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March 8, 2001

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

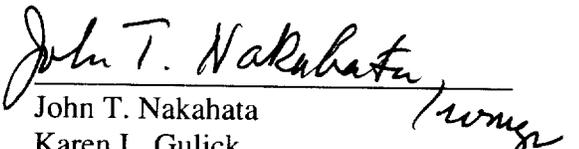
Re: Ex Parte Submission in IB Docket No. 00-187

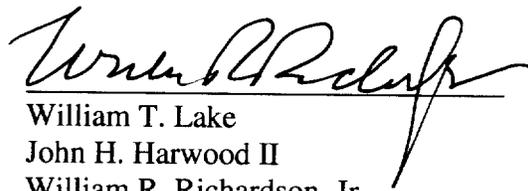
Dear Ms. Salas:

As set forth in their February 21 letter, representatives of the Applicants in the above-captioned matter met with Commission staff on February 16 to discuss a number of issues addressed in the Applicants' prior filings, including the appropriate interpretation of sections 310(a) and 310(b)(4) as reflected in analysis set forth in *Telecom Finland*.¹ Enclosed for filing in the docket of this proceeding are the original and two copies of a further legal analysis of that issue.

We are serving a copy of this letter and the attached response on all parties to this proceeding, pursuant to the Commission's Public Notice in this docket.

Respectfully submitted,


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¹ *In the Matter of Telecom Finland, Ltd.*, 12 FCC Rcd 17648 (Int'l Bur. 1997). 1997 of Copies rec'd
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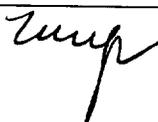
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March 8, 2001

Page 2



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Attachment

cc (w/att.): Attached service list

March 8, 2001

MEMORANDUM

**The VoiceStream-Powertel-DT Mergers Fall within the Scope of Section 310(b)(4)
And Satisfy the Public Interest Standard of That Section**

Summary:

It is clear from the face of the statute, its legislative history, and Commission precedent that, even if the German government controlled DT, a foreign corporation, section 310(b)(4) would apply to DT's proposed mergers with VoiceStream and Powertel, and section 310(a) would not. By its plain terms, section 310(b)(4) applies where an alien, a foreign corporation, or a foreign government owns an interest of more than 25 percent of the capital stock of a corporation that controls a U.S. subsidiary corporation that holds common carrier licenses. Commission decisions (*Intelsat*, *Orion*, *Telecom Finland*) likewise recognize that, where an indirect foreign interest of greater than 25% in a common carrier license is at issue, section 310(b)(4) applies. U.S. commitments to the WTO and the Basic Telecom Agreement adopt the same interpretation of section 310. Thus, the plain language of the statute, the Commission's prior interpretations, and the requirement to interpret statutes in light of U.S. international obligations all compel the same result.

Conversely, by its plain language section 310(a) does not apply to the mergers proposed here and thus poses no bar to their approval. Section 310(a) applies only to radio licenses that are "granted to or held by any foreign government or the representative thereof," *i.e.*, interests in licenses that are directly held by a foreign government or its representative and therefore are outside the scope of section 310(b)(4). The distinction between sections 310(b)(4) and 310(a) would be obliterated if section 310(a) were read to permit looking beyond the actual holder of the license for indirect foreign government influence over common carrier licenses, or indeed any radio licenses. The legislative history of section 310 also makes clear that Congress intended section 310(a) to apply only where a foreign government or its representative is the *direct holder* of a Commission license. Consistent with the distinction between sections 310(b)(4) and 310(a), the Commission never has held that section 310(a) prohibits a foreign government from obtaining *indirect* control over a *common carrier* license. *See, e.g., Intelsat* (applying *de facto* control test under section 310(a) with respect to application for non-common carrier authority); *Orion* (same).

Both the plain language of section 310 and Commission precedent squarely refute Senator Hollings' argument that section 310(b)(4) governs only *non-controlling* interests and therefore that section 310(a) applies here. Section 310(b)(4) expressly applies in *every* instance in which a foreign government (or foreign corporation) owns more than a 25% indirect interest in a common carrier radio license, regardless of whether that government exercises "control" over the licensee. Indeed, the Commission could not have granted the merger applications filed by Airtouch and Vodafone, or British Telecom and MCI, if Senator Hollings' interpretation of section 310 were correct. Under the Senator's reasoning, the application of section 310(b)(4) in

those cases would “read out of existence” section 310(b)(2). And in prohibiting direct holdings of common carrier radio licenses by *foreign corporations* in section 310(b)(2), Congress used the same language applicable to section 310(a), which bars direct holdings of radio licenses by *foreign governments*.

