

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Pandora Radio LLC	)	
	)	KXMZ(FM), Box Elder, SD
Petition for Declaratory Ruling Under Section	)	Facility ID No. 164109
310(b)(4) of the Communications Act of 1934,	)	FCC File No. BALH-20130620ABJ
as Amended	)	

To: The Secretary  
Attn: Chief, Media Bureau

**OPPOSITION TO PETITION FOR DECLARATORY RULING**

**THE AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS AND PUBLISHERS**

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## SUMMARY

On June 11, 2013, Pandora Media Inc., the self-proclaimed leader in Internet music streaming, announced its intention to acquire a broadcast radio station: KXMZ(FM), Box Elder, South Dakota – the 7th ranked radio station in the 257th ranked radio market in the United States. Pandora publicly, forthrightly and repeatedly stated its objective in purchasing KXMZ: to make the station the centerpiece of Pandora’s dispute over the licensing rate for public performances by means of Pandora’s Internet music streaming service. The proposed acquisition of KXMZ was widely recognized as a publicity stunt. It was, and remains, a ploy to draw attention to Pandora’s disgruntlement over the public performance royalties Pandora pays to copyright owners to stream their songs over the Internet.

During Media Bureau processing of the KXMZ assignment application, Pandora admitted serious difficulties identifying and calculating its foreign owned shares. Pandora amended its assignment application to designate a newly created, wholly owned subsidiary, Pandora Radio LLC, as the proposed assignee, thus gaining the benefit of the 25 percent indirect foreign ownership threshold under Section 310(b)(4) of the Communications Act, as opposed to the 20 percent direct standard of Section 310(b)(3). Even so, Pandora now admits it cannot “prove . . . for a fact” that it complies with the 25 percent foreign ownership limitation of Section 310(b)(4), because it does not know the identities of the beneficial owners of at least half its shares.

On November 14, 2013, at the urging of broadcasters and public interest groups, including organizations representing the interests of small business, women and minority broadcasters, the Commission issued the Foreign Investment Declaratory Ruling to clarify that it

would entertain foreign broadcast ownership proposals that exceed the 25 percent benchmark of Section 310(b)(4). But the Commission also issued three caveats with the Declaratory Ruling:

1. It did not intend to “rubber stamp” such proposals or grant “blanket waivers.” It would, instead, undertake a searching, in-depth, fact-specific, individualized case-by-case review, focusing on the unique circumstances of each proposal.
2. It would evaluate such proposals in strict accordance with the Commission’s public interest standard, to ensure the appropriateness of issuing an affirmative finding that the public interest would be served by permitting the requested foreign ownership.
3. It intended the Foreign Investment Declaratory Ruling to address a longstanding concern about inadequate access to capital for broadcasters that are small businesses and/or are owned by women and minorities, and expected the Declaratory Ruling to promote opportunities for those disadvantaged broadcasters to gain additional access to foreign capital, which in turn could yield additional programming directed at niche and minority audiences.

Pandora has now filed its Petition, the first to invoke the Foreign Investment Declaratory Ruling, seeking consent for Pandora to be up to 100% foreign owned so that it may acquire KXMZ. But the public interest showing accompanying the Petition, meager even if accepted at face value, collapses under scrutiny, and is entirely inadequate to support grant of the Petition. *Not one* of the Congressionally mandated public interest goals cited by Chairman Wheeler in his endorsement of the Declaratory Ruling – increased investment, innovation, media diversity, localism, and efficient use of spectrum – would be advanced by Pandora’s acquisition of KXMZ. Moreover, the acquisition has the potential to inflict broad and expansive public interest harms. Grant of the Petition could trigger a chain of events leading to the unraveling of the collective

music licensing system that has served copyright holders, the broadcasting industry, and American society for a century. As a collateral result, the broadcasting industry could be pushed toward further consolidation by large, publicly held companies.

The story behind Pandora's attempted acquisition of KXMZ is far more complex, with vastly more significant repercussions, than Pandora would have the Commission appreciate. But Pandora cannot conceal that its proposed acquisition of KXMZ has nothing to do with serving the public interest, and everything to do with thrusting a "small Midwestern radio station" into the middle of a music licensing dispute between Pandora and the songwriters, composers and publishers whose works Pandora streams over the Internet millions of times each day.

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To: The Secretary  
Attn: Chief, Media Bureau

**OPPOSITION TO PETITION FOR DECLARATORY RULING**

The American Society of Composers, Authors and Publishers (“ASCAP”) opposes Pandora Radio’s Petition for Declaratory Ruling Under Section 310(b)(4) of the Communications Act, as amended. Pandora cannot demonstrate compliance with the 25 percent foreign ownership limitation of Section 310(b)(4). It therefore seeks a ruling permitting it to be up to 100% foreign owned, so that Pandora can acquire radio station KXMZ(FM), Box Elder, South Dakota.<sup>1</sup> The Petition fails to demonstrate how “the public interest would be served by permitting the requested foreign ownership,”<sup>2</sup> and should be denied.

Nearly 10% of Americans listen to Pandora’s computer algorithm-generated programming each month,<sup>3</sup> including “more than 42,000 unique listeners in the Rapid City area

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<sup>1</sup> See Petition for Declaratory Ruling of Pandora Radio LLC Under Section 310(b)(4) of the Communications Act of 1934, as Amended, FCC File No. BALH-20130620ABJ (filed June 27, 2014) (“Petition”).

<sup>2</sup> *Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees*, Declaratory Ruling, 28 FCC Rcd 16244, 16252 (2013) (¶ 15) (“*Foreign Investment Declaratory Ruling*”).

<sup>3</sup> Petition at 5; see also Pandora News Release, “Pandora Announces May 2014 Audience Metrics” (June 4, 2014), available at <http://investor.pandora.com/phoenix.zhtml?c=227956&p=irol-newsArticle&ID=1937243&highlight=> (“Share of total U.S. radio listening for Pandora in May 2014 was 9.13%, an increase from 7.29% at the same time last year.”)

[who] represent nearly one-third of the [Metropolitan Statistical Area's] population.”<sup>4</sup> Pandora, therefore, does not need or want to acquire KXMZ to expand its audience. Instead, Pandora's purpose in acquiring KXMZ is to entangle the station in Pandora's dispute over performance royalty rates. If Pandora is successful, music publishers have threatened to withdraw from ASCAP and Broadcast Music, Inc. (“BMI”), the two largest performing rights organizations (“PROs”). If that occurs, the fallout could be unprecedented. The system of collective licensing that has served the music industry, broadcasters and the American public for a century could disintegrate. Music licensing could regress to one-to-one negotiations between copyright holders and broadcasters – a costly and inefficient logistical nightmare. Large radio group owners might be able to navigate such an uneconomic landscape, but small radio stations likely could not. Grant of the Petition could collaterally result in further consolidation of broadcast radio station ownership by large, publicly held companies.

In addition to the myriad public interest concerns presented by the Petition, there exists a very practical one. There could be no cabining of a grant of the Petition to Pandora's specific circumstances. Pandora is a well-capitalized, publicly held company. If Pandora is entitled to exceed the 25 percent benchmark, then all other publicly held companies will also be entitled to the same relief.

