

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

In the Matter of
NextWave Personal Communications Inc.
Section 310(b) Compliance Demonstration and
Petition for Declaratory Ruling
File Nos. 00341CWL96 et al.

ORDER

Adopted: July 11, 2003

Released: July 14, 2003

By the Chief, International Bureau and Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On April 10, 1998, NextWave Telecom Inc. ("NTI") filed a Compliance Demonstration and Petition for Declaratory Ruling seeking confirmation that the level of indirect foreign ownership of its subsidiaries is in the public interest and is authorized pursuant to section 310(b)(4) of the Communications Act of 1934, as amended, and Commission rules and policies under the Foreign Participation Order. NTI asserts that a favorable ruling on its petition would satisfy the conditions the Wireless Telecommunications Bureau ("WTB") imposed on the grant of C-Block PCS licenses to NextWave's wholly-owned subsidiary, NextWave Personal Communications Inc. ("NextWave"), and thereby provide grounds for the conditions to be removed.

2. In this Order, we grant NTI's petition for declaratory ruling and find that NextWave has complied fully with the condition, imposed on the grant of its C-block licenses, that required it either to

1 Section 310(b) Compliance Demonstration and Petition for Declaratory Ruling, File Nos. 00341CWL96 et al. (filed April 10, 1998) (Petition).

2 NTI is a holding company whose wholly owned subsidiaries, NextWave Personal Communications Inc. and NextWave Power Partners Inc., hold C-block and D/E/F block personal communications service ("PCS") licenses, respectively. See Applications of NextWave Personal Communications Inc. for various C-Block broadband PCS Licenses, Memorandum Opinion and Order, 12 FCC Rcd 2030 (WTB 1997) (NextWave Licensing Order) (conditionally granting 63 C-block broadband PCS licenses to NextWave Personal Communications Inc.). See also Applications of NextWave Power Partners et al. for Authority to Construct and Operate Broadband PCS Systems Operating on Frequency Blocks D, E, and F, Memorandum Opinion and Order, 12 FCC Rcd 22477 (WTB 1997) (conditionally granting D/E/F block PCS licenses to NextWave Power Partners Inc.).

3 47 U.S.C. § 310(b)(4); 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), recon., 15 FCC Rcd 18158 (2000).

4 See Petition at 1.

restructure to bring its indirect foreign ownership within the 25 percent benchmark of section 310(b)(4) or demonstrate that it is in the public interest to permit it to exceed the benchmark.⁵ We therefore remove this and related conditions imposed on the grant of C-block licenses to NextWave.

II. BACKGROUND

3. At the conclusion of the Commission's 1996 C-Block Broadband PCS auction, NextWave was the high bidder on a total of 63 licenses. On May 31, 1996 and August 14, 1996, WTB issued public notices accepting NextWave's post-auction, "long form" applications for filing.⁶ On January 3, 1997, WTB granted the NextWave applications, conditioned, *inter alia*, on NextWave either (1) restructuring to conform its indirect foreign ownership to the 25 percent statutory benchmark of section 310(b)(4); or (2) demonstrating that the public interest would be served by allowing it to exceed the benchmark. WTB required that NextWave complete the restructuring, or submit the required showing, within six months from the date of the January 3, 1997 Public Notice granting the licenses.⁷

4. On April 10, 1997, NextWave filed a petition for temporary waiver of its restructuring obligations and, on May 16, 1997, WTB granted this waiver and extended NextWave's restructuring deadline to 90 days after the effective date of the Commission's then pending rulemaking proceeding regarding the implementation of the World Trade Organization Basic Telecommunications Agreement ("WTO Agreement").⁸ WTB concluded that, because the Commission's rulemaking might afford NextWave more flexibility with regard to foreign investment, an extension of time would serve the public interest by allowing NextWave to build out its infrastructure without having to undertake a corporate restructuring that may ultimately prove to be unnecessary.⁹

5. On November 25, 1997, the Commission adopted the *Foreign Participation Order*, which established rules to implement the market-opening commitments made by the United States in the WTO.¹⁰ These rules became effective on February 9, 1998.¹¹ NextWave therefore had 90 days from that date to file its compliance demonstration with the Commission. On April 10, 1998, NTI filed the

⁵ See *NextWave Licensing Order*, 12 FCC Rcd at 2076, 2079, ¶¶ 101, 110-111.

