

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

FILED/ACCEPTED

AUG 10 2007

Federal Communications Commission  
Office of the Secretary

In re Application of )  
 )  
 )  
DIGICEL (USVI) LLC )  
 )  
 )  
For Declaratory Order Pursuant to )  
Section 310(b)(4) of the Communications Act )

**PETITION FOR DECLARATORY ORDER**

Digicel (USVI), LLC (“Digicel”) hereby petitions the Commission for a declaratory ruling that the proposed foreign ownership structure of Digicel in excess of the 25-percent benchmark set forth in Section 310(b)(4) of the Communications Act, 47 U.S.C. § 310(b)(4), will not harm the public interest. This Petition is submitted in connection with Digicel’s application for Commission consent to assignment to it of the PCS license of Elandia Technologies, Inc. (“Elandia”), call sign WPOJ804 in BTA 491 (U.S. Virgin Islands), which Digicel and Elandia are simultaneously filing with the Wireless Telecommunications Bureau. For the reasons set forth below, Digicel respectfully submits that the foreign ownership structure of the proposed transferee in this transaction conforms to Commission policy favoring the licensing of entities subject to indirect ownership and control by individuals who are citizens of WTO member countries and by entities whose “home countries” are WTO members, and that such foreign ownership will not harm the public interest.

## **I. The Asset Purchase Agreement**

On July 30, 2007, Digicel signed an Asset Purchase Agreement with Elandia for the sale of Elandia's U.S. Virgin Islands PCS license to Digicel. Digicel's parent and affiliated organizations operate mobile telephony systems in a large number of Caribbean markets, and the acquisition of Elandia's Virgin Islands license marks a logical progression of the Digicel group's business strategy in that region. The transaction with Elandia represents the first effort by petitioner Digicel, or any of its affiliates, to secure a facility license regulated by the Commission.<sup>1</sup>

## **II. Request for Declaratory Order**

In order to consummate acquisition of Elandia's license, Digicel's parent organization established a holding company – Digicel (USVI Holdings) LLC (“Holdings”) – and an operational company – Digicel (USVI) LLC (“Digicel”) – under the laws of the U.S. Virgin Islands. The single-member manager of each of the companies is, initially, a United States citizen. Petitioner Digicel is wholly owned by Holdings, and will acquire Elandia's license and infrastructure and assume responsibility for operation of Elandia's PCS system in the U.S. Virgin Islands.

The proposed licensee's parent organization is 100 percent owned and controlled by non-U.S. entities. Under Section 310(b)(4) of the Communications Act, no common carrier licensee may be owned by a U.S. entity that is owned or controlled more than 25 percent by foreign

---

<sup>1</sup> Digicel USA, Inc., a Delaware corporation affiliated with petitioner Digicel through a common shareholder and parent organizations, received a global Section 214 authorization from the Commission in December 2003.

investors, unless the Commission makes an affirmative determination that ownership and control in excess of that benchmark will not harm the public interest.

In its *Foreign Participation Order*, the Commission found that, “[b]ecause additional foreign investment can promote competition in the U.S. market, we conclude that the public interest will be served by permitting more open investment by entities from WTO Member countries in U.S. common carrier wireless licensees.”<sup>2</sup> On the basis of this finding, the Commission adopted, “as a factor in our public interest analysis,” a “rebuttable presumption” that competitive concerns are not posed by indirect ownership of common carrier and aeronautical radio licensees by nationals of or entities with home countries in WTO members under Section 310(b)(4) of the Act.<sup>3</sup> The Commission went on to find that “adopting a rebuttable presumption in favor of entry will allow the Commission to grant the vast majority of applications swiftly, while maintaining the oversight necessary to ensure that entry by an applicant from a WTO Member is consistent with the public interest.”<sup>4</sup> The Commission ruled that this policy would specifically apply to petitions for declaratory rulings by prospective licensees in transfer of control and assignment applications that the public interest would be served by allowing them to exceed the 25 percent indirect foreign ownership limit .<sup>5</sup>

Since adoption of this policy in the *Foreign Participation Order*, the Commission has had numerous occasions to apply it in the context of applications for transfers of control and

---

<sup>2</sup> *In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, 12 FCC Rcd 23891, 23939 (1997).

<sup>3</sup> *Id.*, at 23913.

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

<sup>5</sup> *See id.*, at 23940.

assignments of mobile telephony licenses.<sup>6</sup> In these decisions, the Commission has approved up to 100-percent indirect foreign ownership of common carrier licenses as not harmful to the public interest. These rulings establish the framework for the Commission's public interest evaluation of applicant Digicel's indirect foreign ownership, since each of the entities and individual shareholders in the ownership chain of the proposed license transferee are from member countries of the WTO.

Exhibit A attached to this Petition sets forth in diagram form the ownership structure of transferee Digicel, identifying the names and jurisdictions of organization of each entity and citizenship of each individual shareholder involved. This chart reveals that the prospective licensee's ownership runs through a series of wholly owned subsidiaries operating under the laws of Bermuda and St. Lucia. Because each subsidiary in this hierarchy is wholly owned by the entity above it, Applicants do not question that both *de jure* and *de facto* control of the proposed licensee traces to Digicel Group Limited, the entity at the top of the ownership chain. Ultimate ownership and control of the Digicel group of companies in turn is held by an Irish national who owns all outstanding shares of Digicel Group Limited. Each of the foreign jurisdictions thus implicated – Ireland, the United Kingdom<sup>7</sup> and St. Lucia -- are member countries of the WTO.

