parent. In so doing, the F.C.C. applies attribution principles enunciated by the Commission specifically for purposes of calculating attributable foreign equity and voting interests in parent companies of common carrier licensees under § 310(b)(4).[24] In regard to the information required by the

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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."

[24] The F.C.C. set forth a standard for calculating both alien equity and voting interests held in a licensee, or, as here, in the licensee's parent, where such interests are held through intervening entities, including partnerships in *Wilner & Scheiner*, 103 F.C.C.2d 511 (1985), reconsidered in part, 1 F.C.C.R. 12 (1986), and its progeny. The calculation of foreign ownership interests under section 310(b)(4) is a two-pronged analysis in which the Commission examines separately the equity interests and the voting interests in the licensee's parent. The analysis is as follows:

> **Equity**. F.C.C. calculates the *equity* interest of each foreign investor in the parent and then aggregates these interests to determine whether the sum of the foreign equity interests exceeds the statutory benchmark. In calculating attributable foreign equity interests in a parent company, the

F.C.C. to make both of these determinations, the benchmark and the public interest, the F.C.C. has noted that it is "particularly important that applicants give full and complete ownership information in their foreign ownership showings in accordance with the Commission's attribution criteria" when the transferee's ownership structure is extremely complicated. *See Vodafone*, 17 F.C.C.R. 12849 at ¶ 32. The December 4, 2002 and January 23, 2003 letters from James L. Ball, Chief of the Policy Division of the F.C.C.'s International Bureau, to Applicants make roughly the same point.[25]

In deciding whether it is in the public interest to permit foreign investment in licensees of common carrier radio facilities in excess of the benchmarks contained in Section 310(b)(4) of the Act, the F.C.C. initially applied an "effective competitive opportunities," or "ECO," test. *See Foreign Participation Order*, 12 F.C.C.R. 23891, 23896 at ¶ 22.[26] The test was intended to

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Commission uses a multiplier to dilute the percentage of each investor's equity interest in the parent company 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. Once the pro rata equity interests of each alien investor are calculated, these interests are then aggregated to determine whether the sum of the interests exceeds the statutory benchmark.

Voting. F.C.C. calculates the *voting* interest of each foreign investor in the parent and aggregates these voting interests. The presence of aggregated alien equity or voting interests in a common carrier licensee's parent in excess of 25 percent triggers the applicability of section 310(b)(4)'s statutory benchmark. In calculating alien 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. Where alien voting interests in a parent company are held through one or more intervening partnerships, the F.C.C. does not apply the multiplier to dilute any general partnership interest or any limited partnership interest in a company positioned in the next lower tier of the vertical ownership chain, unless the licensee can demonstrate, in the case of a limited partner, that the partner effectively is insulated from active involvement in partnership affairs.

[25] *See* notes 14, 15 and 16, *supra*.

[26] The ECO test requires, as a condition of foreign carrier entry into the U.S. market, that there be no legal or practical restrictions on U.S. carriers' entry into the foreign carrier's market. The ECO test was crafted to serve three goals for regulation of international telecommunications services: to promote effective competition in the U.S. telecommunications service market; to prevent anti-competitive conduct in the provision of international services or facilities; and to encourage foreign governments to open their telecommunications markets.

assist the F.C.C. in examining whether foreign markets offer effective competitive opportunities to U.S. entities. However, with respect to indirect foreign investment from WTO Members, the Commission replaced its ECO test with a rebuttable presumption that such investment generally raises no competitive concerns. *See Foreign Participation Order*, 12 F.C.C.R. 23891, 23896 at ¶¶ 9, 50, and 111-12, With respect to non-WTO Members, the Commission continues to apply the ECO test in order to preserve the international public policy goals of: (i) promoting effective competition in the global market for communications services; (ii) preventing anti-competitive conduct in the provision of international services or facilities; and (iii) encouraging foreign governments to open their communications markets.

In the instant matter, because Applicants have not provided the requested information so as to determine whether the foreign interests are WTO or non-WTO interests, not only is the Commission precluded from doing a public interest test under 47 U.S.C. § 310(b)(4), the Commission can not determine whether to employ its ECO or it rebuttable presumption test.

A. Mailing Address is not an acceptable means of determining nationality.

The preceding discussion has been based upon an assumption that the information shared to date with the Commission by Applicants regarding citizenship is admissible for determining citizenship. It is not.

In his February 6, 2003 declaration at page 3, Steven P Allen, a senior officer in the Applicants' corporate structure admits that "HWL and CKHL have limited information about the individuals and entities that hold direct ownership interests in their respective shares....." It would seem that such a declaration alone would give the Commission pause to proceed.