⁶ See Public Notice, Broadband Personal Communications Services Entrepreneurs' C Block Serv. Information, Report No. CW-96-5 (released May 31, 1996) and Public Notice, Broadband Personal Communications Services Entrepreneurs' C Block Serv. Information, Applications Accepted for Filing, Auction Event No. 10, Report No. CW-95-15 (released Aug. 14, 1996).

⁷ See Public Notice, DA 97-12 (released Jan. 3, 1997); *NextWave Licensing Order*, 12 FCC Rcd at 2031, 2076, 2079, ¶¶ 1, 101, 110-111. In the *NextWave Licensing Order*, WTB analyzed both the stock ownership and the capital contributed to NTI in determining whether NextWave's indirect foreign ownership interests exceeded 25 percent. WTB also determined that two convertible financial instruments characterized as debt in the NextWave Personal Communications license applications should be treated as equity for the purposes of evaluating its compliance with section 310(b)(4). WTB therefore found NextWave to have a capital structure that exceeded the 25 percent foreign ownership benchmark of section 310(b)(4). See *id.*, 12 FCC Rcd at 2070, ¶ 84. WTB granted NextWave 63 C-Block PCS licenses, expressly conditioned on NextWave "coming within the Section 310(b)(4) benchmark, in accordance with the terms of its December 30, 1996 Restructuring Plan, within six months of January 3, 1997." *Id.*, 12 FCC Rcd at 2079, ¶ 110.

⁸ See *NextWave Personal Communications Inc. Request for Temporary Waiver of Indirect Alien Ownership Limits*, Order, 12 FCC Rcd 6543, 6547, ¶ 12 (1997) (*Extension Order*).

⁹ See *id.*, 12 FCC Rcd at 6547, ¶ 12.

¹⁰ See, e.g., *Foreign Participation Order*, 12 FCC Rcd 23891.

¹¹ See *WTO Implementation Order, Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Order, 13 FCC Rcd 6219 (1998).

compliance demonstration and the petition for declaratory ruling which are now before us.¹² By letter dated April 21, 2003, the Policy Division of the International Bureau (“Policy Division”) requested additional information from NTI specifically with respect to NextWave’s current indirect foreign ownership.¹³ NextWave responded to the Policy Division’s information request on May 13, 2003.¹⁴

III. DISCUSSION

6. Section 310(b)(4) of the Act establishes a 25 percent benchmark for indirect, attributable investment by foreign individuals, corporations, and governments in U.S. common carrier radio licensees, but grants the Commission discretion to allow higher levels of foreign ownership if it determines that such ownership is not inconsistent with the public interest.¹⁵ The calculation of foreign ownership interests under section 310(b)(4) is a two-pronged analysis in which the Commission examines separately the equity interests and the voting interests in the licensee’s parent.¹⁶ The Commission calculates the equity interest of each foreign investor in the parent and then aggregates these interests to determine whether the sum of the foreign equity interests exceeds the statutory benchmark. Similarly, the Commission calculates the voting interest of each foreign investor in the parent and aggregates these voting interests.¹⁷ The presence of aggregated alien equity or voting interests in a common carrier licensee’s parent in excess of 25 percent triggers the applicability of section 310(b)(4)’s statutory benchmark.¹⁸ Once the benchmark is triggered, section 310(b)(4) directs the Commission to determine whether the “public interest will be served by the refusal or revocation of such license.”¹⁹

7. In the *Foreign Participation Order*, the Commission concluded that the public interest would be served by permitting greater investment by individuals and entities from WTO Members in U.S. common carrier and aeronautical fixed and en route licensees.²⁰ Therefore, with respect to indirect foreign investment from WTO Members, the Commission applies a rebuttable presumption that such

¹² We note that the Supreme Court’s recent ruling in *F.C.C. v. NextWave Personal Communications*, 123 S.Ct. 832 (2003), did not involve foreign ownership issues and therefore does not impact the conclusions we reach in this Order.

¹³ See Letter from James L. Ball, Chief, Policy Division, International Bureau, Federal Communications Commission to Michael R. Wack, Senior Vice President & General Counsel, NextWave Telecom Inc., File Nos. 00341CWL96 et al. (dated Apr. 21, 2003).