For purposes of determining whether foreign investors are based in WTO member countries within the meaning of its *Foreign Participation Order*, the citizenship of individual

---

<sup>6</sup> See *Applications of Voicestream Wireless Corporation/Deutsche Telekom AG*, 16 FCC Rcd 9779 (2001); *In the Matter of Verizon Communications, Inc./America Movil, S.A. de C.V.*, Memorandum Opinion and Order and Declaratory Ruling, FCC 07-43, released March 26, 2007 (“*Verizon/Movil Order*”), ¶¶ 46-68.

<sup>7</sup> The International Bureau treats Bermuda as part of the United Kingdom for purposes of determining its WTO status.

shareholders and equity owners is typically accepted as dispositive.<sup>8</sup> In this case, ultimate control of the Digicel group is exercised by an individual of Irish nationality. The International Bureau has long recognized Ireland as a WTO member that has implemented commitments to liberalize facilities-based international services and to allow foreign entities to own a majority interest in facilities used to provide voice and data services.<sup>9</sup>

Where the ownership interest is held by a foreign corporation or other business organization, on the other hand, the Commission applies a multi-faceted analysis to determine the “home market” or “principal place of business” of the entity. The criteria for this analysis include, in addition to the country of incorporation or organization, the nationality of investment principals, officers and directors; the country in which the “world headquarters” is located; the country in which the entity maintains the majority of its tangible operating property; and the country from which it derives its greatest sales and revenues from operations.<sup>10</sup> The Digicel group qualifies under each of these criteria.

To begin with, the group maintains its center of operations in Jamaica, a WTO member country. The group’s Chief Executive Officer, Chief Finance Officer, Chief Technology Officer, and centralized administrative services are located there.

---

<sup>8</sup> See Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licensees, International Bureau, DA 04-3610, November 17, 2004 (hereinafter “Foreign Ownership Guidelines”), at 11.

<sup>9</sup> Report on International Telecommunications Markets 2000 Update, International Bureau, DA 01-117, May 4, 2001, at 3.

<sup>10</sup> Foreign Ownership Guidelines, at 12. See *Verizon/Movil Order*, ¶ 53.

Secondly, the officers and directors of each of the Bermuda- and St. Lucia-based holding companies in the hierarchical group structure are nationals of Ireland and the United Kingdom. Again, each of these countries is a WTO member.

Finally, the Digicel group includes 22 operating companies located throughout the Caribbean and Central and South America. Each of the locations in which the group earns revenues is either an independent country which is a WTO member, or an overseas territory of a WTO member.<sup>11</sup> Thus, the Digicel group's revenues derive from countries and territories that are WTO members.

As a result, each of the tests applied by the Commission pursuant to the *Foreign Participation Order* and its progeny looks to the same result: the "home countries" of each of the indirect owners of the proposed licensee are all WTO members.

In light of the foregoing demonstration that petitioner Digicel's indirect foreign ownership is held by individuals and entities from WTO member countries, petitioner is entitled to a rebuttable presumption that such indirect foreign ownership in excess of the statutory 25-percent benchmark will not harm the public interest. Nor do any other factors exist to overcome this presumption. For example, neither the proposed licensee nor any of its affiliates are included on the International Bureau's list of foreign telecommunications carriers presumed to

---

<sup>11</sup> Jamaica, Barbados, Grenada, St. Vincent and the Grenadines, St. Lucia, Antigua and Barbuda, Dominica, St. Kitts and Nevis Islands, Trinidad and Tobago, Haiti, El Salvador, Guyana, U.K. territories (Bermuda, Cayman Islands, Anguilla, Turks and Caicos Islands), departments of France (Martinique, Guadeloupe, French Guiana), and part of the Kingdom of the Netherlands (Aruba, Curacao, Bonaire).

possess market power in foreign telecommunications markets, and none of them is affiliated with any entity on that list.<sup>12</sup>

In addition, as demonstrated in Digicel's and Elandia's companion application to the Commission's Wireless Telecommunications Bureau for assignment of Elandia's PCS license, Digicel's acquisition of the license for BTA 491 will advance the public interest by introducing a new competitor into the U.S. Virgin Islands mobile telephony market. With its experience in providing services since 2001 in neighboring countries and territories around the Caribbean, Digicel will bring technical and marketing expertise, as well as regional knowledge to this undertaking. Assignment of Elandia's license to Digicel will, therefore, serve the public interest.<sup>13</sup>

## CONCLUSION

For the reasons set forth above, the Commission should grant Applicants' request for a declaratory order that Digicel's 100-percent indirect foreign ownership will not harm the public interest should Digicel acquire and operate the PCS license in BTA 491. In addition, because

---


<sup>12</sup> See The International Bureau Revises and Reissues the Commission's List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets, DA 07-233, January 26, 2007.

<sup>13</sup> The Virgin Islands BTA has a population of approximately 110,000 people. The market is currently served by five facilities-based wireless providers, all operating in PCS frequencies. Digicel's acquisition of Elandia's license will not detract from this competition and, as a result of the injection of new capital, could serve to enhance it. Nor will the assignment of the Virgin Islands license from Elandia to Digicel result in any overlap of wireless spectrum licenses granted by the Commission, since Digicel's operation of the PCS license in BTA 491 will represent the first U.S. common carrier license for Digicel or any of its affiliate organizations.

assignment of the Elandia PCS license in BTA 491 will result in the introduction of a new competitor in the U.S. Virgin Islands mobile telephony market, approval of such assignment request will advance the public interest.

Respectfully submitted,

DIGICEL (USVI), LLC

By: 

Delbert D. Smith  
Jones Day  
51 Louisiana Ave., N.W.  
Washington, D.C. 20001  
(202)789-1600  
Its counsel

August 9, 2007



