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August 31, 2012



BY HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
Washington, D.C. 20554

**Re: Request for Clarification of the Commission's Policies and Procedures Under 47 U.S.C. § 310(b)(4)**

Dear Ms. Dortch:

We write on behalf of the Coalition for Broadcast Investment* to ask the Commission to clarify and affirm, at the earliest possible time, the following:

> **Going forward, the FCC will conduct a substantive, facts and circumstances evaluation of proposals for foreign investment in excess of 25 percent in the parent company of a broadcast licensee, consistent with and in furtherance of its authority under Section 310(b)(4) of the Communications Act.**

For the avoidance of doubt, we seek here only confirmation of the Commission's intent to exercise its statutory discretion to consider, in any particular case, whether it would serve the public interest to authorize, condition, or disallow proposed foreign investment in excess of the 25 percent benchmark.

The clarification requested here is squarely within the Commission's existing statutory authority and would neither change (or require any change in) any FCC rule nor

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* The Coalition for Broadcast Investment seeks to promote enhanced access to capital by U.S. broadcasters. The Coalition believes that access to additional and new sources of investment capital will benefit the broadcast industry and American consumers by financing advanced infrastructure, innovative services and high quality programming; and by promoting the creation of highly skilled, well-paying jobs. Coalition members comprise national broadcast networks, radio and television station licensees and community and consumer organizations. A list of Coalition members is attached.

predetermine the outcome of any particular case. Rather, we are asking the Commission merely to "advise the public prospectively of the manner in which [it] proposes to exercise a discretionary power" granted to it by Congress under Section 310(b)(4) of the Act. *American Mining Cong. v. Mine Safety and Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

Taking this modest procedural step would place broadcasters on the same footing as every other industry participant and signal that the broadcast sector continues to be a vital and valued part of the 21st-century media and telecommunications ecosystem. It would send a positive and powerful message to the industry, the capital markets, viewers, listeners and advertisers alike, that in the appropriate circumstances U.S. broadcasters may be afforded access to new sources of capital. It would incent entry into the broadcast sector, including by minority- and women-owned businesses. It would facilitate investment in new services and infrastructure, create jobs and, ultimately, enhance service to local communities and their viewers and listeners.

Absent a clear statement from the Commission, the marketplace will continue to assume that proposals for above-benchmark foreign investment in broadcasters will not even be considered regardless of the facts and circumstances presented or the merits of a particular proposal. As a result, transactions that the Commission may have found to enhance local broadcast service will continue never to see the light of day — an outcome that surely would disserve the public interest.

## Introduction and Summary

Clarifying that the Commission is prepared to exercise its discretion with respect to broadcast proposals under Section 310(b)(4) would acknowledge the competitive realities of the 21st century telecommunications and media environment. Today, programmers, consumers and advertisers have at their fingertips a multitude of choices on radio, television, cable and satellite services, mobile devices, the Internet, and elsewhere.

<u>The Commission's Discretion under Section 310(b)(4)</u>. Nearly 80 years ago, Congress established a 25 percent flexible benchmark with respect to aggregate foreign investment in the parent company of a broadcast or common carrier licensee. Section 310(b)(4) of the Communications Act of 1934, as amended, provides, in pertinent part:

> (b) No broadcast or common carrier . . . license shall be granted to or held by
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> * * *
>
> (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.

47 U.S.C. § 310(b)(4).

The text of Section 310(b)(4) makes clear that the 25 percent figure was intended to be a public interest yardstick only, and not a cap. Under the plain language of the Act the FCC is authorized to disallow a particular instance of foreign investment in excess of the benchmark only upon a finding "that the public interest will be served" by prohibiting it. Just two weeks ago the Commission reiterated that it has discretion under Section 310(b)(4) to permit foreign investment above the 25 percent "benchmark" "unless it finds such ownership would be inconsistent with the public interest." *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*, Report and Order, FCC 12-93 (rel. Aug. 17, 2012) (adopting a proposal set out in Public Notice, "International Bureau Seeks Further Comment on Foreign Ownership Policies: Forbearance from Section 310(b)(3) for Common Carrier Licensees," 27 FCC Rcd 3946 (Int'l Bur., 2012)) (the "*Forbearance Order*") at 3 (§ 5).

Consistent with the language and intent of Section 310(b)(4), the Commission repeatedly has evaluated above-benchmark foreign investment in the common carrier context *and* exercised its discretion to approve or condition such investment when and as appropriate. Yet, at the same time, the Commission to date has maintained what the FCC itself has characterized as an irrebuttable presumption against even considering — much less authorizing — proposals for foreign investment in broadcasters that would exceed the 25 percent benchmark.

<u>Changed circumstances</u>. The Commission's refusal even to consider exercising its discretion under Section 310(b)(4) in the broadcast context has been attributed variously to concerns that foreign governments could disrupt communications during wartime or commandeer public opinion through propaganda aired on radio and television stations. Regardless of whether the American public ever could have been susceptible to such perceived threats, technological and marketplace developments have obviated these concerns.