¹⁴ See Letter from Michael R. Wack, Senior Vice President & General Counsel, NextWave Telecom Inc. to James L. Ball, Chief, Policy Division, International Bureau, Federal Communications Commission, File Nos. 00341CWL96 et al. (dated May 13, 2003) (*May 13, 2003 Letter*).

¹⁵ See 47 U.S.C. § 310 (b)(4) (providing that “No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by ...any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government, or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest would be served by the refusal or revocation of such license.”).

¹⁶ *BBC License Subsidiary L.P.*, Memorandum Opinion and Order, 10 FCC Rcd 10968, 10973, ¶ 22 (1995) (*BBC License Subsidiary*).

¹⁷ *Id.*, 10 FCC Rcd at 10974, ¶¶ 26-27.

¹⁸ See, e.g., *Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1857, ¶ 47 (1995) (*Sprint Ruling*). See also *BBC License Subsidiary*, 10 FCC Rcd at 10973, ¶ 25.

¹⁹ *Sprint Ruling*, 11 FCC Rcd at 1857, ¶ 47 (quoting section 310(b)(4)).

²⁰ *Foreign Participation Order*, 12 FCC Rcd at 23896, 23940, and 23913, ¶¶ 9, 50, and 111-12.

investment generally raises no competitive concerns.²¹ The Commission has stated, in the *Foreign Participation Order*, that it will “deny an application if we find that more than 25 percent of the ownership of an entity that controls a common carrier radio licensee is attributable to parties whose principal place(s) of business are in non-WTO Member countries that do not offer effective competitive opportunities to U.S. investors in the particular service sector in which the applicant seeks to compete in the U.S. market, unless other public interest considerations outweigh that finding.”²² In evaluating an applicant’s request for approval of foreign ownership interests under section 310(b)(4), the Commission uses a “principal place of business” test to determine the nationality or “home market” of foreign investors.²³

8. NTI asserts in its April 10, 1998 petition that NextWave’s indirect foreign ownership level fully comports with the rules and policies adopted in the *Foreign Participation Order*. It states, in its May 13, 2003 letter, that NextWave’s current indirect foreign ownership level falls below the 25 percent benchmark of section 310(b)(4). It therefore requests that the Commission remove the foreign ownership conditions imposed on the grant of NextWave’s C-block licenses.²⁴ No parties are on record opposing grant of the NTI petition or its request for removal of the foreign ownership conditions set forth in the *NextWave Licensing Order*.²⁵

²¹ *Id.* at 23896, 23913, and 23940, ¶¶ 9, 50, and 111-12.

²² *Foreign Participation Order*, 12 FCC Rcd at 23946, ¶ 131. With respect to non-WTO Members, the Commission continues to apply the “effective competitive opportunities,” or “ECO,” test in order to preserve the international public policy goals of: (i) promoting effective competition in the global market for communications services; (ii) preventing anti-competitive conduct in the provision of international services or facilities; and (iii) encouraging foreign governments to open their communications markets. *Id.* at 23894-95, ¶ 5.

²³ Specifically, in determining a foreign entity’s home market for purposes of the public interest determination under section 310(b)(4), the Commission will identify and balance the following five factors: (1) the country of its incorporation, organization or charter; (2) the nationality of all investment principals, officers, and directors; (3) the country in which its world headquarters is located; (4) the country in which the majority of its tangible property, including production, transmission, billing, information, and control facilities, is located; and (5) the country from which it derives the greatest sales and revenues from its operations. *See Foreign Participation Order*, 12 FCC Rcd at 23941, ¶ 116 (citing *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd 3873, 3951, ¶ 207 (1995) (*Foreign Carrier Entry Order*)). For examples of cases applying the five-factor “principal place of business” test, *see Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, Experimental Licenses, and Earth Station Licenses and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act*, Order and Authorization, 16 FCC Rcd 22897 (2001), *erratum*, 17 FCC Rcd 2147 (Int’l Bur. 2002), *recon. denied*, 17 FCC Rcd 14030 (2002); *Space Station System Licensee, Inc. (Assignor) and Iridium Constellation LLC (Assignee)*, Memorandum Opinion, Order and Authorization, 17 FCC Rcd 2271 (Int’l Bur. 2002).

²⁴ *Petition* at 6.