I. The Commission has explicit authority under section 310(b)(4) to grant the Applications, because the plain language of that section applies to transactions involving an *indirect* interest by an alien, a foreign corporation, or a foreign government of greater than 25% in corporations controlling common carrier licensees.

- A. Under section 310(b)(4), common carrier radio licenses¹ can be held by any corporation that is “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 allowing such a transaction is in the public interest. 47 U.S.C. § 310(b)(4) (emphasis added).
1. In other words, by its plain terms section 310(b)(4) applies to circumstances in which an alien, a foreign corporation, or a foreign government owns more than 25 percent of a corporation that controls a U.S. subsidiary corporation that holds common carrier licenses. Section 310(b)(4) does *not* apply to a structure where an alien, a foreign corporation, or a foreign government or its representative itself holds a radio license or where the radio license is not a broadcast, common carrier, or aeronautical license. Rather, sections 310(b)(1), (b)(2), and (a) (all originally enacted as part of the same section) respectively apply in those circumstances.
 2. This case involves precisely the type of structure to which section 310(b)(4) applies. If the Commission approves the proposed mergers of DT (a foreign corporation) with VoiceStream and Powertel (U.S. corporations), DT will own VoiceStream, which in turn will wholly own subsidiaries that will directly hold the Commission licenses. Thus, DT will have only an *indirect* interest in the licensees through a corporation controlling those licensees. Irrespective of any German government ownership or control of DT, section 310(b)(4) would allow such indirect control provided that the Commission finds such an ownership interest to be in the public interest. As a result, even if the German government had *de jure* or *de facto* control of DT — and Applicants contend the government will not control DT following the mergers, *see Reply in Support of Applications For Consent to Transfer of Control*, filed Jan. 8, 2001, at 37-44 (“*Applicants’ Reply*”) — the government’s resulting control of VoiceStream’s licensee subsidiaries also would be *indirect*.

¹ This section applies equally to broadcast and certain aeronautical licenses.

3. Because the proposed post-merger structure falls squarely within the plain language of section 310(b)(4), the Commission has authority to approve the mergers if they are in the public interest under the WTO-consistent standard the Commission established in the *Foreign Participation Order*. See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997) (“*Foreign Participation Order*”).
- B. Consistent with the plain language and the legislative history of the Act, Commission decisions recognize that, where an indirect interest of greater than 25% in a common carrier license is at issue, section 310(b)(4) applies and section 310(a) does not.
1. In *Intelsat*, the Commission recognized that section 310(b)(4) applies to an indirect investment by a “foreign company, foreign government or representative of a foreign government . . . in common carrier, broadcast, or aeronautical” licenses. See *In the Matter of the Applications of Intelsat LLC*, Memorandum Opinion, Order and Authorization, 15 FCC Rcd 15460 ¶ 52 (2000) (“*Intelsat*”). Therefore, in considering the application for transfer of common carrier authority at issue there, the Commission applied the WTO analysis now applicable under section 310(b)(4). *Id.* at ¶¶ 52-55, n.167. In short, it is apparent that the Commission applied section 310(a) only where section 310(b)(4) did *not* apply: to Intelsat’s application for an authorization on a private carrier basis. See *id.* at ¶¶ 48-50.
 2. In *Orion Satellite Corp.*, the Commission granted authority to launch and operate an international satellite system that would offer capacity on a *non-common carrier* basis. The Commission considered whether the proposed interests of foreign governments in the satellite system would be consistent with section 310(a) because the licenses at issue did not fall within any category listed in section 310(b) (broadcast, common carrier, or aeronautical). Indeed, the Commission expressly distinguished section 310(b), stating that “the foreign ownership restrictions embodied in section 310(b) . . . do not apply to non-common carrier satellite systems such as the one proposed by Orion.” *Orion Satellite Corp.*, Memorandum Opinion, Order and Authorization, 5 FCC Rcd 4937 ¶¶ 18-21, n.40 (1990) (“*Orion*”).
 3. In *Telecom Finland*, the International Bureau clarified the scope of both section 310(b)(4) and section 310(a). Specifically, the Bureau stated that “section 310(b)(4) creates an exception to section 310(a) to permit a foreign government to hold indirectly” a U.S. common carrier license if the Commission finds such ownership to be in the public interest. *Telecom Finland, Ltd.*, Order, 12 FCC Rcd 17648 ¶ 7 (1997). With this “exception” the Bureau recognized that section 310(b)(4) and section

310(a) create separate tracks: section 310(b)(4) authorizes the Commission to approve a foreign government's application to assume *indirect* control through ownership in a corporation controlling a common carrier licensee, while section 310(a) bars a foreign government or its representative from *directly* holding a radio license.

