

**STAMP AND RETURN**

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

In the Matter of

HAWAIIAN TELCOM, INC. and  
HAWAIIAN TELCOM SERVICES  
COMPANY, INC. (Debtors-in-Possession)

Application for Consent to Transfer of  
Control of Domestic Authorizations Under  
Section 214 of the Communications Act, as  
Amended

FILED/ACCEPTED

FEB 17 2010

Federal Communications Commission  
Office of the Secretary

**PETITION FOR DECLARATORY RULING UNDER SECTION 310(B)(4)  
OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED**

Hawaiian Telcom, Inc. (“HTI”) and Hawaiian Telcom Services Company, Inc. (“HT Services,” and together with HTI, the “Petitioners”), both debtors-in-possession in Chapter 11 cases before the United States Bankruptcy Court for the District of Hawaii (the “Bankruptcy Court”), hereby request that the Commission issue a declaratory ruling finding that it is in the public interest for certain institutional entities, funds, and other investment vehicles to take up to 100 percent indirect foreign ownership of the Petitioners under Section 310(b)(4) of the Communications Act of 1934, as amended, provided that less than 25 percent of such indirect foreign ownership is from non-World Trade Organization (“WTO”) member countries.<sup>1</sup>

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<sup>1</sup> 47 U.S.C. § 310(b)(4).

## I. BACKGROUND

As explained in the associated Application for Consent to Transfer Control,<sup>2</sup> Petitioners, holders of domestic and international Section 214 authorizations and several wireless licenses, along with certain affiliates including Hawaiian Telcom Communications, Inc. (“HTC”) and Hawaiian Telcom Holdco, Inc. (“Holdco”), filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code on December 1, 2008. Each Petitioner is 100 percent owned and controlled by HTC, a U.S. entity. In turn, HTC is 100 percent owned and controlled by Holdco, Petitioners’ ultimate corporate parent and also a U.S. entity.<sup>3</sup> This corporate structure will remain the same after the Plan of Reorganization becomes effective.

On December 30, 2009, the Bankruptcy Court issued an order approving Petitioners’ Plan of Reorganization.<sup>4</sup> As part of the reorganization, the Holdco common stock held by the current owners of Holdco (investment funds managed by a private equity firm) will be cancelled, and the new Holdco common stock will be issued to the Senior Secured Parties of HTC, subject to dilution on account of the warrants, the rights

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<sup>2</sup> Application for Consent to Transfer Control, *Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc. (Debtors-in-Possession) Application for Consent to Transfer of Control of Domestic Authorizations Under Section 214 of the Communications Act, as Amended* (filed Jan. 22, 2010) (“Domestic Application”).

<sup>3</sup> Domestic Application, Exhibit 1, Plan of Reorganization at 32-34.

<sup>4</sup> *In re Hawaiian Telcom Communications, Inc., et al.*, Chapter 11, Case No. 08-02005 (Bankr. D. Haw. Dec. 30, 2009) (Order Confirming the Joint Chapter 11 Plan of Reorganization of Hawaiian Telcom Communications, Inc. and its Debtor Affiliates) (“Confirmation Order”). This Order, which includes the Plan of Reorganization approved by the Court, is attached included in Petitioners applications for transfer of control of their domestic Section 214 authorizations.

offering, and the management equity incentive program.<sup>5</sup> Petitioners, through HTC and Holdco, will therefore be 100 percent indirectly owned (subject to the dilution described in the preceding sentence) by a combination of the banks, investment funds, and financial institutions that make up these Senior Secured Parties, some of whom have foreign ownership. As detailed in Petitioners' Application, approval of this transfer of control is in the public interest and will allow Petitioners to complete their reorganization and give them and their affiliates a sound financial structure so that they can continue to serve their customers and invest in new facilities and services.<sup>6</sup>

## **II. REQUEST TO PERMIT INDIRECT FOREIGN OWNERSHIP IN EXCESS OF 25 PERCENT.**

### **A. Petitioners Are Entitled To A Presumption That Exceeding 25 Percent Foreign Ownership Is In The Public Interest.**

In its implementation of Section 310(b)(4) of the Act, the Commission established a presumption that foreign ownership or control of greater than 25 percent of a U.S. carrier is in the public interest where the entity or entities holding that interest are from WTO member countries.<sup>7</sup> This presumption is supported by the commitments that the United States made in the context of the WTO Basic Telecom Agreement, increased competition in the market, and the Commission's improved regulatory tools.<sup>8</sup> This approach benefits U.S. consumers by encouraging additional competition in the U.S.