²⁵ *See* Public Notice, Wireless Telecommunications Bureau, Commercial Wireless Division, Approves Settlement Request and Dismisses Two Applications for Review (released May 23, 2003) (approving withdrawal of pleadings filed against NextWave Personal Communications Inc. by Antigone Communications Limited Partnership and PCS Devco Inc., pursuant to a settlement request dated June 1, 1998); Letter from Linda C. Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Bob Calaff, Senior Corporate Counsel for Governmental and Industry Affairs, T Mobile USA Inc. (dated Apr. 14, 2003) (approving withdrawal of pleadings filed against NextWave Power Partners Inc. and NextWave Personal Communications Inc. by Auction 35 participants that requested dismissal of their pending applications for C and F block Broadband Personal Communications Services licenses for spectrum previously licensed to NextWave Personal Communications Inc. and NextWave Power Partners Inc.); Letter from Linda C. Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, to John T. Scott, Vice President and Deputy

(continued....)

9. Turning first to the ownership structure of NextWave as it existed on the date of filing of the petition, we find that NTI has demonstrated that NextWave's indirect foreign ownership at that time complied with the rules and policies adopted in the *Foreign Participation Order*. According to information provided by NTI in the petition, NTI's level of foreign equity share ownership at the time was less than 27 percent, and its level of foreign-contributed equity capital was less than 38 percent.²⁶ NTI also states that more than 95 percent of its total equity ownership was attributable to citizens of, or entities from, the United States and other WTO Member countries.²⁷ Although the petition does not provide a distinct calculation of foreign voting interests, as required by *BBC License Subsidiary*,²⁸ we find no basis to attribute to NTI a level of foreign voting interests that is higher than the level of attributable foreign equity. Indeed, NTI's May 13, 2003 letter states that, then as now, NTI's closely-held "Series A" stock, which constitutes control of NTI, is held by domestic corporations or individual U.S. citizens, with only a *de minimis* number of such shares being owned by foreigners.²⁹ Thus, it is the U.S. holders of the Series A shares who have de jure and de facto control of NextWave. The more widely-held "Series B" stock elects only a minority of NTI's board of directors and otherwise votes only for certain events that WTB concluded do not amount to control.³⁰ We therefore find that the vast majority of NextWave's indirect foreign equity and voting interests as of April 10, 1998, were from WTO Member countries and therefore complied with the Commission's "open entry" standard for WTO Member investment in U.S. common carrier radio licensees.

10. Turning next to NTI's current level of foreign ownership, we find that the indirect foreign equity and voting interests in NextWave now fall below the 25 percent benchmark set by section 310(b)(4) of the Act. In its May 13, 2003 letter, NTI provides the following foreign ownership information, which it calculated based on the company's internal records, updated by a foreign ownership survey that it completed just prior to its May 13, 2003 response: 80.9 percent of NTI's issued and outstanding shares are held by domestic individuals, corporations, or partnerships; 14.5 percent are held by foreign individuals, corporations or partnerships; and the remaining 4.6 percent are held in "street name" by U.S. brokerage houses on behalf of individuals, corporations, or partnerships whose citizenship is unknown to NextWave.³¹ NextWave argues that, even if these "street name" shares were held by

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General Counsel for Regulatory Law, Verizon Wireless (dated Apr. 14, 2003) (same); Letter from Linda C. Ray, Deputy Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Michelle C. Farquahar, Hogan and Hartson, counsel for Alaska Native Wireless, L.L.C. (dated Apr. 14, 2003) (same).

²⁶ *Petition* at 6. As discussed *supra* note 7, WTB in the *NextWave Licensing Order* analyzed both the stock ownership and the capital contributed to NTI in determining whether NextWave's indirect foreign ownership interests exceeded 25 percent. In addition, WTB concluded that two of NTI's debt instruments should be treated as equity. NTI states in its petition that, while it continues to believe it properly characterized as debt certain financial instruments that WTB concluded were equity, it would not debate the Bureau's conclusions in the context of a ruling on its petition. Thus, NTI's foreign ownership calculations reflect WTB's conclusions regarding the characterization of debt and equity. See *Petition* at 3 n.8.

²⁷ *Petition* at 5.

²⁸ See *supra* note 16 and accompanying text.