## **I. OVERVIEW**

### **A. Pandora Does Not Want KXMZ – It Wants Lower Music Licensing Fees.**

For Pandora, this proceeding is not about KXMZ. It is not about providing foreign capital to the domestic broadcast industry. It is not about serving the needs of citizens of Box Elder, South Dakota. And it has nothing to do with programming KXMZ in a manner consistent

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<sup>4</sup> Petition at 7 n.17.

with the public interest. Pandora’s attempt to acquire a broadcast radio station is simply a ploy it is using in the ongoing dispute over the licensing fees Pandora pays to stream music over the Internet.

Pandora pays different music licensing fees than radio broadcasters. This is because Pandora’s business model and the way it uses music are distinct from traditional AM and FM broadcasters.<sup>5</sup> Pandora doesn’t just *play* music, it *is* music – and very little else.<sup>6</sup> Disgruntled over the licensing rate assessed against its Internet music streams, Pandora hatched a scheme. Pandora would acquire a single terrestrial broadcast station – any station would do; the target just happened to be KXMZ – and then try to recast itself as a “broadcaster” entitled to the reduced licensing rate applicable to broadcast radio stations’ Internet streaming services under ASCAP and BMI agreements negotiated with the committee that represents most commercial radio stations. As a “broadcaster,” Pandora – so it contends – would pay the lower broadcaster licensing rate not just for KXMZ, *but also for Pandora’s billions of Internet music streams*. Pandora really does not *want* to own KXMZ (as evidenced by the paltry public interest showing accompanying the Petition, discussed below); it only wants to *use* the station as a means to an end – to pay less for the product that is the lifeblood of Pandora’s existence: music. In short,

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<sup>5</sup> See *infra* nn. 19-21 and accompanying text.

<sup>6</sup> Pandora has “a single mission: [t]o play only music you’ll love.” Pandora Media, Inc., “About Pandora,” available at <http://www.pandora.com/about>. Unlike broadcast radio stations, Pandora’s Internet-only streams do *virtually nothing* but play music – they offer no commentary, news, information, public affairs programming, public service, or non-musical entertainment of any kind (except for a few comedy skits). The amount of music played by Pandora is staggering. Pandora “streams 200 million songs before 10 a.m. every day.” Pandora Press Release, “Pandora is Now 200 Million Music Fans Strong” (Apr. 9, 2013), available at <http://press.pandora.com/phoenix.zhtml?c=251764&p=irol-newsArticle&ID=1816051&highlight=>. In one month (March 2013), Pandora “played more than 100,000 unique artists and more than 1 million unique songs.” *Id.* In terms of annual figures, “for the eleven months ended December 31, 2013, [Pandora] streamed 15.31 billion hours” of content – almost entirely music. Pandora Media, Inc., United States Securities and Exchange Commission Form 10-KT for the Transition Period from February 1, 2013 to December 31, 2013 at 8 (“Pandora 2013 10-KT”). In sum, Pandora has an unrelenting focus – and complete reliance – on the attributes and “intrinsic qualities” of one solitary product: music.

Pandora's purchase of a KXMZ is a stunt.<sup>7</sup> Pandora has no desire to enter the broadcasting business or to serve the public interest.

Before it encountered difficulties with the KXMZ assignment application, Pandora never shied from candidly stating the reason for its purchasing of the station. On June 11, 2013, when it announced its intended purchase, Pandora publicly acknowledged that its purpose in acquiring KXMZ was to “qualify for certain Radio Music Licensing [sic] Committee (‘RMLC’) settlement agreements concerning royalties and public performance of music works in the [PROs’] repertoires.”<sup>8</sup> Pandora’s assistant general counsel penned a guest column in a well-known Washington, DC political publication, boasting that Pandora’s acquisition of KXMZ “allows us to qualify for the same RMLC license under the same terms as our competitors.”<sup>9</sup> Pandora told National Public Radio that it was “aiming to get the more favorable royalty rates given to terrestrial broadcasters.”<sup>10</sup> The day after the announcement, a business article perfectly summarized Pandora’s plot: *Pandora Buys a Radio Station, Just to Make a Point About*

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<sup>7</sup> See Jacqueline Sahagian, *Pandora’s Publicity Stunt Could Be Blocked by the FCC*, Wall St. Cheat Sheet (July 30, 2013), available at <http://wallstcheatsheet.com/stocks/pandoras-publicity-stunt-could-be-blocked-by-the-fcc.html/>.

<sup>8</sup> Pandora Media, Inc., United States Securities and Exchange Commission Form 8-K at 2 (June 11, 2013). See also Pandora 2013 10-KT at 49 (stating that Pandora entered into an agreement to purchase KXMZ “to allow us to qualify for certain settlement agreements concerning royalties for the public performance of musical works between the Radio Music Licensing [sic] Committee (‘RMLC’) and the American Society of Composers, Authors and Publishers (‘ASCAP’) and Broadcast Music, Inc. (‘BMI’), respectively.”) The RMLC is a nonprofit entity that “represents the interests of the commercial radio industry (some 10,000 commercial radio stations) on music licensing matters.” Radio Music License Committee, “Our Mission,” available at <http://www.radiomlc.org/Homepage/4779186>.

<sup>9</sup> Christopher Harrison, *Why Pandora Bought an FM Radio Station*, The Hill (June 11, 2013), available at <http://thehill.com/blogs/congress-blog/technology/304763-why-pandora-bought-an-fm-radio-station>.

<sup>10</sup> Laura Sydell, *Pandora Buys A Radio Station, Songwriters’ Group Calls It A ‘Stunt,’* NPR News (June 15, 2013), available at <http://www.npr.org/blogs/therecord/2013/06/15/191703769/songwriters-group-calls-pandoras-radio-station-buy-a-stunt>.

*Royalties*.<sup>11</sup> Despite the many platitudes later extended by Pandora – that its purchase of KXMZ would “bring an innovative new programming model to . . . the radio sector”<sup>12</sup> and would “enhance both the localism and diversity of voices in the Rapid City radio market”<sup>13</sup> – Pandora’s motive remains the same: to ensnare KXMZ in Pandora’s bid to reduce the performance royalty rate applicable to its Internet music streaming business.<sup>14</sup>

## **B. The Pandora Music Licensing Dispute Colors This Entire Proceeding.**

The Petition avoids any discussion of the “music copyright war”<sup>15</sup> that underlies Pandora’s scheme to acquire KXMZ. Yet an overview of this issue is vital to understanding Pandora’s maneuverings.