Mr. Allen goes on to reveal that in proffering his simulated corporate disclosure form that his "conclusion as to where a shareholder is 'from' is based on the shareholder's address....."[27]

Applicants cite for the Commission no authority for this creative application of a "mail box rule." The such a authority is needed was clearly explained in *Greater Boston TV Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir. 1970), in which the D.C. Circuit made clear that the Commission must "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." If the Commission were to accept the Applicants proposal for employing the "mail box citizenship" rule, it could be clearly deviating from prior policies and standards.

While ACN might understand the need for such a creative application of mailing addresses to meet the requirements of 47 U.S.C. 310(b)(4) and 47 CFR ¶¶ 64.04(4) and 63.18(h), ACN calls to the Commission's attention the lack of reliability of employing such a system as reflected by the Commission's own forms that require both mailing address and citizenship.[28]

The Congress and the federal courts have been asked on numerous occasions to assign citizenship and have established new means to do so: 1) Where was the company incorporated, 2) What is its principal place of business. Identifying citizenship by means of a mailing address,

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[27] Even more novel than the mail box rule prepared by Applicants is that it is not being consistently applied. Mr. Allen explains in footnote 4 on page three that two entities with non-Hong Kong addresses were assigned Hong Kong citizenship because their ultimate parent is located in Hong Kong. The Commission is not told the mailing addresses of those two entities and the percentages of their ownership. Additionally, such assignment runs counter to judicial precedent, which generally views subsidiary and parent corporations as separate entities in determining citizenship. *See U.S.I. Properties Corp. v. M.D. Constr. Co.*, 860 F.2d 1, 7 (1st Cir. 1988), *cert. denied,* 490 U.S. 1065, (1989). An exception exists in some circuits when the subsidiary is the "alter ego" of the parent company. *See e.g., Keller v. Honeywell Protective Servs.*, 742 F.Supp. 425, 428 (N.D.Ohio 1990), or when the entity is an unincorporated division of a larger corporation. *See Brunswick Corp. v. Jones*, 784 F.2d 271, 275 n. 3 (7th Cir. 1986). Applicants have not provided such additional information.

[28] A feature presentations on the March 1, 2003, CBS Show "60 Minutes" is instructive. The feature demonstrated that a U.S. corporation (Montana Press) was owned by a holding company with a Swiss mailing address, that in turn was revealed to be an Iraqi controlled operation. The geography here may be

unless that address is shown to be the location of incorporation or the principal place of doing business, has not been employed.

A concise description of the history of assigning citizenship is found in *Caisse Nationale De Credit Agricole v. Chameleon* 1995 WL 76877 9 (N.D.Ill.1995.)

> From approximately the late 1800's until 1958, federal courts treated corporations organized under the laws of a foreign nation solely as foreign citizens. *Compare, e.g., National S.S. Co. v. Tugman*, 106 U.S. 118, 121, 1 S.Ct. 58, 59 (1882). In 1958, Congress amended the diversity jurisdiction statute to imbue corporations with "dual citizenship." The appended subsection reads: "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business...." 28 U.S.C. § 1332(c)(1) (1994). In adding this provision, Congress sought to curtail a local corporation's ability to create diversity with another local party by the simple expedient of incorporating in a different state.
> * * *
> Although the legislative history to does not specifically mention foreign corporations, the manifest weight of authority is to apply § 1332(c)(1) to foreign-chartered companies and to recognize both their foreign and domestic citizenships.

Applicants, in offering mailing addresses as a means to identify its ownership's citizenship, ask the Commission to disregard decades of precedent for such identification. And in place of such history, Applicants offer a system that is suffers from a lack of reliability.

The Commission cannot accept such a proposal. For in doing so, it would fail to meet its obligations to the Congress, the public and parties such as ACN, which entered into contracts with Global with the belief that the Commission would never permit a transfer under 47 U.S.C. §§ 214, 310(b)(4) or 310(d) without ensuring the Applicants were properly qualified under law.

V. ADVERSE INFERENCE

The employment of an adverse inference against Applicants for that which they choose not to reveal as required by law is not a matter of first impression for the Commission. *See*

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different, but the television expose' illustrates the real world risks of employing a mailing address to

Garden State Broadcasting Limited Partnership v. F.C.C., 996 F.2d 386 (D.C. Cir. 1993)[29] and *In re Applications of Liberty Cable Co., Inc.*, 13 F.C.C.R. 10716 (1998);.[30]

Equally instructive are the matters in which the Commission refused to apply adverse inference for they are easily distinguished from the instant matter.