- Americans live, work and play in a multichannel, multi-platform environment in which they can produce and consume content freely — locally, nationally, and internationally.

  - Today, in addition to broadcasting, many other sources of information are available to the U.S. public.

  - Today, consumers have access to local, national, and international news and information from myriad sources — including the Internet, mobile applications, video and audio streaming services, cable and satellite programming networks, and social networking tools. None of these outlets are subject to limitations on foreign investment.

- At the same time, the Commission has developed substantial expertise and tools to evaluate the merits of proposed foreign investment.

  - The Commission routinely conducts on-the-merits reviews of foreign investment in common carriers pursuant to a presumption that the public interest is served by capital sourced from WTO-member states.

  - Close coordination with federal national security agencies ensures that U.S. security interests are taken into account and that, where appropriate, transactions are conditioned or disapproved.

<u>Public interest benefits</u>. The modest relief requested here would enable local broadcast stations to join their cable, satellite and online counterparts in having the opportunity to gain access to significant new or additional sources of capital. Ceasing to single out broadcasters, and broadcasters alone, for a *per se* ban on above-benchmark foreign investment would ensure that common carrier and broadcast licensees' respective ability to participate in world capital markets is not determined by a false dichotomy in the application of the statutory benchmark.

- Broadcasters should be able to access the capital markets on the same terms as their unregulated competitors.

  - In the multiplatform, multi-channel environment in which broadcasters now compete, being the sole medium without even potential access to above-benchmark levels of foreign capital is arbitrary and inequitable.

  - This is especially true at a time when the Commission has liberalized its foreign investment policies and procedures for common carriers, which are subject to the same statutory regime as broadcasters for evaluation of foreign investment.

- In exercising its discretion to consider proposals for above-benchmark indirect foreign investment in broadcast licensees, the Commission could provide new opportunities for minority businesses and entrepreneurs, whose access to the domestic capital markets has been limited, thereby advancing the public interest in viewpoint diversity and media competition.

Alignment with U.S. Policy. Clarifying that the Commission will no longer maintain an *ad hoc* presumption against above-benchmark foreign investment in radio and television broadcasters would be consistent with broader U.S. policy favoring inbound foreign investment, a recognized source of jobs and capital for businesses that operate locally in the United States. The irony in the persistence of any historical presumption against inbound foreign investment in broadcasters is that today, it is *outbound* investment that causes debate among policymakers and the public alike — for example, the transfer of a manufacturing plant to another country with lower labor costs. It is remarkable that the world's leading economy would restrict the broadcast sector, almost alone, in its ability to create jobs, build infrastructure, and otherwise serve local American communities using foreign capital.

- As the White House stated in June 2011, "The United States welcomes the investment and jobs supported by the U.S. affiliates of foreign-domiciled companies. These companies play an important role in the U.S. economy, as they build plants and other facilities or provide additional capital to businesses that already operate locally in the United States."

- *See* SelectUSA, available at http://selectusa.commerce.gov, a U.S. government site listing as industries "represent[ing] unparalleled opportunity for global growth and success" aerospace, automotive, biotechnology, chemical, consumer goods, creative and media, energy, environmental technology, financial services, healthcare and medical technology, logistics and transportation, machinery and equipment, pharmaceuticals, professional services, retail trade, semiconductors, software and information technology services, textiles, and travel, tourism, and hospitality.

Authority to Act. The Coalition asks merely that the Commission clarify that it will accept and consider on the merits proposals for indirect foreign investment in broadcasters in excess of the 25 percent benchmark. Such a clarification constitutes precisely the type of "general statement[] of policy" that the Commission is authorized to make on its own motion pursuant to Section 553(b) of the Administrative Procedure Act. 5 U.S.C. § 553(b)(B). Indeed, in the *Forbearance Order* issued earlier this month, the Commission clarified its intent, going forward, to forbear in certain circumstances from applying the 20 percent foreign ownership limit set forth in Section 310(b)(3) of the Act to the class of common carrier licensees in which foreign interests are held through U.S.-organized entities that do not control the licensee.

A comprehensive discussion of the origins and historical application of the Section 310(b)(4) benchmark, the Commission's discretion under the statute, and the acknowledged public interest benefits of enhanced access to capital, is set out in the Appendix. We emphasize that the relief we are seeking here -- a clear statement by the Commission that, going forward, it will exercise its authority to evaluate on the merits broadcast proposals under

Section 310(b)(4) -- would not dictate the result of any particular substantive evaluation precisely because, under the Act, the *outcome* of any review under Section 310(b)(4) is within the Commission's discretion in the application of its public interest test.

## Conclusion

The Commission's effective presumption against enhanced foreign investment in the broadcast sector no longer serves the public interest — if it ever did. It deters investment in businesses that provide service to local communities and invest in jobs and infrastructure in those communities. It disadvantages a single class of participants in an increasingly complex media and telecommunications ecosystem that faces rigorous competition from firms that are not subject to any restrictions on foreign investment. Meanwhile, the concerns that once informed the Commission's presumptive policy have lost their meaning.