### **1. The Role of Performance Rights Organizations and Music Royalties.**

Under United States copyright law, when a song is “publicly performed,” i.e., played – whether on a radio station, in a restaurant or bar, or over the Internet – the people who wrote the music (composers and songwriters) and those who own the copyright in the song (generally, a

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<sup>11</sup> Joshua Brustein, *Pandora Buys a Radio Station, Just to Make a Point About Royalties*, Bloomberg Businessweek (June 12, 2013), available at <http://www.businessweek.com/articles/2013-06-12/to-make-a-point-about-royalties-pandora-buys-a-radio-station> (“Brustein Article”). See also Hannah Karp, *Pandora Buys FM Station, Aiming to Lower Royalty Rates*, Wall St. J. (June 11, 2013) (“Pandora said . . . it had made a deal to buy KXMZ-FM, a tiny terrestrial radio station in Rapid City, S.D., in order to qualify to pay lower royalty rates to music publishers.”); Julianne Pepitone, *Pandora Buys South Dakota Radio Station in Bid for Lower Fees*, CNNMoney (June 11, 2013), available at <http://money.cnn.com/2013/06/11/technology/pandora-buys-radio-station/>; Matthew Rocco, *Pandora Buys FM Station to Lower Music Royalties*, Fox Business (June 11, 2013), available at <http://www.foxbusiness.com/industries/2013/06/12/pandora-buys-fm-station-to-lower-music-royalties/>.

<sup>12</sup> Petition at 14-15.

<sup>13</sup> *Id.* at 15.

<sup>14</sup> See *Brustein Article* (“In its announcement, Pandora argues that owning an over-the-airwaves radio station should legally entitle it to better royalty rates . . . . Pandora complains that ASCAP grants specific privileges to the Internet properties of so-called terrestrial broadcasters, which include almost all of Pandora’s main competitors. Hence the purchase of KXMZ . . . .”)

<sup>15</sup> Peter Weber, *Death to Pandora? A Guide to the Looming Music Copyright War*, The Week (July 10, 2014), available at <http://theweek.com/article/index/264453/death-to-pandora-a-guide-to-the-looming-music-copyright-war>.

music publisher) are entitled to receive payments (or “royalties”). These songwriters, composers and publishers (the “Copyright Owners”) are able to collect their royalties – which for many serve as their main sources of livelihood – by joining one of three performing rights organizations: ASCAP, BMI, or SESAC, Inc.<sup>16</sup> Through a system of collective licensing, hundreds of thousands of Copyright Owners are able to spread the administrative costs of licensing across the membership of the PROs. On the other side of the ledger, “users” of music – such as broadcasters – pay fees to the PROs, who then distribute these payments to the Copyright Owners as royalties. As consideration for their payments, users receive blanket licenses from the PROs enabling the users to “perform” lawfully the millions of songs in the PROs’ catalogs. Collective licensing makes manageable the enormous transaction costs that would otherwise accompany one-to-one negotiations between Copyright Owners and music users. As a result, society enjoys access to a constant stream of music.

## **2. Pandora’s Dispute with the PROs.**

Pandora disputes the amount it should pay Copyright Owners to stream their copyrighted songs across Pandora’s Internet platform. Pandora claims it should be entitled to the very same payment terms for its Internet-only streaming music business as broadcasters who, ancillary to their primary business – terrestrial radio broadcasting – also stream audio over the Internet. The payment terms for radio broadcasters were established by a January 2012 negotiated settlement<sup>17</sup> between ASCAP and the RMLC – an organization that “represents the vast majority of the

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<sup>16</sup> Only ASCAP and BMI, by far the larger of the PROs, operate on a non-profit basis.

<sup>17</sup> Despite being agreed to in 2012, because of its retroactive effect the settlement is embodied in the “ASCAP 2010 Radio Group License Agreement.” It is referred to herein as the “Radio Group License” because it is applicable, as its name plainly states, to entities that own and operate multiple radio stations, commonly known as “radio groups.”

nation's radio stations (some 10,000 radio stations)."<sup>18</sup> The Radio Group License was designed for over-the-air broadcasting and Internet music streaming by broadcast radio groups that derive the overwhelming bulk of their revenues from terrestrial radio broadcasting. It was never intended to apply to Internet-centered operations like Pandora. Moreover, the Radio Group License is only available to over-the-air broadcasters whose radio broadcasts are covered by another ASCAP license – the 2010 Radio Station License Agreement – the terms of which apply solely to the licensee's terrestrial broadcast radio stations.

Pandora proudly proclaims that it dissects and categorizes the “musicological ‘DNA’ . . . of more than one million tracks”<sup>19</sup> using a “deeply detailed, hand-built musical taxonomy.”<sup>20</sup> Simply put, Pandora exploits music in an entirely different manner from traditional broadcast radio stations, most of which play a limited number of songs derived from playlists of music in a particular genre (Adult Contemporary, Classic Rock, Smooth Jazz, Country, etc.).<sup>21</sup> Pandora, therefore, appropriately pays a different licensing rate for its access to virtually the entire spectrum of copyrighted music.

### **3. Pandora's Plan to Draw KXMZ into Its Music Licensing Dispute.**

After ASCAP and BMI repeatedly rebuffed Pandora's demands for access to the Radio Group License, Pandora concocted its scheme to become a “broadcaster.” Pandora sought out a broadcast radio station to target. It eventually settled on KXMZ – the 7th ranked station in the

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<sup>18</sup> *Federal Court Approves Radio Industry Settlement with ASCAP*, RMLC Press Release (Jan. 27, 2012), available at <http://www.radiomlc.org/pages/4795848.php>.

<sup>19</sup> Petition at 4-5.

<sup>20</sup> *Id.* at 4.

<sup>21</sup> Pandora engages in “the most comprehensive analysis of music ever undertaken.” Pandora Media, Inc., “About Pandora,” available at <http://www.pandora.com/about>.

257th ranked radio market<sup>22</sup> – not because Pandora had any logical connection to or affinity for the Rapid City, South Dakota radio market, but because the price was right.<sup>23</sup> With the filing of the KXMZ assignment application, Pandora launched its strategy to drag KXMZ into the fray of Pandora’s Internet music licensing dispute.

## **II. GRANT OF PANDORA’S PETITION WOULD PROVE HARMFUL TO THE PUBLIC INTEREST.**

Pandora’s maneuverings to make KXMZ the centerpiece of its dispute over Internet music licensing fees have extremely broad public interest implications that extend well beyond the immediate KXMZ service area. Pandora’s ploy to exploit KXMZ, if sanctioned by the Commission, could help upend the century-old collective licensing system by which Copyright Owners are compensated, and by which broadcasters gain seamless access to the vast music catalogs that help supply their programming. The ultimate losers would be consumers – those for whom music is intended. The FCC should not countenance such a result. It should deny the Petition as unmistakably contrary to the public interest.

The Commission possesses broad authority to deny approval of transactions like this one – that are not in the public interest, or that, on balance, inflict greater harm than benefit on the public.<sup>24</sup> The Commission’s public interest analysis is extremely wide-ranging, encompassing the “broad aims of the Communications Act”<sup>25</sup> and ensuring that the proposed assignment will

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<sup>22</sup> BIA/Kelsey Radio Ratings Report, Rapid City, S.D. (Fall 2013). After Pandora began programming KXMZ pursuant to a Local Marketing Agreement, KXMZ’s ranking plummeted to 11th in the Rapid City market. *See* BIA/Kelsey Radio Ratings Report, Rapid City, S.D. (Spring 2014).

