

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

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| In the Matter of |) | |
| |) | |
| Transfer of Control of Surfcreek Communications, Inc. |) | IB Docket No. 09-____ |
| |) | |
| Petition for Declaratory Ruling as to Indirect Foreign Ownership Under Section 310(b) of the Communications Act, as Amended |) | |

To: The Commission

APPLICATION FOR TRANSFER OF CONTROL AND PETITION FOR DECLARATORY RULING AS TO INDIRECT FOREIGN OWNERSHIP

Pursuant to Sections 63.12(a) and 63.24(c) of the Commission’s Rules, 47 C.F.R. §§ 63.12(a), 63.24(c), and Sections 214 and 310(b)(4) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 214, 310(b)(4), Surfcreek Communications, Inc. (“Surfcreek” or “Applicant”), by its attorneys, hereby (a) applies for authority from the Commission to transfer control of its Section 214 international telecommunications certificate to Surfcreek Acquisitions, Inc., a Delaware corporation (“Buyer” or “Buyer/Transferee”), and (b) petitions for a declaratory ruling that the public interest would not be served by prohibiting the indirect foreign ownership of Surfcreek by Wavecrest Netherlands BV, a Dutch corporation and the parent of Buyer, in excess of the Commission’s 25% benchmark.

In support of this relief, Applicant respectfully shows as follows:

Factual Background

1. Surfcreek, a privately held Pennsylvania corporation located at 239 4th Avenue, Suite 1801, 18th Floor, Pittsburgh, PA 15222, is a non-facilities based provider of international communications services. Applicant holds an international telecommunications certificate (ITC-

214-20071113-00465) issued by the Commission on November 30, 2007 to provide global international facilities-based and resale telecommunications services.¹ The common stock of Applicant is owned by Thierry Mbandi (“Mbandi”), a United States citizen residing in Pittsburgh, Pennsylvania.² In a Stock Purchase Agreement executed August 28, 2009, Mbandi and Surfcrest Acquisitions, Inc.,³ a Delaware corporation located at 1209 Orange Street, Wilmington, DE 19801, agreed to the sale of 95% of the outstanding common stock of Applicant to Buyer/Transferee. Buyer is a wholly owned subsidiary of Wavecrest Netherlands BV (“Wavecrest” or “Indirect Foreign Transferee”), a Dutch corporation located at Van Vollenhovenstraat 3, 3016BE, Rotterdam, Zuid-Holland, The Netherlands.

2. Wavecrest is an international communications provider offering wholesale and retail telephony services using conventional circuit-switched and Internet protocol (IP) telephony. Wavecrest is not a monopoly provider of communications services in any country and does not hold a market share in excess of 50% in any market. The company provides voice services in The Netherlands and international services from The Netherlands to numerous destinations worldwide. Founded in 2001, Wavecrest has its headquarters in Rotterdam, The Netherlands. Wavecrest was purchased from its prior owners on May 1, 2009 and is no longer affiliated with or under any common ownership with Wavecrest (UK) Ltd., a previously

¹ *International Authorizations Granted*, Public Notice, Rep. No. TEL-0212, DA 07-4897 (rel. Dec. 6, 2007), annexed hereto as Exhibit A. Applicant Surfcrest Communications, Inc. has been assigned FCC Registration Number (“FRN”) 0017118399 for its FCC-related transactions.

² Additional information regarding Surfcrest can be found at <http://www.surfcrest.com>.

³ Buyer Surfcrest Acquisitions, Inc. has been assigned FRN #0019380534 for its FCC-related transactions.