Accordingly, for all the reasons stated herein and in the Appendix, we respectfully request that the Commission promptly clarify and affirm that, going forward, it will conduct a case-by-case evaluation of proposals for foreign investment in U.S. broadcast holding companies at levels exceeding the 25 percent benchmark.

Kindly direct any questions concerning this submission to the undersigned.

Respectfully submitted,

Mace Rosenstein
Gerard J. Waldron

*Counsel for the Coalition for Broadcast Investment*

Attachments

cc: Hon. Julius Genachowski, Chairman
Commissioner Robert McDowell
Commissioner Mignon Clyburn
Commissioner Ajit Pai
Commissioner Jessica Rosenworcel

**The Coalition for Broadcast Investment**

Adelante Media Group
Bonten Media Group
BuenaVision Television Network
Bustos Media Holdings, LLC
CBS Corporation
Clear Channel Communications, Inc.
Cuban National Council
Emmis Communications Corporation
Entravision Communications Corporation
Hearst Television Inc.
International Black Broadcasters Association
ION Media Networks, Inc.
Latinos in Information Science and Technology Association
League of United Latin American Citizens
LIN Television Corporation d/b/a LIN Media
Minority Media & Telecommunications Council
National Association of Black County Officials
National Black Caucus-Local Elected Officials
National Black Chamber of Commerce
National Organization of Black Elected Legislative Women
The National Puerto Rican Chamber of Commerce
Nexstar Broadcasting Group Inc.
Schurz Communications Inc.
Sinclair Broadcast Group, Inc.
Una Vez Mas Television Group
United States Hispanic Chamber of Commerce
Univision Communications Inc.
The Walt Disney Company

## APPENDIX

### I. HISTORICAL JUSTIFICATIONS FOR DISPARATE TREATMENT OF BROADCASTERS UNDER SECTION 310(b)(4) HAVE BEEN OVERTAKEN BY TECHNOLOGICAL AND MARKET DEVELOPMENTS.

The Commission has recognized that "Congress has given [the FCC] the flexibility to consider a broad range of factors, and to adapt [its] policies and rules to reflect current conditions" in making its public interest determination under Section 310(b)(4).[1] Just as the technological and competitive environment in which broadcasters operate today was unimaginable in 1934, so the historical moment in which the Commission first implemented Section 310(b)(4) is unrecognizable and, we would submit, irrelevant, today.

In the common carrier context the Commission, over time, has modified its practices under Section 310(b)(4) in order to consider and, where appropriate, authorize foreign investment in excess of the statutory benchmark in order to encourage a "more open and competitive U.S. telecommunications market."[2] Yet, during the same period in which the Commission has, among other things, established a rebuttable presumption *in favor* of foreign investment in common carriers in most circumstances, it has "effectively created the presumption in the broadcast area that, absent special considerations that outweigh the statutory concerns, the public interest [would] be served by *denying* licenses to entities with alien ownership above 25 percent."[3]

The Commission has discretion in applying the benchmark to broadcast investment. Yet diametrically opposed presumptions — one in favor of foreign investment for common carriers, another against foreign investment for broadcasters — are at least anachronistic in today's marketplace, as carriers continue to expand their service offerings to deliver audio and video content to consumers, and to compete directly with broadcast licensees for programming inputs, advertisers and viewers.

We need not catalogue here nearly eight decades' worth of disruptive innovation in the media and telecommunications industry affecting common carriers and broadcasters alike. One thing is clear: in the face of such momentous changes the Commission's "effective" presumption against even the consideration of broadcasters' Section 310(b)(4) proposals is neither justifiable nor sustainable.

#### A. The Availability of Myriad Sources of News, Information, Sports, and Entertainment Content Delivered Over Multiple Competing Platforms Has Undermined the Commission's Historical Rationale for Refusing to Consider Above-Benchmark Broadcast Foreign Investment.

The historical justification for the Commission's categorical refusal even to consider indirect broadcast foreign investment above the 25 percent benchmark, dating from the earliest days of wireless communications, was that foreign powers could acquire and disrupt ship-to-shore and governmental communications facilities during wartime.[4] Later, with the emergence of commercial broadcasting, some expressed concern that a hostile foreign power could use broadcast outlets -- which, at the time, were the only real-time mass communications platform -- to manipulate American public opinion.

Even accepting the validity of those concerns for purposes of argument, they reflect a factual predicate that long ago was overtaken by marketplace and technological developments. Now, nearly 80 years following enactment of Section 310(b)(4), the media landscape has been transformed.