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<sup>5</sup> "Senior Secured Parties" as used in this Petition has the same meaning as ascribed to such term in the Plan of Reorganization. See Domestic Application, Exhibit 1, Plan of Reorganization at 32-34.

<sup>6</sup> Domestic Application at 12-16.

<sup>7</sup> *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23896-8, 23913 (1997) ("*Foreign Participation Order*").

<sup>8</sup> *Id.* at 23896.

market, allowing the Commission to prevent anticompetitive conduct in the provision of international services and facilities more effectively, and promoting further opening to U.S. carriers in foreign markets.<sup>9</sup> Consistent with its “open entry standard,” the Commission also found that the presumption could be overcome only in “exceptional circumstances” where control of a U.S. carrier by a foreign carrier would pose a risk to competition by virtue of the foreign carrier’s ability to exercise market power to favor its U.S. affiliate.<sup>10</sup> Further, the Commission found that it is “highly unlikely that a carrier from a WTO Member country” that has open markets and a pro-competitive regulatory regime in place could pose such a high risk to competition.<sup>11</sup>

As shown below, this presumption applies here.<sup>12</sup> In accordance with the approved Plan of Reorganization, over one hundred Senior Secured Parties will hold common stock in Holdco upon the Petitioners’ emergence from bankruptcy. Together, these Senior Secured Parties will own all (subject to the dilution described above) of the common stock of Holdco, which, as explained above, holds 100 percent of the common stock of HTC, which in turn holds 100 percent of the common stock of Petitioners. Holdco will have a single class of common stock, each share of which represents an equal voting interest. As of the date of this Petition, no single person or entity is expected to obtain a 10 percent or greater direct or indirect interest in Holdco as a result of this

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<sup>9</sup> *Id.* at 23896-7

<sup>10</sup> *Id.* at 23913-4.

<sup>11</sup> *Id.* at 23914.

<sup>12</sup> 47 U.S.C. §§ 310(a) and (b)(1-3), which prohibit certain direct foreign ownership of FCC authorizations, are not implicated by this Petition because the authorizations and licenses at issue are held by Petitioners, both of which are U.S. entities, which in turn are 100 percent owned by another U.S. entity.

reorganization,<sup>13</sup> and thus no person or entity (including any foreign carrier or affiliate thereof) would exercise control over Holdco and its subsidiaries. The Holdco common stock, when issued, will be transferable, but may, depending upon the occurrence of certain events, become subject to certain trading restrictions that will limit the ability of any entity that does not already hold an ownership interest of 4.75 percent or greater in the stock at the time of Holdco's emergence from bankruptcy to obtain such an ownership interest for two years thereafter absent approval of the Holdco board of directors.

**B. Petitioners Have Conducted A Thorough Review Of The Proposed Owners Consistent With The Plan Of Reorganization.**

To ensure compliance with the Communications Act and the Commission's rules regarding foreign ownership, Petitioners worked with several parties to obtain information from each of the Senior Secured Parties that is expected to take common stock in Holdco.<sup>14</sup> Specifically, each of the more than 100 entities was asked first to identify the jurisdiction in which it is incorporated or organized.<sup>15</sup> If the entity was a limited partnership, limited liability company, or similar entity, it was also asked whether it has: (a) a sole general partner, sole member, or similar controlling entity or (b) multiple

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<sup>13</sup> As discussed further below, claims against the bankruptcy estate may be traded among the claim holders and with third parties during the pendency of the bankruptcy proceeding. The information provided herein reflects the most current information available with respect to the Senior Secured Parties.

<sup>14</sup> The list of Senior Secured Parties is maintained by Lehman Commercial Paper Inc. ("Lehman"), which is the administrative agent for the secured lenders under the pre-bankruptcy secured credit facility. Houlihan Lokey, Lehman's financial advisor, and counsel assisting Lehman in its role as administrative agent for the secured lenders gathered the information to support this Petition. A declaration attesting to the accuracy of the information included in this Petition is attached hereto.

<sup>15</sup> The 100-plus creditors who will take common stock in Holdco are comprised of banks, mutual funds, collateralized loan obligation funds, hedge funds, and similar institutions and funds.

general partners and/or multiple members with management power. If any of these questions was answered in the affirmative, the Senior Secured Party was asked to identify the jurisdiction in which the controlling partner(s) or member(s) were organized or incorporated.