The Commission rejected a claim for an adverse inference in *In re Applications of Sandab Communications Ltd. P'ship II,* 11 F.C.C.R. 9040 at ¶ 12 (1996); [hereinafter *Sandab*] because, "Absent Commission inquiry, there is no basis for an adverse inference because a licensee chooses to rely on information already supplied." *Sandab,* 11 F.C.C.R. 9040 at ¶ 12. In the instant matter, as the docket reveals, Applicants have been asked no less than four times for the information that has not be revealed.

There is also a case law and other government agency opinions to which the Commission and impacted parties may look for the exercise of adverse inferences and the basis for evaluating Applicants' petition .

The Fifth Circuit in *NLRB v. Laredo Coca-Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980) upheld an adverse inference where respondent's counsel failed to call an available witness who was likely to have knowledge of a particular matter, and who was likely to be favorably disposed to the respondent's case. Likewise in *Arthurs v. Stern*, 560 F.2d 477 (1st Cir. 1977), the

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assign citizenship.

[29] In *Garden State* the DC Circuit affirmed the Commission's remanding of an ALJ opinion which failed to exercise an adverse inference. The basis for the adverse inference was the failure to provide the a date for an organization meeting which was key to the licensing decision. On remand and upon further investigation the missing date was found to undermine the application, which was subsequently denied.

[30] Available at http://ftp.F.C.C..gov/Bureaus/Wireless/Orders/1998/F.C.C.980d1.txt. In the *Liberty* matter, the Commission denied a license extension, a much more draconian step than the mere refusal to transfer which is at stake in the instant matter and at paragraph 124 stated:

> These adverse traits were demonstrated when Liberty was not forthcoming with highly relevant documentary evidence in the discovery and hearing stages of this case either out of recalcitrance, a reckless disregard for the Rules of Practices, or as a result of an unprecedented high degree of noncaring, mindless inattention.... In view of this record, denial of the authorizations that are in issue is the only appropriate remedy.

First Circuit affirmed a medical disciplinary board's adverse inference from a physician's refusal to testify before that board, despite the fact that he was also the subject of a pending criminal indictment where 5th amendment protections would be available. The Seventh Circuit in *Minnesota Mining & Manufacturing Co. v. Pribyl*, 259 F.3d 587 (7th Cir. 2001) upheld a trial court's adverse inference instruction after six gigabytes of music were erased defendant's hard drive the night before he was to turn it over pursuant to a discovery request. See also *Garden State* for D.C. Circuit. ACN asserts that it and the public are entitled to an adverse inference due to the refusal of applicants to provide citizenship information.

There are also helpful orders from sister agencies.

The Department of Commerce in its *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Round Wire From Spain,* 64 F.C.C.R. 17323 (April 9, 1999) stated "adverse inferences may be used when an interested party fails to cooperate by not acting to the best of its ability to comply with the Department's requests for information." *See also Kawasaki Steel Corporation v. U.S.*, slip op. 00-91 (August 1, 2000).

The National Labor Relations Board has held that a respondent's production of weak evidence, where stronger evidence available, permits inference that the production of strong evidence would have been adverse. *See The Goodyear Tire & Rubber Company*, 271 NLRB 343 [117 LRRM 1086] (1984).

VI. ANTI-DRUG ABUSE ACT OF 1988

On December 27, 1991 the Commission unleashed its first salvo in the war on drugs when it adopted 47 C.F.R. § 1.2001 et. sq.[31] The rules state in part:

[31] *See Amendment of Part 1 of the Commission's Rules to Implement Section 5301 of the Anti-Drug Abuse Act of 1988*, 6 F.C.C.R. 7551 (1991).

(a) In order to be eligible for any new, modifies, and /or renewed instrument of authorization from the Commission including but not limited to, authorizations issued pursuant to Sections 214, 301, 302, 303(l), 308, 310 (d)... of the Communications Act of 1934, as amended, by whatever name that instrument may be designated , all applicants shall certify that neither the applicant nor any party to the application is subject to a denial of Federal benefits that included FCC benefits ....

(b) A party to the application, as used in paragraph (a) of this section shall include:

(1) ...

(2) if the applicant is a corporation or unincorporated association, all officers, directors, or persons holding 5% or more of the outstanding stiock or shares (voting and /or non-voting) of the applicant....