Russian-owned entity located in London, England, which provides service in other European markets and operates a pan-European network.⁴

3. The Netherlands, the country in which Wavecrest is located and provides services, is a WTO member nation. Indirect Foreign Transferee qualifies for a presumption of non-dominance under Section 63.10(a)(4) of the Commission's rules, 47 C.F.R. § 63.10(a)(4), in that Wavecrest is not a monopoly provider of communications services in any country and holds less than 50% market share in the international transport and the local access markets in The Netherlands, the only country in which it provides domestic services. The transaction is subject to the condition precedent that transfer of the stock may not occur until such time as the Commission has granted all necessary approvals.⁵ The instant application and petition, by which Applicant requests (a) transfer of control authorization with respect to its international 214 resale certificate, and (b) a ruling by the Commission that the proposed level of foreign ownership is not contrary to the public interest and allowing foreign ownership in excess of the statutory (25%) benchmark, are submitted in accordance therewith.

4. The information required by Sections 63.24(a) and 63.18(a)-(d), (h)-(p) of the Commission's Rules, 47 C.F.R. §§ 63.24(a), 63.18(a)-(d), (h)-(p), is set forth in Exhibit B hereto. Included as Exhibit C is the certification of Applicant as to all such information.

⁴ Indirect Foreign Transferee Wavecrest Netherlands BV has been assigned FRN #0019380542 for its FCC-related transactions. The information on Wavecrest posted at <http://www.wavecrestcom.com> is inaccurate and outdated. Wavecrest Netherlands BV was purchased by Siponomic BV, a Netherlands corporation owned by five shareholders all with Netherlands nationality, on May 1, 2009. Wavecrest Netherlands BV has no operations in London, Paris, Frankfurt or Milan and does not provide domestic telecommunications in any country other than the Netherlands. *See* Certification of Thierry Mbandi, annexed as Exhibit C hereto.

⁵ Pursuant to Section 7.8 of the Stock Purchase Agreement, title to the shares of Applicant "shall not pass to Buyer until such time as all necessary FCC approvals have been granted."

Legal Framework

A. Transfer of Control

5. Pursuant to Section 214 of the Act, telecommunications carriers must obtain a certificate of public convenience and necessity from the Commission before constructing, acquiring, operating or engaging in transmission over lines of communications, or before discontinuing, reducing, or impairing service to a community.⁶ In accordance with Section 63.24 of the Commission's rules, an assignment or transfer of control of an international section 214 authorization requires application to and prior approval by the Commission.⁷ Section 63.24 sets forth the required contents of international transfer of control applications. The information required to be included in initial Section 214 applications also is required in applications to assign or transfer control of international Section 214 authorizations. Applicants for transfers of control or assignments of international Section 214 authority may file consolidated applications and petitions for declaratory ruling for approval of indirect foreign ownership in excess of 25% pursuant to Section 310(b)(4) of the Act.

B. Indirect Foreign Ownership

6. The Commission considers the indirect foreign ownership of common carrier Title II licensees pursuant to its public interest analysis under Section 310(b)(4) of the Act and the policies adopted in the 1997 *Foreign Participation Order*.⁸ As part of that analysis, the

⁶ See 47 U.S.C. § 214(a).

⁷ 47 C.F.R. § 63.24(a).

⁸ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*"), Order On Reconsideration, FCC 00-339, 15 FCC Rcd 18158 (2000).

Commission considers any national security, law enforcement, foreign policy or trade policy concerns raised by the indirect foreign investment.⁹

7. Section 310(b)(4) of the Act establishes a 25% benchmark for investment by foreign individuals, corporations and governments in entities that control U.S. common carrier and radio licensees. By its express language, Section 310(b)(4), rather than Section 310(b)(3), applies in situations where the foreign entity holds equity or voting interests in a domestically organized holding company that directly or indirectly controls the licensee. The section also grants the Commission discretion to allow higher levels of foreign ownership if it determines that such ownership is not inconsistent with the public interest. Thus, as the Commission has noted, “a foreign government, individual, or corporation may own, directly or indirectly, up to 100 percent of the stock of a U.S. holding company that holds a controlling interest in a common carrier or aeronautical radio licensee provided the Commission does not find the foreign ownership to be inconsistent with the public interest.”¹⁰

8. Applicants and licensees are required to obtain prior approval before direct or indirect foreign ownership of their U.S. parent company exceeds 25%. In the *Foreign*

⁹ *Harbinger Capital Master Fund I, Ltd. and Harbinger Capital Special Partners Special Situations Fund, L.P.*, Order and Declaratory Ruling, DA 09-1862 (rel. Aug. 24, 2009) (“*Harbinger Capital*”); *Petition of TelCove, Inc. for a Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act of 1934, as amended*, DA 06-860 (rel. April 14, 2006).