In addition, each entity was asked whether it was otherwise owned or controlled by a parent entity (including majority ownership of equity or majority voting control), and the extent of any non-U.S. ownership in the parent or the entity itself. Finally, if none of the above was applicable, the Senior Secured Party was asked to identify whether a majority of its equity or its voting securities (or both) are held by non-U.S. citizens in the aggregate.

This information was categorized as follows:

- Where a Senior Secured Party indicated that it is a non-U.S. entity by jurisdiction of organization or incorporation and stated that it did not have any “upstream” non-U.S. equity or voting interests, that Senior Secured Party was considered to be associated with the country of its organization or incorporation.<sup>16</sup>
- Where a Senior Secured Party indicated that it is a non-U.S. entity by jurisdiction of organization or incorporation and stated that there are “upstream” non-U.S. equity or voting interests, that Senior Secured Party was also considered to be associated with the country of its organization or incorporation unless the owner or group of investors representing that “upstream” interest were from a single country.<sup>17</sup>

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<sup>16</sup> Petitioners believe that many of the investment fund creditors are managed by U.S. advisers who hold the authority to invest and vote the shares on behalf of the owner. Given the sizeable number of creditors and the small equity ownership held by each, however, the Petitioners have taken the conservative approach of identifying potential foreign ownership for such creditors by reference to the relative equity positions held by each creditor rather than looking to the jurisdiction of the investment managers.

<sup>17</sup> Petitioners believe this approach is conservative because in many cases there is substantial U.S. investment in these interests but they have been considered as 100 percent foreign based upon their respective countries of organization or incorporation. In a small number of cases, such entities organized under non-U.S. law indicated that a small portion of their investment is derived from investors from non-WTO member

- Where a Senior Secured Party indicated that it is a U.S. entity by jurisdiction of organization or incorporation and but also stated that there are non-U.S. interests in its parent, members, partners, or other “upstream” foreign ownership, that Senior Secured Party’s ownership interest was associated with the countries identified for those “upstream” interests (including giving effect to the Commission’s multiplier rule based upon the equity ownership interest identified for that Senior Secured Party).

Many of the Senior Secured Parties are widely-held funds for which identification of possible foreign investors holding minority interests would be impracticable. In most cases, this information is not publicly available, and the only method of obtaining this information is from the Senior Secured Parties themselves. Moreover, because more than 100 entities with interests ranging from approximately 0.002 percent to 7.716 percent will hold equity in Holdco, no single entity will hold any material stake in the Petitioners or have any ability to control the Petitioners. Under these circumstances, the Petitioners believe that using the jurisdiction of organization or incorporation of the Senior Secured Parties and their corporate parents, members, or other owners or managers provides reasonable insight into the collective foreign ownership of Holdco. Nonetheless, Petitioners have provided further information regarding the “home market” of those entities expected to hold interests of greater than 5 percent following consummation of this transaction.

Petitioners were unable to acquire ownership information for 15 entities that will collectively hold approximately 5 percent of Holdco’s common stock. However, as of the date of this Petition, none of these entities is expected individually to hold more than 1.6 percent of the common stock.

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countries such as Monaco. These indirect interests, however, total considerably less than one-tenth of one percent of the total indirect ownership interests in the Petitioners.

**C. Almost 95 Percent Of Petitioners' Ownership And Voting Equity, Including Holdco's Largest Shareholders, Will Be Indirectly Held By U.S. Or Other WTO-Member Interests.**

Using the procedure described above, based upon the most current information available regarding the claims held against the bankruptcy estate, Petitioners determined that approximately 55.185 percent of the common stock of Holdco will be held by entities that are (i) not incorporated or organized under the laws of the United States or (ii) themselves owned or controlled by non-U.S. persons or entities that are not incorporated or organized under the laws of the United States. Further, Petitioners concluded that almost all of the foreign-owned investors are properly attributed to WTO-member countries, as the following chart shows<sup>18</sup>:

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<sup>18</sup> A number of the creditors are organized under the laws of the Cayman Islands, a British overseas territory; a few others have ownerships interests associated with other British territories and/or dependencies, such as Bermuda, the British Virgin Islands, Jersey, and Guernsey. The Commission has previously deemed territories of a similar nature to be WTO signatories in light of their connection to the United Kingdom. *See Cable & Wireless USA, Inc.; Application for Authority to Operate as a Facilities-based Carrier in Accordance with the Provisions of Section 63.18(e)(4) of the Rules between the United States and Bermuda*, Order, Authorization and Certificate, 15 FCC Rcd 3050, 3052 (¶ 7) (2000).



