

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

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In the Matter of
Review of Foreign Ownership Policies for
Common Carrier and Aeronautical Radio
Licensees under Section 310(b)(4) of the
Communications Act of 1934, as Amended

IB Docket No. 11-133

MAILED
AUG 10 2011
FCC Mail Room

NOTICE OF PROPOSED RULEMAKING

Adopted: August 9, 2011

Released: August 9, 2011

Comment Date: (45 days after publication in the Federal Register)

Reply Comment Date: (75 days after publication in the Federal Register)

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

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## I. INTRODUCTION

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

<sup>1</sup> 47 U.S.C. § 310(b)(4). Section 310(b)(4) states that no broadcast, common carrier, aeronautical en route, or aeronautical fixed radio station license shall be granted to or held by “any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.” *Id.* For ease of reference, we refer to aeronautical en route and aeronautical fixed radio station licenses as “aeronautical” radio station licenses. In using this shorthand, we do not include other types of aeronautical radio station licenses issued by the Commission. *See, e.g.*, 47 C.F.R. § 87.5 (defining various types of aeronautical radio stations); 47 C.F.R. § 87.19(a)-(b) (applying foreign ownership requirements to aeronautical en route and aeronautical fixed station licenses).

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

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

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

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

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

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

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

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

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

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

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

<sup>7</sup> 47 U.S.C. § 151.

<sup>8</sup> See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3964, ¶ 238.

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

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

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

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

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

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

## II. BACKGROUND

### A. Section 310 of the Act

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

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

- (a) The station license required under this Act shall not be granted to or held by any foreign government or representative thereof.
- (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by—
  - (1) any alien or the representative of any alien;
  - (2) any corporation organized under the laws of any foreign government;

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<sup>10</sup> We use the term “wireless carriers” in this NPRM to refer to common carrier and aeronautical radio station licensees.

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

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

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

- (3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
- (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.<sup>14</sup>

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

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

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

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<sup>14</sup> 47 U.S.C. § 310(a)-(b).

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

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

<sup>17</sup> 47 U.S.C. § 310(b)(3).

<sup>18</sup> See, e.g., *Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended*, Declaratory Ruling, 103 F.C.C.2d 511, 518, ¶ 12 (1985) (*Wilner & Scheiner I*), reconsidered in part, 1 FCC Rcd 12 (1986) (*Wilner & Scheiner II*); *PrimeMedia Broadcasting, Inc.*, Memorandum Opinion and Order, FCC 88-218, 3 FCC Rcd 4293, 4295 (1988).

<sup>19</sup> 47 U.S.C. § 310(b)(4).

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

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

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

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

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

<sup>20</sup> Compare 47 U.S.C. § 310(b)(4) with 47 U.S.C. § 310(b)(3).

<sup>21</sup> See 47 C.F.R. § 1.2.

<sup>22</sup> See *Application of Fox Television Stations, Inc.*, Memorandum Opinion and Order, FCC 95-188, 10 FCC Rcd 8452, 8474-77, ¶¶ 52-55 (1995) (*Fox I*) (stating that "[i]t is clear that section 310(b)(4) gives the Commission discretion with respect to alien ownership in excess of the statutory benchmark. It is equally clear that the statute requires that the Commission be made aware whenever foreign ownership could exceed the benchmark level, so that it can exercise that discretion" and citing to *Moving Phones Partnership L.P. v. FCC*, 998 F.2d 1051, 1057-58 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1004 (1994) and *Telemundo, Inc. v. FCC*, 802 F.2d 513, 516 (D.C. Cir. 1986)). See also *Galesburg Broadcasting Company*, FCC 91-131, 6 FCC Rcd 2210 (1991) (finding that the transfer of a majority of the voting stock in the U.S.-organized parent of the licensee to a trustee wholly owned by a Canadian bank without prior Commission approval "deprived the Commission of the opportunity to pass on the propriety of alien ownership which Section 310(b)(4) of the Act contemplates").

<sup>23</sup> See 47 C.F.R. § 0.261.