<sup>23</sup> Pandora agreed to pay \$600,000 for KXMZ. *See* Pandora 2013 10-KT at 49.

<sup>24</sup> *See, e.g., Comcast Corp. General Electric Co. and NBC Universal, Inc.*, 26 FCC Rcd 4238, 4247-48 (¶ 22) (2011) (“*Comcast*”); *General Motors Corp. and Hughes Electronics Corp.*, 19 FCC Rcd 473, 483 (¶ 15) (2004) (“*General Motors*”).

<sup>25</sup> *Comcast* at 4248 (¶ 23) (internal quotations omitted).

serve “the public interest, convenience, and necessity.”<sup>26</sup> This evaluation investigates not only “whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission’s rules,”<sup>27</sup> but also examines “whether a grant could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.”<sup>28</sup> Because “the Commission has adopted rules to promote diversity, competition or other public interest concerns, those rules . . . may form the basis for determining whether the . . . application[ ] . . . [is] on balance in the public interest.”<sup>29</sup> In sum, the Commission possesses exceedingly wide-ranging authority to “determin[e] whether the transaction serves the *broader* public interest,”<sup>30</sup> and the burden falls squarely on Pandora to prove that its proposed transaction meets this standard.<sup>31</sup>

The Foreign Investment Declaratory Ruling repeatedly emphasized that petitions such as Pandora’s, seeking approval of foreign ownership of a broadcast station in excess of the 310(b)(4) standard, will be evaluated in *strict* accordance with the public interest standard.<sup>32</sup> The Commission’s decisions on such petitions are to be governed by a “fact-specific, individual case-

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<sup>26</sup> *Id.* at 4341(¶ 251) (internal quotations omitted).

<sup>27</sup> *Id.* at 4247 (¶ 22).

<sup>28</sup> *Id.*; see also *Applications for Consent to Transfer of Control from License Subsidiaries of Allbritton Communications Co. to Sinclair Television Group, Inc.*, Memorandum Opinion and Order, DA 14-1055 (MB July 24, 2014) (“*Sinclair Order*”) (¶ 24).

<sup>29</sup> *Sinclair Order* (¶ 24).

<sup>30</sup> *General Motors* at 484 (¶ 17) (emphasis added).

<sup>31</sup> *Comcast* at 4247 (¶ 22); *General Motors* at 483 (¶ 22); *Sinclair Order* (¶ 25).

<sup>32</sup> Commission precedent requires “an *affirmative* Commission finding . . . that such ownership *is* in the public interest.” *Foreign Investment Declaratory Ruling* at 16250 (¶ 12) (emphasis added). This requires a more robust endorsement than Pandora’s framing of the standard: that the transaction “is not inconsistent with the public interest.” Petition at 1-2.

by-case review”<sup>33</sup> and will vary “based on the . . . unique circumstances presented by each application.”<sup>34</sup> The Commission also articulated a particular public interest cause it wished to promote with the issuance of the Foreign Investment Declaratory Ruling: “spur[ring] new and increased opportunities for capitalization for broadcasters, and particularly for minority, female, small business entities, and new entrants . . . . [which] may in turn yield greater innovation, particularly in programming directed at niche or minority audiences.”<sup>35</sup> That this was the primary objective of the Foreign Investment Declaratory Ruling was reemphasized in a Further Notice of Proposed Rulemaking issued in the 2010 and 2014 Quadrennial Review of broadcast ownership rules. There, while describing its “recent initiatives to foster diversity,”<sup>36</sup> the Commission explained that the Foreign Investment Declaratory Ruling addresses the issue of “limited access to capital . . . in the broadcast industry, *particularly for small entities, including entities owned by minorities and women.*”<sup>37</sup>

As the Commission delves into the distinctive facts and unique circumstances of this proceeding, it will find that the proposed transaction fails to pass the stringent public interest test dictated by the Foreign Investment Declaratory Ruling. The “unmitigated public interest benefits”<sup>38</sup> trumpeted by Pandora are highly implausible and evaporate under scrutiny. Moreover, those benefits, even if accepted at face value, have *nothing* to do with the specific

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<sup>33</sup> *Foreign Investment Declaratory Ruling* at 16250 (¶ 11).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 16249 (¶ 10). *See also* Statement of Commissioner Ajit Pai (noting that the ruling would “increase minority ownership of broadcast outlets . . . . [because] minority entrepreneurs will have a better chance of being able to enter the broadcast industry or expand existing businesses.”). *Id.* at 16257-58.

<sup>36</sup> *Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4513 (¶ 245) (2014).

<sup>37</sup> *Id.* at 4513 (¶ 310).

<sup>38</sup> Petition at 15.

cause promoted by the Foreign Ownership Declaratory Ruling: boosting access to foreign sources of capital for minority, female, and small business broadcast owners so as to allow for an increased focus on niche and minority-oriented programming.<sup>39</sup>

Contrary to Pandora’s assertion that its proposed acquisition of KXMZ presents “exactly the type of transaction that the Commission aimed at facilitating when it adopted the [Foreign Investment] Declaratory Ruling,”<sup>40</sup> this proceeding instead exemplifies a transaction where a “fact-specific, individual . . . review”<sup>41</sup> leads to the unavoidable conclusion that “a denial will serve the public interest.”<sup>42</sup>

**A. The Alleged Public Interest Benefits of the Proposed Transaction are Implausible and Unsubstantiated.**

Pandora claims that its acquisition of KXMZ will produce the following benefits, which “fully justify the Commission’s issuance of the public interest declaratory ruling requested by Pandora,”<sup>43</sup> even if Pandora is 100% foreign owned:

1. An “influx of new capital into the Rapid City radio market.”<sup>44</sup>
2. Application of “The Music Genome Project” to KXMZ, resulting in innovation of “a manner previously unseen in broadcasting.”<sup>45</sup>

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<sup>39</sup> Pandora’s statement to the contrary – that grant of the Petition “will provide significant public interest benefits consistent with those outlined in the Commission’s recent declaratory ruling regarding the application of Section 310(b)(4) to broadcasters” – is nonsensical. Petition at iii (emphasis added). The alleged benefits are completely unrelated to the cause promoted by the *Foreign Investment Declaratory Ruling*.

<sup>40</sup> Petition at 14.

<sup>41</sup> *Foreign Investment Declaratory Ruling* at 16250 (¶ 11).

<sup>42</sup> *Id.* at 16249 (¶ 10).

<sup>43</sup> Petition at 15.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 16.

3. “Further[ance] of the Commission’s diversity goals.”<sup>46</sup>
4. A “cutting edge approach to programming” that will be a “unique means of furthering the Commission’s objective of fostering broadcast localism.”<sup>47</sup>

An examination of these statements reveals each to be hollow.

**1. Pandora’s Acquisition of KXMZ Does Not Implicate “Foreign Investment.”**

Pandora claims that allowing it to acquire KXMZ will further the Commission’s recently reiterated goal of spurring foreign investment in the broadcasting industry. Pandora mischaracterizes the objective of the Commission’s Foreign Investment Declaratory Ruling.