<b>HOME COUNTRY OF INTEREST</b>	<b>PERCENTAGE OF HOLDCO</b>
Cayman Islands	34.757%
Switzerland	7.764%
Netherlands	2.866%
Luxembourg	1.075%
Bermuda	0.900%
Canada	0.772%
Australia	0.600%
Denmark	0.268%
Ireland	0.326%
France	0.066%
British Virgin Islands	0.152%
Guernsey	0.044%
United Kingdom	0.045%
Belgium	0.011%
Bahamas	0.005%
Jersey	0.050%
Italy	0.011%
Norway	0.007%
Singapore	0.106%
Japan	0.014%
Unknown	5.345%
<b>TOTAL NON-U.S. INTERESTS</b>	<b>55.185%</b>

Only 0.005 percent of the total anticipated ownership has been identified as attributable to an interest based in a non-WTO member country, the Bahamas. Consistent with Commission precedent,<sup>19</sup> Petitioners have also treated the small number of interests whose home country could not be identified as from non-WTO member countries. Using this methodology, nearly 95 percent of Holdco would be held by U.S. or other WTO-member investors:

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<sup>19</sup> *Foreign Ownership Guidelines For FCC Common Carrier and Aeronautical Radio Licenses Section 310 of the Communications Act of 1934, as amended Initial Authorizations and Transfers of Control and Assignments of Common Carrier and Aeronautical Radio Licenses*, 19 FCC Rcd 22612, § III.C.1 (Int'l Bur. Nov. 17, 2004).

<b>HOME COUNTRY OF INTEREST</b>	<b>PERCENTAGE OF HOLDCO</b>
U.S.	44.815%
WTO-Member	49.835%
Non-WTO Member and Unknown	5.350%

To further support this Petition, additional information was gathered with respect to the three largest Senior Secured Parties – the only entities that are expected to hold greater than 5 percent indirect interests in the Petitioners. This analysis confirmed that these entities’ home markets, determined using the five factors set forth in the Commission’s Foreign Participation Order,<sup>20</sup> are the United States or other WTO-member countries.

Claims against the bankruptcy estate may be traded among the claim holders and with third parties during the pendency of the bankruptcy proceeding. In addition, following the issuance of the new Holdco common stock, that stock is expected to be publicly traded. Therefore, Petitioners request that the Commission find that it is in the public interest for Petitioners to have indirect foreign ownership of up to 100 percent, as long as less than 25 percent of the ownership is attributable to non-WTO member countries. Petitioners undertake to notify the Commission if they become aware that any entity associated with a non-WTO member country has acquired a 5 percent or greater indirect ownership interest in them, or if the aggregate ownership interests associated with non-WTO member countries increases by more than 5 percent above the levels described in this Petition.

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<sup>20</sup> See *Foreign Participation Order* at 23941 (¶116) (citing *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd 3873, 3951 (¶207) (1995)).

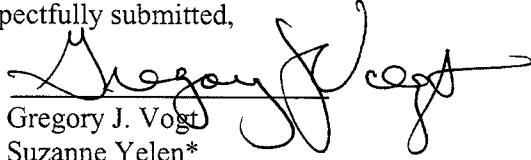
### III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission issue a declaratory ruling that it is in the public interest for HTI and HT Services to have indirect foreign ownership in excess of the 25 percent benchmark under Section 310(b)(4), as described above.

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Respectfully submitted,

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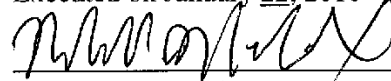
## DECLARATION

I, Randall Braunfeld, am an Authorized Signatory of Lehman Commercial Paper Inc.

I have reviewed the foregoing "Petition for Declaratory Ruling under Section 310(b) of the Communications Act of 1934, as Amended." The statements pertaining to the ownership of those creditors that will take common stock in Hawaiian Telcom Holdco, Inc. as contemplated by the Plan of Reorganization approved by the Bankruptcy Court are as of the date hereof true and correct to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 22, 2010



Randall Braunfeld

Authorized Signatory

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