- Broadcast services compete with myriad sources of information and entertainment in a highly and increasingly competitive broadband environment.[5]

- 92 percent of Americans use multiple platforms to access news and information content.[6]

- Broadcast stations compete with other media outlets not only for viewers and listeners, but also for advertising revenue.[7]

Broadcasters today must compete with a vast number of non-broadcast media outlets for news and information — and diverse editorial viewpoints — both domestically and from around the world. These include satellite-delivered news channels owned and operated by foreign governments, such as the RT ("Russia Today") Network, Al Jazeera, Deutsche Welle and the BBC; online news sites such as The Guardian, Japan Today and The Jerusalem Post; Internet portals such as Google, Yahoo! and AOL; and streaming video sites such as Hulu and Bambuser — among others.[8] Yet neither the countless competing program services that vie for consumers' attention, nor the cable and satellite systems and Internet service providers that deliver them, are subject to presumptive -- or any -- limitations on foreign investment.

- The availability of rich and varied content, including news and information programming, from around the world -- as owned or chosen by many non-U.S. persons -- disseminated over the air, on cable and satellite systems and on the Internet, has done no discernible harm to the public interest. Nor has harm from such content been alleged.

The FCC last considered adopting a more flexible approach to foreign investment in the broadcast context in 1995 — at the dawn of the Internet age and before the explosion of information outlets throughout our society and economy.[9] Even then, the FCC acknowledged that the "burgeoning number of information and entertainment sources has lessened the concern that misinformation and propaganda broadcast by alien-controlled licensees could overwhelm other media voices."[10] But in 1995 the Commission did "not believe that the time ha[d] yet come to ease restrictions on alien ownership of broadcast license[e]s."[11]

The technological and commercial revolution that was only beginning in 1995 has matured within the space of a generation. The media marketplace is, truly, cacophonous, and each local broadcaster must vie to be heard by consumers who are distracted by a multiplicity of competing choices from here and abroad. There is no basis in fact or law for continuing to impose an *ad hoc* ban on even the consideration of indirect foreign investment above the statutory benchmark in broadcast licensees.

### B. The Perception that Foreign Editorial Control Over a U.S. Broadcaster Poses a Greater National Security Risk than Foreign Control Of Domestic Telecommunications Networks or Other Media Outlets is Outdated and Inaccurate.

In contrast to what the Commission has characterized as its "traditionally heightened concern for foreign influence over or control of licensees which exercise editorial discretion over the content of their transmissions,"[12] the Commission has justified its willingness to consider foreign investment in common carrier licensees on the ground that they are "passive" conduits for information provided by others.[13] But this outdated rationale, too, can no longer be squared with the realities of telecommunications technology and the media marketplace in the 21st century.

Indeed, the current threat of greatest concern to policymakers comes not from editorial control over broadcast transmissions, but the possibility that foreign agents will engage in cyber-warfare using our communications networks. President Obama has identified cybersecurity as "one of the most serious economic and national security challenges we face as a nation."[14] Chairman Genachowski also has observed this phenomenon:

> Broadband Internet — over wired and wireless communications networks — has transformed our economy and society, opening up a new world of broad opportunity. $8 trillion are exchanged over these wired and wireless networks each year, and growing. If you shut down the Internet, you'd shut down our economy.[15]

In an era in which ostensibly "passive" wired and wireless networks play such an essential role in our economy and society, including the dissemination of data and information from around the world, and yet routinely are permitted to exceed the benchmark, a presumption against foreign investment on the basis that broadcasting is a more "active" service simply makes no sense with respect to communications, national security, trade or competition policy concerns. Yet broadcasters continue to be subject to this stark structural disadvantage vis-à-vis every other participant in the 21st century media marketplace — cable television operators, direct-to-home satellite systems, national and regional non-broadcast programming networks, wireless broadband networks, online content aggregators, Internet portals, website hosts, and others.

### C. The Commission Would Continue to Have Plenary Authority to Enforce Commercial Broadcasters' Compliance with Their Public Interest Obligations Under the Act.

Notwithstanding their locus of ownership or investment, broadcast stations are obligated under the Act to provide service in the public interest to their local communities. We are not seeking any change in those fundamental obligations. The Commission's exercise of its discretion under Section 310(b)(4) to consider and, where appropriate, authorize foreign investment in excess of the 25 percent benchmark would not abrogate its fundamental responsibility under Section 310(d) of the Act to evaluate the nature and extent of a broadcaster's service to its community -- among other matters -- to determine whether a station license should be granted or renewed.