- C. This is the only plausible reading of the language of the statute and its legislative history. *See Applicants' Reply* at 25-26, 29-31, nn.97, 99. But even if it were not the only plausible reading, the fact that U.S. commitments to the WTO and the Basic Telecom Agreement adopt the same interpretation of section 310 is dispositive.
1. As the Supreme Court held in another case involving executive agreements, statutes "ought never to be construed to violate the law of nations, if any other possible construction remains. . . ." *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804));
 2. The "possibility of international discord" over a contrary view, in "such highly charged international circumstances" makes this rule even more compelling — as demonstrated by the EU comments in this case. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963). *See also* Note Verbale submitted by the European Community, FCC Docket No. 00-187 (Jan. 25, 2001).
- D. Just as it is clear that the mergers fall within the scope of section 310(b)(4), it is equally clear that they satisfy the public interest standard of that section. Under the WTO framework and the Commission's *Foreign Participation Order*, the Commission presumes that the section 310(b)(4) public interest test is satisfied for WTO member countries. *See Foreign Participation Order* at ¶ 51. Applicants have shown in great detail that the transactions pose no risk to competition in the United States, let alone the "very high risk to competition" necessary to overcome the presumption in favor of entry. *See Applicants' Reply* at 4-24.

II. By its plain language, section 310(a) does not apply to the mergers and thus poses no bar to their approval.

- A. While section 310(b)(4) applies to *indirect* interests through investments in corporations controlling common carrier licensees such as those resulting from the mergers proposed here, section 310(a) applies only to licenses that are "granted to or held by any foreign government or the representative thereof," *i.e.*, interests in licenses held directly by a foreign government or its representative outside the scope of section 310(b)(4).
1. The distinction between sections 310(b)(4) and 310(a) would be obliterated if section 310(a) were read to permit looking beyond the actual

holder of the license for indirect foreign government influence through investments in corporations controlling common carrier licensees.

2. VoiceStream's licensee subsidiaries will hold all Commission licenses following the mergers. Neither DT nor the German government will *directly* hold any U.S. common carrier license. Accordingly, section 310(a) would not bar the transaction even if the Commission were to determine that such licenses would be *indirectly* controlled by the German government or its representative.
- B. The legislative history of section 310 makes clear that section 310(a) applies only where a foreign government or its representative is the *direct holder* of a Commission license. As demonstrated below, if section 310(a) reached government control of U.S. corporations that in turn control U.S. radio licensees, Congress would not have had to adopt the predecessor of section 310(b)(4) in 1934.
1. The Radio Act of 1912, which contained the earliest predecessor of section 310, imposed no restrictions on a foreign government's ownership of stock in a U.S. company holding a license under that Act. The 1912 Act provided that a "license shall be issued only to citizens of the United States or Puerto Rico, or to a company incorporated under the laws of some State or Territory of the United States or Puerto Rico. . . ," but the Act did not place any restrictions on an alien's right to own a portion of that U.S. company. Act of Aug. 13, 1912, ch. 287, § 2, 37 Stat. 302 (1912). The Attorney General then concluded that that Act did not prohibit ownership of a U.S. licensee by "foreigners": The "statutes [do] not undertake to exclude from its benefits domestic corporations whose stock is owned or controlled by foreigners." *Radio Communication – Issuance of Licenses*, 29 Op. Atty Gen. 579, 580 (1912). Thus, under the 1912 Act, foreign governments and their representatives were allowed to own and control U.S. corporations that held licenses.
 2. The Radio Act of 1927 amended the 1912 Act by adding a limitation on the amount of stock that a foreign government or its representative could directly hold or vote in a U.S. company holding a radio license. The 1927 Act prohibited an alien, including a "foreign government or representative thereof," from voting more than one-fifth of the capital stock of a U.S. corporation holding a license. Radio Act of 1927, ch. 169, § 12, 44 Stat. 1162 (1927). The 1927 Act still imposed no limitation on the interest a foreign person or entity could have in a U.S. corporation that in turn controlled a U.S. licensee.
 3. The Communications Act of 1934 amended the alien ownership provisions in the 1927 Act to address this specific issue for the first time. Congress not only adopted the 1927 Act's foreign ownership restrictions virtually unchanged; it also added the predecessor to section 310(b)(4) to