¹⁰ *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, DA 04-3610, at 10 (International Bureau, Nov. 17, 2004); *accord, Harbinger Capital*, ¶¶ 11-12. Where there is a showing of a risk to competition in the U.S. market from foreign investments by an individual or entity from a WTO member country, the Commission may impose specific conditions on the licensee to address such risks to competition. In addition, in the exceptional case where an application poses a very high risk to competition in the U.S. market, where conditions imposed by the Commission would not satisfactorily address competition concerns, the Commission could deny the application. *Foreign Participation Order*, 12 FCC Rcd. at 23913-15, ¶¶ 51-54. Neither of these circumstances is present in this case.

Participation Order, the Commission unanimously concluded that the public interest would be served by permitting greater investment by individuals and entities from WTO member countries in U.S. common carrier and aeronautical radio licenses. Accordingly, it afforded a rebuttable presumption by which the Commission presumes that foreign investment from WTO member countries does not pose competitive concerns in the U.S. market.

Analysis

9. The Commission's procedures for grant and transfer of Section 214 international authorizations are relatively straightforward. Applicant has supplied all required information, along with the requisite certification, and if not for the indirect foreign ownership issue, this transfer of control application would be subject to automatic grant under the Commission's streamlined processing rules. Consequently, Surf creek believes that the public interest, convenience and necessity would be served by grant of authorization for a Section 214 transfer of control.

10. Applicant also respectfully submits that, pursuant to the above legal framework, the Commission should determine that the public interest would not be served by prohibiting the its indirect foreign ownership in excess of the 25% benchmark. Under the proposed transaction, the indirect foreign ownership of Surf creek would exceed the 25% benchmark for both equity and voting interests, since Wavecrest Netherlands BV, a Dutch company, owns 100% of the outstanding stock of Buyer Surf creek Acquisitions, Inc. However, all foreign equity and voting interests in Buyer are held by an entity that is headquartered and has its principal place of business in The Netherlands, a WTO member country and a nation in which Indirect Foreign Transferee Wavecrest Netherlands BV is not a monopoly provider of communications services.

Indeed, it cannot be contested that Wavecrest Netherlands BV is not a monopoly provider of any services in any country and does not hold a market share in excess of 50% in any market.

11. Accordingly, Applicant is entitled to a rebuttable presumption that its indirect foreign ownership would not pose a risk to competition in the U.S. market, and there is no evidence to rebut this presumption. Against this background, consistent with applicable Commission precedent, Applicant respectfully submits that it would not serve the public interest to prohibit its indirect foreign ownership by Wavecrest Netherlands BV as described herein.¹¹

WHEREFORE, for all the foregoing reasons, Applicant respectfully requests that the Commission (a) grant authority to transfer control of Applicant's Section 214 international authorization to Buyer Surf creek Acquisitions, Inc., and (b) issue a declaratory ruling that the public interest would not be served by prohibiting the indirect foreign ownership of Applicant by Wavecrest Netherlands BV, a Dutch corporation, in excess of the Commission's 25% benchmark.

Respectfully submitted,

SURFCREEK COMMUNICATIONS, INC.