The Commission's authority to ensure that broadcasters continue to discharge their obligations under the public interest standard is analogous to its power to ensure that common carrier licensees comply with the nondiscrimination provisions of the Act. Significantly, the Commission has observed that, in its "experience in authorizing up to 100 percent foreign ownership and control of U.S. wireless parent companies under section 310(b)(4), we find no evidence that the foreign ownership of a common carrier licensee, in and of itself, is directly relevant to the carrier's compliance" with its statutory obligations.[16] Furthermore, because the "other, more tailored tools at [the Commission's] disposal" enable it "to ensure that rates, practices and classifications of common carrier licensees are just and reasonable and not unjustly or unreasonably discriminatory," authorizing increased foreign investment "would not hinder the Commission's ability to enforce carriers' compliance with their obligations under the Act . . . ."[17]

Similarly, in the broadcast context, precisely the same tools that have always been available to the Commission under Section 310(d) in the licensing and renewal processes -- for example, ensuring that local stations' programming decisions are responsive to the needs, interests and concerns of their communities, and reviewing broadcasters' compliance with the rules pertaining to children's programming and political broadcasting, among other things -- will continue to enable the Commission to enforce broadcasters' "compliance with their obligations under the Act." Meanwhile, improved access to foreign capital may enhance a broadcast licensee's ability to meet its public interest obligations by financing improvements in existing broadcast services and the development of new and innovative ones.

## II. FOREIGN INVESTMENT IS BENEFICIAL FOR UNITED STATES INDUSTRY AND CONSUMERS AND COULD BENEFIT BROADCASTERS AND THE COMMUNITIES THEY SERVE.

To gauge the opportunity costs of the Commission's historical refusal to consider above-benchmark foreign investment in broadcasters one need look no further than the telecommunications industry and the many competitive and consumer benefits of inbound foreign investment in that sector. Today, "[f]ew sectors are more global than telecommunications. Telecommunications technology, services, and equipment are a major driver of trade, growth, and innovation."[18] Globalization, growth, and innovation are a direct result of the discretion the Commission has exercised to consider and, where appropriate after a merits-based review, authorize foreign investment in common carriers in excess of the statutory benchmark.

The impact of foreign investment on the U.S. telecommunications industry is well documented. "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."[19]

- Verizon Wireless, the nation's largest wireless provider, is a joint venture of Verizon Communications, Inc., and Vodafone Group plc, a United Kingdom company.[20] Verizon Wireless owns and operates the nation's largest 4G LTE network, covering more than 200 million people in more than 230 markets across the United States.[21]

- T-Mobile USA, Inc., a wholly owned subsidiary of German telecommunications provider Deutsche Telekom AG, is the fourth largest wireless provider in the United States by subscribership.[22] The Commission has recognized the important role foreign-owned T-Mobile has played "in the development of a more competitive mobile services marketplace by engaging in both pricing and technical innovation."[23]

Other sectors of the telecommunications industry likewise have benefited from significant foreign investment made possible by the Commission's exercise of its discretion under Section 310(b)(4).

- The Commission has approved above-benchmark foreign investment in Global Crossing Ltd., a major "Tier One" common carrier and Internet Service Provider, and in Level 3, a major Department of Defense contractor.[24] The merged companies' extensive U.S. and international network reaches more than 450 core markets in North America, Latin America, Europe, the Middle East, Africa, and Asia.[25]

- The Commission has twice exercised its statutory discretion to permit significant foreign investment in Iridium,[26] an integral element in the U.S. Government's communications infrastructure, approximately 25 percent of whose revenue is attributable to its contracts as a communications services provider to the Department of Defense.[27]

As recently as August 17, 2012, the Commission reiterated its belief "that providing greater flexibility in the structuring of foreign investment in common carrier licensees will enhance opportunities for technological innovation and promote economic growth and potential job creation in the telecommunications sector."[28] By contrast, the Commission's refusal even to consider transactions involving indirect foreign investment in excess of 25 percent in broadcasters has deprived the broadcast sector of needed and available capital and its concomitant benefits. It is, of course, impossible to quantify precisely the effect of the Commission's policy on the broadcast sector or American consumers. Because the industry understands the Commission's policy to result in an "effective" irrebuttable presumption against foreign investment, broadcasters do not even seek Commission review of potentially beneficial transactions.

Nevertheless, just as the telecommunications sector and other industries benefit from enhanced growth and productivity, job creation and increased competition as a result of foreign investment, there is ample basis to conclude that broadcasters and the American public likewise would benefit from broadcasters' enhanced access to foreign capital. In fact, a more balanced approach to inbound foreign investment in broadcasting would serve several historical goals of U.S. telecommunications policy.