The Foreign Investment Declaratory Ruling was intended to promote new foreign *investment* in, and access to foreign capital resources for, the domestic broadcasting industry – not the acquisition of domestic broadcast stations by fully capitalized entities that just happen to have existing high levels of foreign ownership.<sup>48</sup> This is a distinct difference. Broadcasters and public interest associations, including those representing various civil rights groups, petitioned the Commission to issue the Foreign Investment Declaratory Ruling specifically in order to “increase access to *capital and investment financing*” from foreign sources.<sup>49</sup> In their view, “financial institutions”<sup>50</sup> had become overly wary of financing broadcast transactions where the 25 percent benchmark might become an issue. For example, “*banks* from Canada and Europe

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<sup>46</sup> *Id.* at 17.

<sup>47</sup> *Id.*

<sup>48</sup> Pandora’s market capitalization is over \$5.5 billion. *Id.* at ii.

<sup>49</sup> *Foreign Investment Declaratory Ruling* at 16244 (¶ 1) (emphasis added).

<sup>50</sup> *Id.* at 16246 (¶ 5).

ha[d] expressed their interest in making *equity investments* in U.S. broadcast stations,”<sup>51</sup> but had hesitated due to Section 310(b)(4) concerns. Clearly, the impetus for both the petition, and the grant, of the Foreign Investment Declaratory Ruling was to provide broadcasters – *especially small business, minority and/or female-owned institutions* – expanded access to financing from overseas banks, financial institutions, and investors.<sup>52</sup> Such broadcasters, it was hoped, would use this additional financing to improve their service – “particularly [with] programming directed at niche or minority audiences.”<sup>53</sup> The Foreign Investment Declaratory Ruling was not intended as a vehicle for fully capitalized companies to acquire broadcast stations under the guise of “providing foreign capital.” Pandora’s proclamation that its proposed acquisition of KXMZ is “exactly the type of transaction”<sup>54</sup> envisioned by the Foreign Investment Declaratory Ruling could not be more inaccurate.

## **2. The “Music Genome Project” Is Not “Innovation” of the Sort Envisioned by the Commission.**

Pandora proclaims that it will virtually revolutionize broadcast radio programming if it is allowed to acquire KXMZ. Pandora boasts that it will use “The Music Genome Project” to serve KXMZ’s listeners “in a manner previously unseen in broadcasting.”<sup>55</sup> Behind the hyperbole of these over-amped statements lies a simple truth: if it acquires KXMZ, Pandora will turn over the station’s programming decisions to a computer.

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<sup>51</sup> *Id.* (emphases added).

<sup>52</sup> “The biggest obstacle to minority ownership in the broadcast industry is the lack of access to capital.” *Id.*, Statement of Commissioner Ajit Pai, at 16258.

<sup>53</sup> *Id.* at 16249 (¶ 10).

<sup>54</sup> Petition at 14.

<sup>55</sup> *Id.* at 16.

No one questions Pandora's status as an "innovative technology company."<sup>56</sup> But its much vaunted "Music Genome Project" is really just "a very detailed music database, pure and simple."<sup>57</sup> Pandora proposes the wholesale importation and "appl[ication] to radio broadcasting [of] the data and expertise that it has developed managing The Music Genome Project."<sup>58</sup> In plain English: KXMZ will be programmed by a computer. When the Commission expressed hope that the Foreign Investment Declaratory Ruling would "yield greater innovation . . . in programming,"<sup>59</sup> it likely did not envision the relinquishment of human involvement in programming decisions. Given the Commission's longstanding commitment to localism, which includes station personnel ascertaining issues of importance to local citizens and then delivering community-responsive programming in response, it is difficult to see how operating KXMZ via "complex algorithms"<sup>60</sup> developed for a well-established Internet platform could be deemed "innovative" programming.<sup>61</sup>

### **3. Pandora's Acquisition of KXMZ Does Not Promote Diversity.**

Pandora next claims that "grant of the Petition will further the Commission's diversity goals."<sup>62</sup> According to Pandora, its acquisition of KXMZ would simultaneously further

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

<sup>57</sup> Carlton Wilkinson, *How Pandora's Music Genome Could Fail Against the Likes of Apple*, *The Street* (Oct. 7, 2013), available at <http://www.thestreet.com/story/12059828/1/how-pandoras-music-genome-could-fail-against-the-likes-of-apple.html>.

<sup>58</sup> Petition at 16.

<sup>59</sup> *Foreign Investment Declaratory Ruling* at 16249 (¶ 10).

<sup>60</sup> Pandora 2013 10-KT at 4.

<sup>61</sup> Pandora was founded almost 15 years ago, and adopted its current business model in 2005. Petition at 5.

<sup>62</sup> *Id.* at 17.

“program diversity, viewpoint diversity, source diversity, [and] outlet diversity.”<sup>63</sup> Pandora provides no details about *how* this would occur. Certainly, as a new licensee in the market, Pandora might be credited with generating some form of program diversity and outlet diversity. But the same could be said of any new licensee – Pandora adds nothing unique in this regard. Viewpoint diversity, on the other hand, “is most easily measured through the amount of [a licensee’s] news and public affairs programming, which relates most directly to the Commission’s core policy objectives of facilitating robust democratic discourse in the media.”<sup>64</sup> Viewpoint diversity is a “paramount objective of th[e] Commission because the free flow of ideas under-girds and sustains our system of government.”<sup>65</sup> Pandora gives no indication that it will provide news or public affairs programming on KXMZ, and fails to explain how algorithm-driven music selection enhances “democratic discourse”<sup>66</sup> or the “free flow of ideas.”<sup>67</sup> Lastly, “source diversity” is a television-centric concept that was discarded long ago as a component of the Commission’s diversity goals.<sup>68</sup> In sum, Pandora provides nothing beyond generalized, unsubstantiated statements to explain how its ownership of KXMZ would further the Commission’s diversity goal.

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<sup>63</sup> *Id.* at 16.

<sup>64</sup> *Adelphia Communications Corporation*, 21 FCC Rcd 8203, 8292 (¶ 204) n. 636 (2006) (“*Adelphia*”) (citing *2002 Biennial Regulatory Review-Review of the Commission’s Broadcast Ownership and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13631 (¶ 32) (subsequent history omitted) (“*2002 Biennial Review*”).

<sup>65</sup> *2002 Biennial Review* at 13627 (¶ 32).

<sup>66</sup> *Adelphia* at 8292 (¶ 204) n. 636.

<sup>67</sup> *2002 Biennial Review* at 13631 (¶ 32). Pandora claims that it “plans to continue and expand KXMZ’s involvement in serving the needs and interests of the local community.” Petition at 17. But the activities cited do not involve news and public affairs programming. See Pandora’s Opposition to Petition to Deny, FCC File No. BALH-20130620ABJ (filed Aug. 13, 2013) at 6-8 (detailing previous KXMZ “community service activities” that Pandora pledges to continue).

<sup>68</sup> *2002 Biennial Review* at 13633-34 (¶¶ 43-45).