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

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

<sup>26</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23893-97, ¶¶ 1-12, 23935-42, ¶¶ 97-118.

presumes that foreign investment from WTO Member countries does not pose competitive concerns in the U.S. market.<sup>27</sup> For purposes of determining whether foreign investors are based in WTO Member countries and, thus, afforded greater investment opportunities under section 310(b)(4) of the Act, the Commission uses the “principal place of business” test to determine the nationality or “home market” of foreign entities that seek to invest directly or indirectly in the U.S. parent of a common carrier or aeronautical radio licensee.<sup>28</sup> The Commission’s public interest analysis under section 310(b)(4) also considers any national security, law enforcement, foreign policy or trade policy concerns raised by the proposed foreign investment.<sup>29</sup> In assessing the public interest, the Commission takes into account the record developed in each particular case and accords deference to the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, foreign policy and trade policy.<sup>30</sup>

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

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

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

<sup>29</sup> *Foreign Participation Order*, 12 FCC Rcd at 23913-15, ¶¶ 59-66.

<sup>30</sup> *Id.* at 23918, ¶¶ 59, 23919, ¶¶ 61-66.

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

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

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

### C. Implementation of the *Foreign Participation Order*

15. Under the regulatory framework adopted in the *Foreign Participation Order*, we will authorize up to 100 percent foreign ownership of a U.S. parent company that, in turn, controls a common carrier or aeronautical radio licensee, provided the petition is properly supported and absent countervailing public interest concerns. As a general rule, we authorize the foreign investors named or otherwise specifically described in the section 310(b)(4) petition to hold the ownership amounts – both equity and voting interests – specified in the petition so long as the petition contains sufficient information to demonstrate that the foreign investment is properly ascribed to WTO Member countries. We also include in our section 310(b)(4) rulings certain provisions and limitations, described below, to accommodate future changes in foreign ownership of the U.S. parent and to prohibit non-WTO investment from exceeding 25 percent of the U.S. parent's equity and/or voting interests. In addition, we have imposed, on a case-by-case basis, specific conditions that respond to concerns raised by the Executive Branch in particular proceedings with respect to potential effects of the proposed foreign investment on U.S. national security, law enforcement, and public safety.<sup>36</sup>

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

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

<sup>34</sup> *Id.* at 23946, ¶ 131.

<sup>35</sup> *Id.*

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

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

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

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

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

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

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

<sup>40</sup> See, *e.g.*, *Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc. For Consent to Transfer Control of Licenses and Authorizations, et al.*, Memorandum Opinion and Order and Declaratory Ruling, FCC 06-167, 21 FCC Rcd 13580 (2006) (authorizing, *inter alia*, 100 percent indirect foreign ownership of Guam Cellular by DoCoMo and its Japanese shareholders); *International Authorizations Granted*, Public Notice, DA 04- (continued...)

standard 25 percent aggregate allowance, which in such cases permits non-U.S. citizens of other foreign countries to acquire an aggregate 25 percent ownership interest in the foreign company. These rulings also include standard conditions to ensure that no single foreign shareholder acquires an interest in the foreign company that exceeds 25 percent without prior Commission approval and that non-WTO Member investment does not exceed 25 percent. In order to comply with a “home market” ruling, the foreign company must take steps to ensure that its foreign ownership from countries other than its home market does not exceed 25 percent.<sup>41</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>48</sup> 47 U.S.C. § 310(d).

<sup>49</sup> "Spectrum leasing arrangement" is defined in section 1.9003 of the Commission's rules, 47 C.F.R. § 1.9003.

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

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

### III. DISCUSSION

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

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

#### A. The Distinction Between WTO and Non-WTO Investment

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

<sup>51</sup> See *supra* note 6 and accompanying text.

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

<sup>53</sup> See *supra* ¶¶ 12-14.

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

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

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

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<sup>54</sup> *Foreign Participation Order*, 12 FCC Rcd at 23944-45, ¶¶ 124-127.

<sup>55</sup> *Id.*, 12 FCC Rcd at 23946, ¶ 131.

<sup>56</sup> *Id.*

<sup>57</sup> See [http://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/telecom\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm) (visited on July 19, 2011). There are currently 152 WTO Member signatories (excluding the European Union which, in addition to its Member states, is a contracting party). See [http://wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (visited July 26, 2011). Of the current 152 WTO Member signatories, 20 have joined the WTO since the WTO Basic Telecommunications Agreement entered into force on February 5, 1998. The WTO Member signatories represent governments or separate customs territories with full autonomy in the conduct of their trade policies. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 2 (GATT Secretariat 1994), 33 I.L.M. 1125 (1994), art. XII, which is publicly available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf). See also [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org.3\\_e.htm#join](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org.3_e.htm#join) (explaining the WTO's accession process) (visited on June 16, 2011).