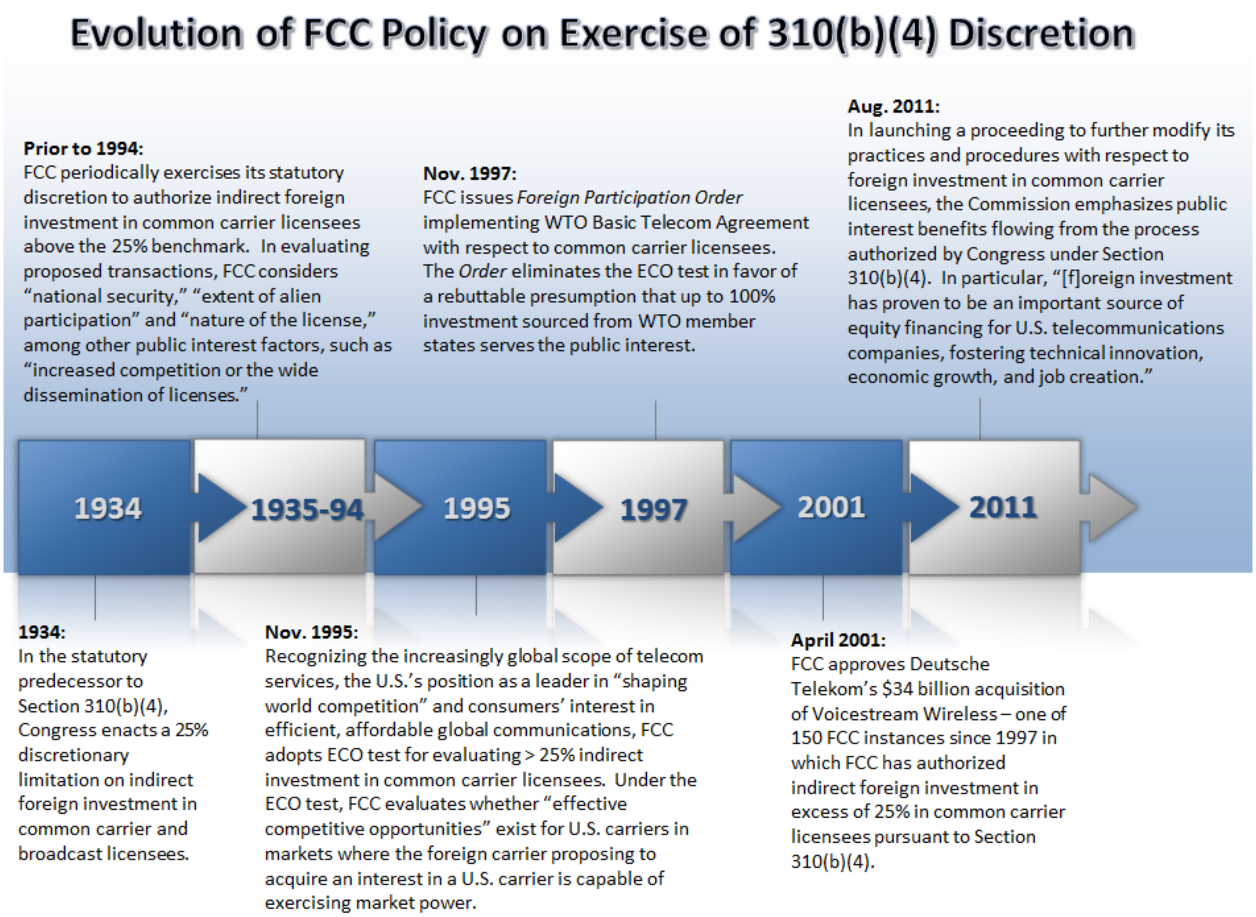
| Policy Goal | Potential Effect of Enhanced Foreign Investment in Broadcasting |
|---|---|
| *Diversity* | • In exercising its discretion to consider proposals for above-benchmark indirect foreign investment in broadcast licensees, the Commission could provide new opportunities for minority- and women-owned businesses and entrepreneurs whose access to the domestic capital markets has been limited.[29]<br>• Several public interest organizations and the Commission's own Advisory Committee for Diversity have demonstrated that revisiting the Commission's broadcast policy under Section 310(b)(4) could advance the public interest in media diversity.[30] |
| *Innovation* | • Expanding broadcasters' access to capital would enable them to expand the services they offer their communities and to provide a competitive spur to other media companies to do the same.<br>• Broadcasters already have begun to use mobile applications and social media to coordinate responses to emergencies or to keep the public continuously updated on local and national news issues.[31]<br>• Radio stations are investing millions of dollars in digital technology to augment and expand their service to local communities.<br>• Improved access to capital would facilitate the implementation of these initiatives and fund the development of new, as yet unforeseeable, innovations. |
| *Competition* | • A more conducive environment for foreign investment in broadcasting would promote the Commission's policy of fostering competition in the marketplace for the delivery of video programming.[32]<br>• Broadcasters should be able to seek access to the same sources of investment capital that are available to their unregulated competitors.<br>• As Chairman Genachowski observed in a recent speech to the National Association of Broadcasters, in order to compete in the "dramatically changed" "multi-platform digital broadband world," broadcasters must pursue innovative strategies to reach audiences in new ways and are "investing millions" of dollars in digital products to serve their communities.[33] |

But these and other benefits that could be realized by facilitating broadcasters' access to capital will not, and cannot, materialize without the clarification we are requesting here. Absent guidance from the Commission, broadcasters and the capital markets will continue to assume that any proposal seeking authorization under Section 310(b)(4) for above-benchmark foreign investment will be denied, or effectively denied by not being acted on.