By: 

Glenn B. Manishin

Duane Morris LLP

505 9th Street, N.W., Suite 1000

Washington, D.C. 20004

(202) 776-7813

*Attorneys for Applicant/Petitioner Surf creek
Communications, Inc.*

Dated: December 17, 2009

¹¹ See, e.g., *Harbinger Capital, supra*, ¶¶ 11-12; *Intelsat, Ltd.*, DA 04-0434 (rel. Dec. 22, 2004).

EXHIBIT A

[Section 214 Authorization]



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
445 12th STREET S.W.
WASHINGTON D.C. 20554

News media information 202-418-0500
Fax-On-Demand 202-418-2830; Internet: <http://www.fcc.gov> (or <ftp.fcc.gov>)
TTY (202) 418-2555

DA No. 07-4897

Report No. TEL-01212

Thursday December 6, 2007

INTERNATIONAL AUTHORIZATIONS GRANTED

Section 214 Applications (47 C.F.R. § 63.18); Section 310(b)(4) Requests

The following applications have been granted pursuant to the Commission's streamlined processing procedures set forth in Section 63.12 of the Commission's rules, 47 C.F.R. § 63.12, other provisions of the Commission's rules, or procedures set forth in an earlier public notice listing applications accepted for filing.

Unless otherwise noted, these grants authorize the applicants (1) to become a facilities-based international common carrier subject to 47 C.F.R. § 63.22; and/or (2) to become a resale-based international common carrier subject to 47 C.F.R. § 63.23; or (3) to exceed the 25 percent foreign ownership benchmark applicable to common carrier radio licensees under 47 U.S.C. § 310(b)(4).

THIS PUBLIC NOTICE SERVES AS EACH NEWLY AUTHORIZED CARRIER'S SECTION 214 CERTIFICATE. It contains general and specific conditions, which are set forth below. Newly authorized carriers should carefully review the terms and conditions of their authorizations. Failure to comply with general or specific conditions of an authorization, or with other relevant Commission rules and policies, could result in fines and forfeitures.

Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules in regard to the grant of any of these applications may be filed within thirty days of this public notice (see Section 1.4(b)(2)).

An updated version of Sections 63.09-.25 of the rules, and other related sections, is available at <http://www.fcc.gov/ib/pd/pf/telecomrules.html>.

For additional information, please contact the FCC Reference and Information Center, Room CY-A257, 445 12th Street SW, Washington, D.C. 20554, (202) 418-0270.

ITC-214-20071113-00465 E Surfreck Communications, Inc.
International Telecommunications Certificate
Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service
Grant of Authority Date of Action: 11/30/2007

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

ITC-214-20071113-00466 E Buena Vista Investment Telecom, Inc.
International Telecommunications Certificate
Service(s): Global or Limited Global Facilities-Based Service, Global or Limited Global Resale Service
Grant of Authority Date of Action: 11/30/2007

Application for authority to provide facilities-based service in accordance with section 63.18(e)(1) of the Commission's rules, and also to provide resale service in accordance with section 63.18(e)(2) of the Commission's rules, 47 C.F.R. § 63.18(e)(1), (2).

EXHIBIT B

Section 63.18 Information

Pursuant to Sections 63.24(a) and 63.18(a)-(d), (h)-(p) of the Commission's Rules, 47 C.F.R. §§ 63.24(a), 63.18(a)-(d), (h)-(p), Applicant submits the following information, together with the Certification annexed as Exhibit C:

(a) *Applicant/Licensee:*

Surfcreek Communications, Inc.
239 4th Avenue, Suite 1801, 18th Floor
Pittsburgh, PA 15222
412-242-4983
FRN #0017118399

Buyer/Transferee:

Surfcreek Acquisitions, Inc.
1209 Orange Street
Wilmington, DE 19801
302-777-0247
FRN # 0019380534

Indirect Foreign Transferee:

Wavecrest Netherlands BV
Van Vollenhovenstraat 3
3016BE, Rotterdam, Zuid-Holland
The Netherlands
+31 10-440-0800
FRN #0019380542

(b) Applicant is organized under the laws of Pennsylvania. Buyer/Transferee is organized under the laws of Delaware. Indirect Foreign Transferee is organized under the laws of The Netherlands.