ACN has not been able to locate a 5301 certification in the record of this proceeding. Should such a certification have been filed, ACN would have difficulty in acknowledging its veracity as Applicants have made clear that they cannot identify substantial portions of the ownership structure,[32] let alone certify under Section 5301 that no officer or five percent (5%) owner is in violation of the Anti-Drug Abuse Act of 1988. ACN asserts that the record reflects that no such investigation has taken place and that the failure is reflected in the HWL letters to major owners/nominees of the Applicants.

The HWL letters, which are appended to the Declaration of Steven Allen,[33] are addressed to HKSCC Nominees Limited and HSBC Nominees (Hong Kong) Limited, whom Mr. Allen has identified as holders of super majorities of the stock of both HWL (74.53%) and CKHL (71.38%). The letters request information regarding numbers of shares, and citizenship information, as well as, other identifying characteristics required to meet Applicants' 310(b)(4)

[32] *See* February 6, 2003 Declaration of Steven P Allen at 2 in which he states "Approximately 74.53% of HWL shares are held by two nominees which hold these shares on behalf of beneficial interest holders or other nominees. (These same nominees) directly hold as nominees approximately 71.38 of CKHL's shares."

[33] *Id.*

challenges. No where in the letters, however, is any information requested regarding any Section 5301 ineligibility.

Under 47 C.F.R. § 1.2002(a) the failure to provide a 5301 certificate within 90 days from the filing of an application form or failure to respond to the question concerning certification "shall result in dismissal of the application...."

Conclusion

For the reasons stated above, and in the objections filed by others, the Commission should deny the subject petition by Global Crossing Ltd. and GC Acquisition Limited for a declaratory ruling in connection with the proposed transfer of control.

Respectfully submitted,

AMERICAN COMMUNICATIONS NETWORK, INC.

by _____

William Malone
Gerard Lavery Lederer
James R. Hobson

Miller and Van Eaton, P.L.L.C.
1155 Connecticut Avenue, N.W.
Suite 1000
Washington, D.C. 20036-4320
(202) 785-0600

Its Attorneys

March 5, 2003

Certificate of Service

I hereby certify that I have caused to be mailed (and also e-mailed where indicated) this day copies of the foregoing statement to the following:

Paul O. Gagnier, Esq.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
POGagnier@swidlaw.com

Patrick W. Kelley
Deputy General Counsel
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535

John G. Malcolm
Deputy Assistant Attorney General
Criminal Division
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
John.Malcom@usdoj.gov

R. Hewitt Pate, Esq.
Deputy Assistant Attorney
for Regulatory Matters
Antitrust Division
Department of Justice
950 Pennsylvania Avenue, N.W., Room 3645
Washington, D.C. 20530
Hewitt.Pate@usdoj.gov

Ms. Louise Novotny
Assistant Director of Research
Communications Workers of America
501 Third Street, N.W.
Washington, D.C. 20001
debbie@cwa-union.org

Mr. Karl W. B. Schwarz
Chairman, Chief Executive Officer
Global Axxess
310 W. St. Louis
Hot Springs, AR 71913
kw.schwarz@worldnet.att.net

Richard S. Elliott, Esq.
Philips J. Spector/ Jessee A. Nicol
Paul, Weiss, Rifkind, Warton & Garrison
1615 L Street, N.W., Suite 1300
Washington, D.C. 20036-5694

Edward Shapiro, Esq.
Bart Epstein
Latham & Watkins
555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20007-5116

Mr. Andy Lucas
1028 North Elm Street
Fairmont, Minnesota 56031
alucas@frontier.net

I further certify that I have caused to be e-mailed copies of the foregoing statement to the following persons as prescribed in Part VI of Public Notice DA 02-2299:

Qualex International
Federal Communications Commission
445 12th Street, S.W., Room CY-B402
Washington, D.C., 20554
qualexint@aol.com

J. Breck Blalock
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C., 20554
Bblalock@F.C.C..gov

Susan O'Connel
Policy Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C., 20554
soconnell@F.C.C..gov

Kathleen Collins
Policy Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C., 20554
Kcollins@F.C.C..gov

Elizabeth Yockus
Policy Division
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C., 20554
eyockus@F.C.C..gov

Zenji Nakazawa
Public Safety and private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C., 20554
znakazaw@F.C.C..gov

Neil Dellar
Transaction Team
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C., 20554
ndellar@F.C.C..gov

Henry Thaggert
Wireline Competition Bureau;
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C., 20554
hthagger@F.C.C..gov,.

Gerard Lavery Lederer

Washington, D.C.
March 5, 2003

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