²⁹ *May 13, 2003 Letter* at 2. See also *NextWave Licensing Order*, 12 FCC Rcd at 2046, ¶ 38 (finding that domestic investors own 99.6 percent of NTI's Series A stock).

³⁰ See *Petition* at 2 (citing *NextWave Licensing Order*, 12 FCC Rcd at 2041-43, ¶¶ 27, 30).

³¹ *May 13, 2003 Letter* at 1-2. NTI's calculations again reflect WTB's 1997 determination that two financial instruments characterized as debt in NextWave's license applications should be treated as equity for the purpose of evaluating compliance with section 310(b)(4). *Id.* at 1 n.2. See also Letter from Michael R. Wack, Senior Vice President & General Counsel, NextWave Telecom Inc. to Susan O'Connell, Policy Division, International Bureau, Federal Communications Commission, File Nos. 00341CWL96 et al. (dated July 9, 2003).

foreign entities, its total indirect foreign ownership would be no more than 19.1 percent. As such, NextWave asserts these facts demonstrate that the level of indirect foreign ownership of its subsidiaries comports with section 310(b)(4) and related Commission rules and policies.³²

11. Based on a review of the record and the representations made by NTI, we find that the indirect foreign ownership interests in NTI's licensing subsidiaries as of April 10, 1998, were consistent with the Commission's open entry standard for WTO investment in U.S. common carrier radio licensees under section 310(b)(4) of the Act.³³ We are also satisfied, based on the record as updated by NTI's May 13, 2003 letter, that the current indirect foreign equity and voting interests in NTI's licensing subsidiaries are below 25 percent³⁴ and that NTI will take all necessary steps to ensure that the indirect foreign ownership of its licensing subsidiaries remains at that level unless and until we are presented with and act upon any future petition for declaratory ruling that NTI files under section 310(b)(4). Accordingly, we grant NTI's petition for declaratory ruling³⁵ and remove the conditions related to foreign ownership imposed on NextWave's grant of C-block licenses.³⁶

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and (j) and 310(b)(4) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 310(b)(4), the Petition for Declaratory Ruling filed by NextWave Telecom Inc. IS GRANTED and the Emergency Petition for Declaratory Ruling filed by NextWave Personal Communications Inc. IS DISMISSED as moot.

13. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 309, the conditions imposed on the grant of C-block broadband PCS licenses to NextWave Personal Communications Inc., set forth in paragraphs 110-111 of the *NextWave Licensing Order*, 12 FCC Rcd 2030 (WTB 1997), and as extended to the D/E/F block licenses held by NextWave Power Partners Inc., are removed.

14. This *Order* is issued pursuant to sections 0.261 and 0.331 of the Commission's rules on delegated authority, 47 C.F.R. §§ 0.261, 0.331, and is effective upon release. Petitions for reconsideration under section 1.106 or applications for review under section 1.115 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of the date of the release of this *Order*. See 47 C.F.R. § 1.4(b)(2).

³² *May 13, 2003 Letter* at 2.

³³ Prior to filing its *Petition*, NextWave filed an Emergency Petition for Declaratory Ruling, asking the Commission to establish a "safe harbor" for certain types of foreign investment in NextWave and similarly situated C- and F-Block licensees. See Emergency Petition for Declaratory Ruling Concerning Section 310(b)(4) of the Communications Act, File Nos. 00341CWL96 et al. (filed June 6, 1997). Given that the Commission did not act upon, and that NextWave did not formally prosecute its June 6, 1997 petition, we find that it has been superceded by the petition we act upon today and dismiss it as moot.

³⁴ As explained in paragraph 9, *supra*, we find no basis to attribute to NTI a level of foreign voting interests that is higher than the level of its attributable foreign equity interests.

³⁵ We note that, because NextWave's indirect foreign ownership has changed since the filing of its petition, our section 310(b)(4) ruling that approves its indirect foreign ownership, as it existed on the day of filing, has been superceded by its current indirect foreign equity and voting interests, which we find are below 25 percent.

³⁶ The conditions we are removing are set forth in paragraphs 110 and 111 of the *NextWave Licensing Order*. Although NTI's request was framed only in terms of its C block licenses, this ruling would also equally apply to the D/E/F block licenses held by NextWave Power Partners Inc. (*see supra* note 2).

FEDERAL COMMUNICATIONS COMMISSION

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