## III. THE COMMISSION HAS THE EXPERTISE AND RESOURCES NECESSARY TO EVALUATE BROADCAST SECTOR FOREIGN INVESTMENT AS A RESULT OF ITS HISTORICAL EXERCISE OF ITS SECTION 310(b)(4) DISCRETION IN THE COMMON CARRIER SECTOR.

The FCC already possesses the substantive expertise, practical experience and institutional resources to conduct on-the-merits reviews of indirect foreign investment in broadcast licensees, based upon its extensive and ongoing experience under Section 310(b)(4) in reviewing transactions involving foreign investment in the parent companies of common carrier licensees. The Commission has considered and approved, denied or (where appropriate) conditioned numerous instances of indirect foreign investment in excess of the statutory benchmark. Furthermore, in doing so, the Commission has evaluated the potential costs and benefits of foreign investment to the telecommunications industry and American consumers, including with respect to competition and diversity.

In exercising its Section 310(b)(4) responsibility with respect to common carrier licensees, the Commission has developed and refined the procedures and criteria generally applicable to the consideration of above-benchmark foreign investment in harmony with its recognition of the benefits of foreign investment in the U.S. telecommunications industry:



The Commission's consideration of proposed broadcast foreign investment could include the same factors that inform the exercise of its Section 310(b)(4) discretion with respect to common carrier licensees. For example, looking to whether the source country or countries enjoy "close and friendly relations with the United States" could help the Commission determine whether a proposed transaction implicates a national security concern.[34]

In addition, today the Commission regularly refers requests for declaratory rulings under Section 310(b)(4) to Team Telecom, an interagency group consisting of representatives of the Department of Justice, the Federal Bureau of Investigation and the Department of Homeland Security, and grants those agencies *de facto* authority to disallow a transaction unless and until any national security concerns have been addressed.[35] Alternatively, Team Telecom can, and often does, intervene on its own motion in FCC foreign ownership review proceedings, requesting that the FCC defer action on a transaction until such time as Team Telecom's national security analysis has been completed. Where the Team Telecom agencies have concerns about potential national security implications of a transaction, they typically require the transaction parties to enter into national security agreements as a condition of approval. These requirements, in turn, are relevant to the Commission's ultimate determination whether the proposed investment would disserve the public interest under Section 310(b)(4).[36]

The Team Telecom process ensures that broadcast transactions proposing foreign investment in excess of the 25 percent benchmark would receive a second-line review that was not available at the time the Commission developed its presumption against such investment; indeed, under existing procedures, the FCC will not authorize foreign investment subject to a Section 310(b)(4) review until it has been authorized to do so by Team Telecom. The Commission itself reiterated earlier this month in the *Forbearance Order* that authorizing above-benchmark foreign investment does not impair national security because "the Commission's section 310(b)(4) policies and procedures provide Executive Branch expert agencies the opportunity to review proposed foreign ownership in the controlling U.S.-organized parents of common carrier licensees for any national security, law enforcement, or public safety issues."[37]

The Commission's historical exercise of its statutory responsibility under Section 310(b)(4) with respect to common carrier licensees is doubly instructive. First, it demonstrates that the Commission already possesses the technical expertise and resources needed to review and analyze indirect foreign investment. Second, it confirms that the Commission is capable of exercising its ultimate discretion under Section 310(b)(4) in a manner that both serves the Act's fundamental public interest requirements and is cognizant of, and responsive to, the competitive dynamics of a flourishing and increasingly global telecommunications industry — all to the benefit of the U.S. telecommunications industry and American consumers.

The Commission already is equally well equipped to review indirect foreign investment in broadcast licensees and can satisfy Congress's directive in Section 310(b)(4) by taking into consideration bedrock communications policy tenets such as promoting competition and fostering media diversity; by ensuring that the national security is protected and that no other public interest harms are likely to materialize; and by taking into consideration the acknowledged benefits of technological innovation, economic growth and job creation.

## Notes and References

[1] *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*, Notice of Proposed Rulemaking, FCC 11-121 (rel. Aug. 9, 2011) ("2011 NPRM"), at ¶ 3.

[2] *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 12 FCC Rcd 23891 (1995) ("ECO Order"), at ¶ 183.

[3] *Fox Television Stations, Inc.*, 11 FCC Rcd 5714 (1995), at ¶ 21 ("*Fox II*") (emphasis added).

[4] *See, e.g.*, *Radio Communication: Hearings on S. 3620 and S. 5334 Before the House Commerce Committee*, 62nd Cong. 35-37 (Mar. 1, 1912).

[5] *See* Steven Waldman *et al.*, *The Information Needs of Communities* (July 2011), at 73 (describing broadcast audience "drift" to cable, satellite, and the Internet.

[6] Kristen Purcell *et al.*, *Understanding the Participatory News Customer* (March 2010), available at http://www.pewinternet.org/ Reports/2010/Online-News.aspx.

[7] Pew Research Center, Project for Excellence in Journalism, *2012 State of the News Media*, available at http://stateofthemedia.org/ ("2012 State of the Media").