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

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

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

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

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

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

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<sup>61</sup> *Foreign Participation Order*, 12 FCC Rcd at 23894, ¶ 3.

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

<sup>63</sup> As discussed above, the Commission currently applies a rebuttable presumption with respect to WTO Member investment under section 310(b)(4). In adopting this presumption in the *Foreign Participation Order*, the Commission explained that it applies "only to competition concerns that may arise because of a foreign carrier's market power in a foreign market." *Foreign Participation Order*, 12 FCC Rcd at 23916-17, ¶ 57. The Commission stated that, because common carrier wireless markets are, "for the most part, wholly domestic, there is no possibility of leveraging foreign bottlenecks in order to create advantages for some competitors in U.S. markets." *Foreign Participation Order*, 12 FCC Rcd at 23940, ¶ 112. See also *id.* at 23936, 23940, ¶¶ 102, 112 (noting that no commenter had argued that foreign investment in common carrier wireless markets could raise anticompetitive dangers).

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

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

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

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

(Continued from previous page)

Trade Agreements issued by the Office of the United States Trade Representative, March 2011, *available at* [http://www.ustr.gov/webfm\\_send/2788](http://www.ustr.gov/webfm_send/2788).

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

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

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

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

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

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

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

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

<sup>71</sup> 17 C.F.R. § 240.13d-1(a).

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

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

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

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

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

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

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

<sup>74</sup> *See infra* note 125 and accompanying text.

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

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

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

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

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

<sup>77</sup> *See Foreign Ownership Guidelines*, 19 FCC Rcd at 22624-22627 (Section D – Calculating Foreign Ownership Interests); *id.* at 22627 (Section E - Use of the “Multiplier”).

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

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

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

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

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

## 2. Approval of Named Foreign Investors

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

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

<sup>81</sup> 47 U.S.C. § 310(b)(3).

<sup>82</sup> 47 U.S.C. § 310(b)(4).

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

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

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

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

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

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

a. **The 49.99 Percent Approval Option for Named Foreign Investors**

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

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

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

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

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

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

**b. The 100 Percent Approval Option for Controlling Foreign Investors**

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

**3. The Aggregate Allowance for Unnamed Foreign Investors**

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

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

<sup>92</sup> We request comment on whether to define the term “group” for this purpose in the same manner discussed in Section III.A. See *supra* ¶¶ 31-34.

<sup>93</sup> 47 U.S.C. § 310(d). The term “control” as used in the Act means “every form of control, actual or legal, direct or indirect, negative or affirmative.” *WWIZ, Inc.*, 36 FCC 561, 579 (1964), *aff’d sub. nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). *De jure* control (control as a matter of law) is typically determined by whether a shareholder owns more than 50 percent of the voting shares of a corporation. *Applications For Consent to the Transfer of Corporate Control from John W. Kluge (De Facto Control) to John W. Kluge (De Jure Control)*, Memorandum Opinion and Order, 98 F.C.C.2d 300, 306 (1984). Determining whether *de facto* control (control as a matter of fact) exists is more complex and is resolved with reference to the particular circumstances of each case. *Applications of Univision Holdings, Inc. (Transferor) and Perenchio Television, Inc. (Transferee) et al.*, Memorandum Opinion and Order, 7 FCC Rcd 6672, 6675 (1992) (quoting *Stereo Broadcasters, Inc.*, 55 F.C.C.2d 819, 821 (1975)). See also *Storer Communications, Inc.*, 101 F.C.C.2d 434, 441 (1985) (“corporate control varies from case to case and cannot be properly defined”). In the context of common carrier authorizations, we have found a variety of factors to be relevant in determining whether a person or entity has *de facto* control over a company. See generally *Applications of Intermountain Microwave*, Public Notice, 12 F.C.C.2d 559 (1963); *Application of Ellis Thompson Corp.*, 10 FCC Rcd 12554, 12555-56, ¶ 9 (ALJ 1995).