#### 4. Pandora's Acquisition of KXMZ Does Not Further Localism.

Pandora's claim that its acquisition of KXMZ would "promot[e] broadcast localism"<sup>69</sup> also rings hollow. The Commission's localism policy is designed, as Pandora correctly notes, "to ensure that each station treats the significant needs and issues of the community that it is licensed to serve with the programming that it offers."<sup>70</sup> What Pandora conveniently avoids, however, is that the Commission's focus in evaluating a licensee's commitment to localism "continues to be on news and public information programming,"<sup>71</sup> which may include "investigative reports, health advice, crime reports, weather, sports, consumer advocacy, family issues, cultural events, business matters, and topics of importance to minorities,"<sup>72</sup> as well as programs exploring "education, minority issues, health matters, violence, consumer topics, women's issues, and religion."<sup>73</sup> Pandora does not explain how its software, which is designed specifically to create an *individualized* online listening experience, can better serve the broader "local tastes" of the Box Elder community and the wider KXMZ listening area, even with respect to musical entertainment.

Pandora also does not explain how permitting the foreign ownership requested in the Petition will allow Pandora "to continue and expand KXMZ's involvement in serving the needs

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<sup>69</sup> Petition at 17.

<sup>70</sup> *Id.* at 17 n. 50 (quoting *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, 17495 (¶ 14) (2011) ("2010 Review").

<sup>71</sup> *2010 Review* at 17495 (¶ 14) (2011).

<sup>72</sup> *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324, 1339 (¶ 32) (2008) (listing examples provided by broadcasters of news and other community responsive programming that they air).

<sup>73</sup> *Id.* at 1339 (¶ 33) (listing examples of public affairs programming aired by broadcasters).

and interests of the local community.”<sup>74</sup> In sum, Pandora’s statement that it is somehow “uniquely situated to offer programming responsive to the preferences of the Box Elder community”<sup>75</sup> is unsubstantiated.

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In issuing the Foreign Investment Declaratory Ruling, Chairman Wheeler warned that petitions like Pandora’s will not be “rubber stamp[ed];”<sup>76</sup> rather, they will be evaluated “on a case-by-case basis to determine if approval to exceed [the] 25% benchmark for foreign ownership is consistent with the public interest, including the goals established by Congress. Those goals include *encouraging investment, innovation, media diversity, localism, and the efficient use of spectrum.*”<sup>77</sup> Pandora’s Petition fails to explain how *any* these goals would be advanced by Pandora’s acquisition of KXMZ. On this basis alone, the Petition should be denied.

**B. The Public Interest Harms Arising from the Transaction Outweigh the Benefits.**

Pandora repeatedly proclaims that “grant of the Petition does not implicate *any* potential harms.”<sup>78</sup> This is absurd. The “potential” harms are, in fact, real and expansive. The fallout from Pandora’s scheme to acquire KXMZ could extend to Copyright Owners, the broadcasting industry, and American society in general.

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<sup>74</sup> Petition at 17.

<sup>75</sup> *Id.* at 7.

<sup>76</sup> *Foreign Investment Declaratory Ruling*, Statement of Chairman Tom Wheeler, at 16254.

<sup>77</sup> *Id.* (emphasis added).

<sup>78</sup> Petition at 18 (emphasis added). *See also id.* at iii (“[G]rant of the petition will [provide benefits] without inflicting any concomitant public interest harms.”); *id.* at 15 (“Pandora will advance these Commission goals without imposing any concomitant public harms....”).

If Pandora uses its ownership of KXMZ to obtain reduced license fees for Pandora's Internet music streams, the talented individuals – composers, songwriters, and publishers – who create the musical compositions enjoyed by all of society will experience a reduction in income, thereby lessening the incentive for, and ability of, composers and songwriters to continue to create new music. That, alone, is a detriment to the public interest. But the potential injury to the public extends much further. The system of collective licensing, which for a century has served to promote a fair and efficient music licensing marketplace, could be jeopardized.

American collective licensing of performing rights in music developed exactly 100 years ago as a pragmatic solution to an immense problem: how to compensate the creators of music when their works were publicly performed, while also providing users who wanted to perform the works with reliable, straightforward access to these works. With the growth of recorded and then broadcast media, a “one-to-one” licensing system, whereby thousands of individual users would negotiate separately with thousands of individual rights holders, was simply not feasible. Collective licensing allowed Copyright Owners to spread the costs of licensing across the entire membership, while providing a beneficial “clearinghouse” for users. Today, collective licensing is completely ingrained in the broadcasting and entertainment industries. Thousands of songwriters, composers and music publishers depend on performance rights organizations for

income,<sup>79</sup> while individual users (including practically all broadcast stations) rely on the system for seamless access to millions of musical works.<sup>80</sup>

Pandora's acquisition of KXMZ could endanger the collective licensing model. Some of ASCAP's largest publisher members are adamant that Pandora does not compensate them appropriately for use of their copyrighted musical works. In 2012, two large music publishers (EMI Music Publishing and Sony/ATV Music Publishing) showed their complete dissatisfaction with the licensing rates being paid by Pandora and other online entities by withdrawing their compositions from the ASCAP (and BMI) repertoires with respect to Internet streaming uses

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<sup>79</sup> ASCAP alone has more than 500,000 members. ASCAP, "About ASCAP," *available at* <http://www.ascap.com/about/>.

<sup>80</sup> One court perfectly summarized ASCAP's modern role:

Prior to ASCAP's formation in 1914 there was no effective method by which composers and publishers of music could secure payment for the performance for profit of their copyrighted works. The users of music, such as theaters, dance halls and bars, were so numerous and widespread, and each performance so fleeting an occurrence, that no individual copyright owner could negotiate licenses with users of his music, or detect unauthorized uses. On the other side of the coin, those who wished to perform compositions without infringing the copyright were, as a practical matter, unable to obtain licenses from the owners of the works they wished to perform. ASCAP was organized as a "clearing-house" for copyright owners and users to solve these problems . . . .

Because of the multitude of performances of music they generate each year, virtually all radio stations and television networks secure the rights to perform the music they use by a "blanket" license. An ASCAP blanket license gives the user the right to perform all of the compositions owned by its members as often as the user desires for a stated term, usually a year. Convenience is the prime virtue of the blanket license: it provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary to perform the copyrighted music used on radio stations and television networks in the course of a year. Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is "automatically" covered by the blanket license . . . .

[In addition,] ASCAP provides its members with a wide range of services. It maintains a surveillance system of radio and television broadcasts to detect unlicensed uses, institutes infringement actions, collects revenues from licensees and distributes royalties to copyright owners in accordance with a schedule which reflects the nature and amount of the use of their music and other factors.

*Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers*, 400 F. Supp. 737, 741-2 (S.D. N.Y. 1975) (subsequent history omitted).

such as Pandora's.<sup>81</sup> If Pandora is allowed to transform its acquisition of a small South Dakota radio station into reduced performance rights obligations for Pandora's online music streaming, music publishers would have yet another reason to withdraw *all* their rights from PROs as to *all* uses, which they have already threatened to do.<sup>82</sup> In other words, the music publishing industry could abandon the collective licensing system altogether. The loss of major music publisher members from the system would severely curtail efficiencies of the current licensing structure, leading to its potential collapse.