limit *indirect* interests — whether or not controlling² — in a U.S. holding company that in turn controls a holder of specific types of radio licenses (broadcast, common carrier, and aeronautical). See H.R. Conf. Rep. No. 1918, 73d Cong. 2d Sess. at 49 (1934). See also J. Gregory Sidak, FOREIGN INVESTMENT IN AMERICAN TELECOMMUNICATIONS 69-73 (1997) (agreeing that section 310(b)(4) was enacted to address alien participation in holding companies). Congress would have had no need to add this provision to section 310 if section 310(a) already reached indirect foreign government control of radio licensees. Moreover, while the Senate passed a bill that would have prohibited all indirect foreign ownership in excess of 25% of a radio licensee, Congress rejected that approach. See *Applicants' Reply* at 30-31 n.97.

4. The 1974 amendments to section 310 did not *expand* the scope of 310(a). These amendments, which separated the provisions of 310(a) from those in 310(b), were enacted to limit the scope of the restrictions in 310(b) to common carrier, broadcast and aeronautical radio licenses only. The principal aim of the 1974 amendments was to relieve the alien ownership restrictions on amateur radio licenses. See H.R. Rep. No. 93-1423, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6305, 6306.
- C. To the extent that the Commission has stated or assumed that section 310(a) bars *indirect* control by a foreign government, it has done so only in cases involving licenses that are outside the scope of section 310(b)(4) (*i.e.*, licenses other than broadcast, common carrier, or aeronautical). See *generally Intelsat* (applying *de facto* control test under section 310(a) with respect to application for non-common carrier authority); *Orion* (same).
1. Even if, contrary to the plain language of section 310(a),³ the Commission had the authority to prohibit a foreign government from obtaining indirect control over a license *not* covered by section 310(b)(4) (such as a non-common carrier satellite license), the Commission plainly lacks authority to prohibit a foreign government from obtaining indirect control over a license that *is* covered by section 310(b)(4) (such as the common carrier licenses at issue here).
 2. Consistent with this distinction, the Commission never has held that section 310(a) prohibits a foreign government from obtaining *indirect* control over a *common carrier* license. Such a holding would violate the plain language of section 310(b)(4).

² See Part II.D, below.

³ Section 310(a) provides only that a radio license “shall not be *granted to or held by* any foreign government or the representative thereof.” 47 U.S.C. § 310(a) (emphasis added). Thus, it governs only direct interests.

3. The Basic Telecommunications Agreement, and the statements of USTR in negotiating that agreement, reflects this understanding of the statutory scheme. *See* United States of America, Schedule of Specific Commitments, Fourth Protocol to the General Agreement on Trade in Services, GATS/SC/90/Suppl.2, at 2 (Apr. 11, 1997) (Regarding limitations on market access for ownership of a common carrier radio license, the Schedule specifies: “Indirect: None.” It then lists several restrictions on “[d]irect” ownership that track section 310.⁴) (“*WTO Commitment*”); *Applicants’ Reply* at 25-36. Whatever these commitments mean for the balance of section 310, they must mean that no restrictions may apply where, as here, section 310(b)(4) squarely applies. Departing from this reading of section 310 not only would violate the U.S. commitments to the WTO, but, as noted above, would undermine USTR’s credibility and expose the United States to retaliatory action. *See Applicants’ Reply* at 35-36.
- D. Senator Hollings argues incorrectly that section 310(a) applies here because section 310(b)(4) governs only *non*-controlling interests. There is no basis in the Act or the Commission’s orders for that argument.⁵
 1. In comments submitted to the Commission in this proceeding, Senator Hollings argues that, although section 310(b)(4) gives the Commission “some discretion to allow indirect foreign ownership of . . . common carrier . . . licenses in amounts above 25% if the public interest is served,” the Commission has no discretion under that section to permit a foreign government or its representative to *control* a license. Comments of Senator Ernest F. Hollings, FCC Docket No. 00-187, at 8 (Dec. 13, 2000). “To interpret [section 310(b)(4)] otherwise,” he claims, “would be to read out of existence section 310(a).” *Id.* Thus, in the Senator’s view, a foreign government may hold an indirect interest of more than 25% in a

⁴ The U.S. Schedule of Specific Commitments to the WTO Agreement on Basic Telecommunications states that common carrier licenses “may not be granted to or held by” (a) a foreign government or the representative thereof (section 310(a)); (b) a non-U.S. citizen or the representative of any non-U.S. citizen (section 310(b)(1)); (c) any corporation not organized under the laws of the United States (section 310(b)(2)); or (d) a U.S. corporation which is more than 20 percent owned by a foreign government or its representative, non-U.S. citizens or their representatives, or a corporation not organized under the laws of the United States (section 310(b)(3)). *WTO Commitment* at 2-3.