[8] LinkTV, available on DirecTV and Dish Network, which "brings satellite news from around the world to American households," Paul Wilner, *Broadcasting a Global Sampler*, The New York Times (Jan. 13, 2008), available at http://query.nytimes.com/gst/fullpage.html?res=9D03E6DC1739F930A25752C0A96E9C8B63&pagewanted=all, provides "a unique perspective on international news, current events, and diverse cultures, presenting issues not often covered in the US media." *About Link TV*, available at http://www.linktv.org/about.

[9] *ECO Order* at ¶¶ 190-94.

[10] *Id.* at ¶ 194.

[11] *Id.*

[12] *Market Entry and Regulation of Foreign-Affiliated Entities*, Notice of Proposed Rulemaking, 10 FCC Rcd 4884 (1995), at ¶¶ 99-101.

[13] *See*, *e.g.*, *GRC Cablevision*, 47 F.C.C. 2d 467, at ¶ 5 (1974); *Cable & Wireless, Inc*. 10 FCC Rcd 13177, at ¶ 18 (1995) ("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 the transmission.").

[14] National Security Council, *The Comprehensive National Cybersecurity Initiative*, available at http://www.whitehouse.gov/cybersecurity/comprehensive-national-cybersecurity-initiative.

[15] Prepared Remarks of FCC Chairman Julius Genachowski, Bipartisan Policy Center, Washington DC, Feb. 22, 2012, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-312602A1.pdf.

[16] *Forbearance Order* at ¶ 15.

[17] *Id.*

[18] *Ambassador Kirk Announces Results of Annual 1377 Review*, Press Release, Office of the United States Trade Representative (April 2010), available at http://www.ustr.gov/ about-us/press-office/press-releases/2010/april/ambassador-kirk-announces-results-annual-1377-review.

[19] *2011 NPRM* at ¶ 2.

[20] *See Cellco Partnership d/b/a/ Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444, at ¶¶ 6-8 (2008).

[21] *Verizon Wireless Facts-at-a-Glance*, available at http://aboutus.verizonwireless.com/ataglance.html.

[22] *AT&T Inc. and Deutsche Telekom AG*, Staff Analysis and Findings, 26 FCC Rcd 1184, at ¶ 8 (November 2011).

[23] *Id.* at ¶ 22.

[24] *Global Crossing Ltd.*, 18 FCC Rcd 20301 (2003).

[25] *Level 3 Company History*, available at http://www.level3.com/ en/about-us/company-information/company-history/.

[26] *Space Station System Licensee, Inc.*, 17 FCC Rcd 2271 (2002); *Iridium Holdings LLC and Iridium Carrier Holdings LLC*, 24 FCC Rcd 10725 (2009).

[27] *Iridium Announces Fourth-Quarter and Full-Year 2011 Results*, Press Release (Mar. 6, 2012), available at http://investor.iridium.com/releasedetail.cfm?ReleaseID=654525; Elizabeth Woyke, "Satellite Phone Surge," Forbes.com (Sept. 2008), available at http://www.forbes.com/2008/09/16/satellite-phones-disaster-techsolutions08-personal-cx_ew_0916satphone.html.

[28] *Forbearance Order* at ¶ 3.

[29] *2010 Quadrennial Regulatory Review*, Reply Comments of the Minority Media and Telecommunications Council, MB Docket No. 09-182, at 4 (filed Jul. 26, 2010).

[30] *See* Advisory Committee on Diversity, *Recommendation on Adoption of a Declaratory Ruling on Section 310(b)(4) Waivers* (Dec. 10, 2004), available at http://www.fcc.gov/DiversityFAC/adopted-recommendations/ ForeignOwnershipFinal.doc; *see also 2006 Quadrennial Regulatory Review, Initial Comments of the Diversity and Competition Supporters in Response to the Second Further Notice of Proposed Rulemaking*, MB Docket No. 06-121, at 3, 37-39 (filed Oct. 1, 2007).

[31] *2012 State of the News Media*.

[32] *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 07-207 (2009).

[33] Prepared Remarks of FCC Chairman Julius Genachowski, NAB Show 2012, Las Vegas, Nevada, April 16, 2012, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0417/DOC-313605A1.pdf

[34] *GRC Cablevision* at ¶ 5.

[35] *See FCC Homeland Security Liaison Activities* (Mar. 2012), available at http://transition.fcc.gov/pshs/docs/liaison.pdf.

[36] *See, e.g.*, *Verizon Communications, Inc.*, 22 FCC Rcd 6195 (2007); *Guam Cellular and Paging, Inc. and Docomo Guam Holdings, Inc.*, 21 FCC Rcd 13580 (2006). Furthermore, the review process administered by the Committee on Foreign Investment in the United States ("CFIUS") ensures that foreign investment in all market sectors is thoroughly screened for any detrimental national security implications. Although this process is voluntary, CFIUS is widely used and provides statutory certainty to investors in the form of firm timelines for review and ruling.

[37] *Forbearance Order* at ¶ 20.