Why should any of this matter to the FCC? It matters because broadcasters and the public will be primary victims of the turmoil that would accompany the demise of collective licensing. The American broadcasting industry developed around the collective licensing system, which provides broadcasters uniform and seamless access to vast quantities of music that broadcasters employ as part of their programming to the public. Today, broadcast programmers do not even have to consider whether they have the "right" to broadcast a particular piece of music – they are practically certain of it. All of this could change dramatically if the collective licensing system disintegrates.

If music publishers withdraw from the collective licensing system, broadcasters would need to gain the necessary clearances to perform musical works on an individual basis.

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<sup>81</sup> The ASCAP (and BMI) rate courts later ruled that EMI and Sony could not "partially" remove their rights as to Internet music streaming services only, but instead must decide whether to be "all in" or "all out" of the collective licensing system. See Nate Rau, *Digital Song Plays Complicate Licensing Debate*, The Tennessean (Aug. 15, 2014), available at <http://www.tennessean.com/story/money/industries/music/2014/08/14/digital-song-plays-complicate-licensing-debate/14087369/>. The music publishers are now closely watching developments and weighing their options.

<sup>82</sup> See Ryan Faughnder, *Sony/ATV Threatens to Withdraw from ASCAP and BMI*, Los Angeles Times (July 11, 2014), available at <http://www.latimes.com/entertainment/envelope/cotown/la-sony-atv-ascap-bmi-20140711-story.html>; Ben Sisario, *Sony Threatens to Bypass Licensers in Royalties Battle* (July 10, 2014), available at <http://www.nytimes.com/2014/07/11/business/media/sony-threatens-to-bypass-licensers-in-royalties-battle.html>.

Theoretically, this might be possible.<sup>83</sup> Realistically, it would be a logistical nightmare. As the Supreme Court has recognized, “[a] middleman with a blanket license [i]s an obvious necessity if . . . thousands of individual negotiations, a virtual impossibility, [a]re to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner.”<sup>84</sup>

The only broadcasting entities that might navigate such a disorderly universe (but at tremendous added cost) would be the large broadcast groups who might be able to summon the necessary legal staff and resources to undertake such complex negotiations. Smaller broadcasters, including the minority, female, and small-business entities that are the intended beneficiaries of the Foreign Investment Declaratory Ruling, would undoubtedly face severe difficulties managing such a herculean task. The result, then, would be that small and minority broadcasters might not have access to enormous swaths of American music catalogs. With the source of much of their programming eliminated, small stations could be forced to sell to large, publicly held broadcast companies, or to cease broadcasting entirely.<sup>85</sup> Even for large broadcasters, the inefficiencies eventually might become overwhelming, with the transaction costs ultimately proving prohibitive. In short, if the collective licensing system collapses because Pandora and other online music streaming entities refuse to remunerate Copyright

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<sup>83</sup> Also, the RMLC or another entity might possibly negotiate rates on behalf of its members. But it is far from clear that the RMLC has the resources to administer such a task. Furthermore, not all radio stations are members of the RMLC.

<sup>84</sup> *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 17 (1979) (emphasis added).

<sup>85</sup> As the Supreme Court noted, “[i]ndividual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement . . . . Indeed . . . *the costs are prohibitive for licenses with individual radio stations . . .*” *Id.* (emphasis added).

Holders appropriately for the right to transmit their works over the Internet, everyone, including the public, will lose.

In light of the far-reaching, and indeed, potentially momentous public interest harms that could accompany Pandora's acquisition of KXMZ, Pandora has manifestly failed to prove "that the proposed transaction[ ], on balance, will serve the public interest."<sup>86</sup>

### **III. PANDORA'S PETITION IS REALLY A GENERIC SECTION 310(B)(4) WAIVER REQUEST.**

Pandora concedes that it "cannot prove in a manner consistent with the standards set forth in [Commission guidance] that foreign entities do not beneficially own or vote more than 25% of its shares."<sup>87</sup> Nonetheless, Pandora casually reassures the Commission that Pandora "poses no alien ownership concerns."<sup>88</sup> After all, claims Pandora, it is a "quintessential American success story"<sup>89</sup> whose benign effort to purchase "a small Midwestern radio station"<sup>90</sup> is "*exactly* the type of transaction that the Commission aimed at facilitating"<sup>91</sup> with issuance of the Foreign Investment Declaratory Ruling. In short, Pandora argues that it should be allowed to own KXMZ, because it is "fundamentally a U.S. company"<sup>92</sup> – with foreign ownership that just happens to exceed 25 percent – whose acquisition of KXMZ could not possibly pose a concern

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<sup>86</sup> *Sinclair Order* (¶ 25).

<sup>87</sup> Petition at 9.

<sup>88</sup> *Id.* at 2.

<sup>89</sup> *Id.* at ii.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 14 (emphasis added).

<sup>92</sup> *Id.* at ii.

for the FCC or the public, now or at any time in the future. Such platitudes are an insufficient legal basis for grant of the Petition.

With adoption of the Foreign Investment Declaratory Ruling, Commissioner Rosenworcel cautioned that the Commission “grant[s] no blanket waivers.”<sup>93</sup> Yet, stripped of its rhetoric, the Petition is really just such a request for generic regulatory relief, i.e., a blanket waiver. Pandora’s request is no different from a petition that might be submitted by any other fully capitalized, publicly traded company that, for whatever reason, cannot accurately ascertain its ownership. As Pandora has pleaded, “many public companies are hampered by the same challenges as Pandora when attempting to prove the citizenship of their shareholders.”<sup>94</sup> If the Commission grants this Petition, future petitioners will only need to establish that they, too, are publicly traded companies that are unable to demonstrate compliance with Section 310(b)(4). Grant of the Petition would have broad and generalized repercussions: namely, the result could not be cabined to Pandora’s circumstances alone, effectively allowing for 100% indirect foreign ownership of all broadcast licensees.

#### **IV. PANDORA’S PROPOSALS DO NOT MEET THE REQUIREMENTS FOR PETITIONS FOR DECLARATORY RULINGS APPLICABLE TO COMMON CARRIERS.**

The Petition notes that the Commission has not adopted detailed rules and procedures for petitions for declaratory rulings under Section 310(b)(4) for broadcast licensees, as it has for common carrier licensees.<sup>95</sup> In the Foreign Investment Declaratory Ruling, the Commission stated that it would evaluate broadcast petitions on a case-by-case basis, although it may elect to

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<sup>93</sup> *Foreign Investment Declaratory Ruling*, Statement of Commissioner Jessica Rosenworcel, at 16256.

<sup>94</sup> Petition at 14.

<sup>95</sup> *Id.* at 28.

adopt comprehensive rules and procedures in the future.<sup>96</sup> Apparently the Commission’s intention in evaluating petitions filed pursuant to the Foreign Investment Declaratory Ruling is not to ignore the rules applicable to common carriers, but to be more stringent in its evaluation of broadcast petitions.