⁵ Senator Hollings further argues, as he must for section 310(a) to apply under his theory, that the German government will have *de facto* control over DT and, in turn, VoiceStream’s licenses. In fact, the German government will not have *de facto* control over VoiceStream’s licenses following the merger. *See Applicants’ Reply* at 37-44. But since the Senator’s attempt to limit section 310(b)(4) to non-controlling interests misreads the statute, the issue of *de facto* control is irrelevant.

licensee, but may not in any circumstances obtain control — direct or indirect — over a licensee.

2. Both the plain language of section 310 and Commission precedent squarely refute this argument.
 - a) As the United States made clear in its WTO commitments, section 310(b)(4) expressly applies in *every* instance in which a foreign government owns more than a 25% indirect interest in a common carrier radio license, regardless of whether that government exercises “control” over the licensee. That section applies to a common carrier license held by any corporation that is “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. . . .” 47 U.S.C. § 310(b)(4) (emphasis added). The plain language of the statute covers all situations where an alien, a foreign corporation, or a foreign government holds an interest in excess of 25 percent. Section 310(b)(4) does not place *any* further limit on the Commission’s discretion to approve indirect ownership by a foreign government in accordance with the public interest.
 - b) The Commission could not have granted the merger applications filed by Airtouch and Vodafone, or British Telecom and MCI, if Senator Hollings’ interpretation of section 310 were correct.⁶ Under the Senator’s reasoning, the application of section 310(b)(4) in those cases would “read out of existence” sections 310(b)(1) and (2): Sections 310(b)(1) and (2) prohibit direct holdings of common carrier radio licenses by *aliens* and *foreign corporations*, respectively, using the same language that section 310(a) employs to bar direct holdings of radio licenses by *foreign governments*.
 - i. Sections 310(a), 310(b)(1) and (b)(2) directly parallel one another: Each section contains an unconditional ban on licenses being “granted to” or “held by” certain foreign entities. Section 310(a) applies to foreign governments, section 310(b)(1) applies to aliens, and section 310(b)(2) applies to foreign corporations. All these provisions were initially enacted together as a whole. *See Applicants’ Reply* at 30-31 n.97.

⁶ See *In re Applications of Airtouch Communications, Inc., Transferor, and Vodafone Group, PLC, Transferee*, Memorandum Opinion and Order, FCC Docket No. 99-1200 (rel. June 22, 1999) (“*Airtouch-Vodafone*”); *In the Matter of the Merger of MCI Communications Corporation and British Telecommunications PLC*, Memorandum Opinion and Order, 12 FCC Red 15351 (1997) (“*MCI-BT*”).

- ii. Thus, if Senator Hollings were correct that section 310(a) prohibits a foreign government from obtaining *indirect* control over a common carrier license — despite the clear authorization of indirect control in section 310(b)(4) — then section 310(b)(2) necessarily would bar Vodafone and BT from obtaining *indirect* control over the common carrier licenses held by Airtouch and MCI. Likewise, section 310(b)(1) would categorically bar aliens from holding controlling shares of the holding company — contrary to the express language of 310(b)(4).

- iii. The Commission’s holdings in *Airtouch-Vodafone* and *MCI-BT* that section 310(b)(4) authorizes foreign corporations and their non-U.S. citizen shareholders to control indirectly Commission licenses, *see Airtouch-Vodafone* at ¶¶ 7-8; *MCI-BT* at ¶ 247, are therefore fatal to Senator Hollings’ interpretation of section 310(a). Just as section 310(b)(4) authorizes foreign corporations to obtain indirect control over common carrier radio licenses notwithstanding the ban on direct control in section 310(b)(1) and (2), section 310(b)(4) authorizes foreign governments to obtain indirect control over common carrier radio licenses notwithstanding the ban on direct control in section 310(a). Thus, consistent with the language of section 310(b)(4), there is no basis in the Act for any distinction between the treatment of foreign corporations and foreign governments in this respect.

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