Pandora touts its proposals – e.g., to allow Pandora to be up to 100% beneficially owned by foreign investors with foreign voting authority capped at 49.99% – as “significantly more restrictive” than the Commission’s approach to common carrier foreign ownership.<sup>97</sup> This is incorrect, because it disregards two of the fundamental requirements applicable to common carriers.

First, even assuming grant of the Petition, ongoing monitoring of stock ownership by Pandora would be necessary because a common carrier licensee that has successfully obtained a declaratory ruling must still obtain Commission approval *prior* to any foreign investor acquiring a greater than five percent voting or equity interest (greater than ten percent in the case of certain passive institutional investors in publicly held companies).<sup>98</sup> Pandora’s Petition does not contemplate such advance approval. Moreover, the method Pandora uses to monitor whether individual foreign investors are acquiring large interests in Pandora – reviewing Securities and Exchange Commission filings – is insufficient for complying with the FCC’s advance approval policy. These SEC reports are filed *after* a shareholder buys stock – usually within 10 days after

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<sup>96</sup> *Foreign Investment Declaratory Ruling* at 16252 (¶ 15).

<sup>97</sup> Petition at 30.

<sup>98</sup> *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*, Second Report and Order, 28 FCC Rcd 5741, 5767-68 (¶¶ 47-48) (2013) (“*Common Carrier Order*”); see also 47 C.F.R. §§ 1.991(i), 1.994(e).

an acquisition, but sometimes as late as 45 days after the last day of a calendar quarter.<sup>99</sup> Yet the Commission's rules require approval of the acquisition of a greater than five percent equity or voting interest by a foreign investor *before* the investment is made, not *after*. Thus, Pandora has not explained how it will comply with the prior approval requirement.

Second, and again even assuming the Petition is granted, Pandora must institute adequate measures to ensure continued compliance with the Commission's foreign ownership rules. The Commission has embedded in its rules the requirement that:

Licensees have an obligation to monitor and stay ahead of changes in foreign ownership of their controlling U.S.-organized parent companies (for rulings issued pursuant to § 1.990(a)(1)) and/or in the licensee itself (for rulings issued pursuant to § 1.990(a)(2)), to ensure that the licensee obtains Commission approval before a change in foreign ownership renders the licensee out of compliance with the terms and conditions of its declaratory ruling(s) or the Commission's rules. Licensees, their controlling parent companies, and other entities in the licensee's vertical ownership chain may need to place restrictions in their bylaws or other organizational documents to enable the licensee to ensure compliance with the terms and conditions of its declaratory ruling(s) and the Commission's rules.<sup>100</sup>

Pandora is incapable of "staying ahead" of its foreign ownership level, given that its method of monitoring foreign shareholders' activities relies is to rely on SEC forms filed *after* share purchases. Moreover, Pandora has no restrictions on foreign ownership in its organizational

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<sup>99</sup> SEC Form 13D and 13G (short form) filings are filed when any person becomes the direct or indirect beneficial owner of more than five percent of a class of stock. They are filed as late as 10 days after the transaction. Form 13F applies to institutional investment managers with at least \$100 million in equity assets under management. It is filed quarterly.

<sup>100</sup> 47 C.F.R. § 1.994 - Note to Paragraph (a). *See also Common Carrier Order* at 5788 (¶ 87), 5811 (¶ 135).

documents and has indicated no willingness to adopt them.<sup>101</sup> In fact, the Petition states that Pandora “has no reason to ask shareholders to waive their right to privacy granted by the SEC”<sup>102</sup> because “asking shareholders to do so may provide a disincentive to buy the company’s stock,”<sup>103</sup> which could affect stock prices. In other words, Pandora does not want to comply with Section 1.994 - Note to Paragraph (a), because to do so might affect Pandora’s stock price. Pandora thus puts its private gain before the public interest.<sup>104</sup>

## V. CONCLUSION

In 1924, then-Secretary of Commerce Herbert Hoover articulated what has commonly become known as broadcasting’s “public interest standard.” Hoover asserted that radio “is not to be considered as *merely a business carried on for private gain* . . . . It is a public concern impressed with the public trust and is to be considered *primarily from the standpoint of public interest* . . . .”<sup>105</sup> While the exact delineations of what serves the “public interest” have been the subject of discussion throughout the history of the Commission, the proceeding at hand requires minimal deliberation.

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<sup>101</sup> See ASCAP’s Supplement to Petition to Deny, FCC File No. BALH-20130620ABJ (filed Sept. 23, 2013) (“Pandora has not put in place any procedures to limit foreign ownership.”); see also Letter from Meredith S. Senter, Jr. Esq. to Peter F. Doyle, Esq. (Dec. 9, 2013) (noting that Pandora “should also be required to institute procedures to ensure continued compliance.”). See also *Common Carrier Order* at 5774 (¶ 61) (in order to comply with the requirement for prior approval of a new five or ten percent foreign investor, the licensee must “take . . . appropriate action to ensure continued compliance with our rules (such as the exercise of stock ownership restrictions to permit advance Commission approval of such investor . . .”).

<sup>102</sup> Petition at 14.

<sup>103</sup> *Id.*

<sup>104</sup> To be sure, Pandora does monitor its ownership. Pandora “relies on Nasdaq OMX to analyze Pandora’s shareholder base on an ongoing basis to monitor movements within the stock and build strategy around shareholder prioritization and targeting efforts.” *Id.* at 19 n. 55. Translated into plain English, all this means is that Pandora tries to keep up with its ownership – in order to support its stock price.

<sup>105</sup> Steve Waldman, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, Federal Communications Commission, July 2011, Chapter 26, Broadcast Radio and Television, at 280 (quoting Christopher H. Sterling and John Michael Kittross, *Stay Tuned: A History of American Broadcasting, 1020-1021* (3d ed. 2001)) (emphasis added).

Pandora's proposed purchase of KXMZ is driven *entirely* by a quest for "private gain."<sup>106</sup> There is barely a passing nod to the public interest in Pandora's proposal. Pandora does not really want or need KXMZ; it simply intends to use the station as a means to an end: slashing music licensing fees for its Internet music streams. The flimsy public interest showing accompanying the Petition is a clear indication that Pandora's priorities lie elsewhere. This, combined with the extensive public interest harms that could accompany grant of the Petition – including the potential unraveling of the collective licensing system – lead to the indisputable conclusion that the proposed acquisition of KXMZ by Pandora will inflict greater public harm than benefit.

ASCAP respectfully appeals to the Commission to enforce the strict public interest standard required by the Foreign Investment Declaratory Ruling, and deny Pandora's Petition as contrary to the public interest.

Respectfully submitted,

**THE AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS AND PUBLISHERS**

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August 28, 2014

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<sup>106</sup> *Id.*

**CERTIFICATE OF SERVICE**

I, F. Scott Pippin, hereby certify that a true and correct copy of the foregoing Opposition to Petition for Declaratory Ruling was sent by first-class, postage prepaid mail, on the 28th day of August, 2014, to the following:

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