(c) Correspondence concerning the application should be directed to:

Glenn B. Manishin, Esq.
Duane Morris LLP
505 9th Street, N.W., Suite 1000
Washington, D.C. 20004
(202) 776-7813

with a copy to:

Hans F. van Helden, CEO
Wavecrest Netherlands BV
Van Vollenhovenstraat 3

3016BE, Rotterdam, Zuid-Holland
The Netherlands
+31 10-440-0800

- (d) Applicant was issued an international telecommunications certificate (ITC-214-20071113-00465) by the Commission on November 30, 2007 to provide global international facilities-based and resale telecommunications services. Neither the Buyer/Transferee nor the Indirect Foreign Transferee have previously received authorization under Section 214 of the Act.
- (e)-(g) N/A
- (h) Indirect Foreign Transferee Wavecrest Netherlands BV holds 100% of the equity of Buyer/Transferee Surf creek Acquisitions, Inc.
- (i) Applicant certifies that Buyer/Transferee is affiliated, as set forth in (h), with Wavecrest Netherlands BV, a foreign carrier located in The Netherlands, which currently provides communications services in The Netherlands and international resale telecommunications services from The Netherlands to numerous destinations world-wide.
- (j) Applicant certifies that Buyer/Transferee seeks to provide international resale telecommunications services from the United States to The Netherlands and to each country to which Indirect Foreign Transferee Wavecrest Netherlands BV provides international service from The Netherlands, as specified in (i).
- (k) The Netherlands, the country in which Indirect Foreign Transferee Wavecrest Netherlands BV operates as a foreign carrier, is a member of the World Trade Organization. Wavecrest does not enjoy monopoly power in The Netherlands.
- (l) Buyer/Transferee desires and is entitled to be regulated as a non-dominant international carrier under Section 63.10 of the Commission's rules in that Indirect Foreign Transferee Wavecrest Netherlands BV is not a monopoly provider of communications services in any country and holds less than 50% market share in the international transport and the local access markets in each of the destination countries to which it provides service.
- (m) See (l) and the information supplied in the application.
- (n) Buyer/Transferee and Indirect Foreign Transferee have agreed not to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses market power on the foreign end of the route and will not enter into such agreements in the future.
- (o) Pursuant to Sections 1.2001 through 1.2003 of the Commission's rules, Applicant certifies that no party to the application is subject to a denial of Federal benefits

pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988. *See* 21 U.S.C. § 853a.

- (p) Except for the accompanying Petition for Declaratory Ruling, this transfer-of-control application otherwise qualifies for streamlined processing pursuant to Section 63.12 of the Commission's rules because the market served by Indirect Foreign Transferee Wavecrest Netherlands BV is a WTO member country and Wavecrest Netherlands BV qualifies for a presumption of non-dominance under Section 63.10(a)(4) in that it is not a monopoly provider of communications services in any country and holds less than 50% market share in the international transport and the local access markets in each of the destination countries to which it provides service.

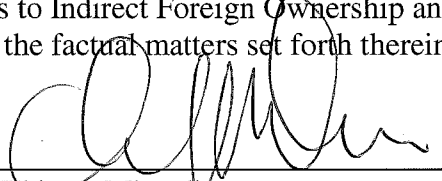
EXHIBIT C

CERTIFICATION

The undersigned, Chief Executive Officer and owner of Applicant Surfcrest Communications, Inc., hereby certifies on behalf of Applicant with respect to the foregoing application for authority to transfer control of Surfcrest's Section 214 certification to provide international services and accompanying petition for declaratory ruling, that:

1. Buyer/Transferee Surfcrest Acquisitions, Inc. is affiliated with a foreign carrier, Wavecrest Netherlands BV, which provides service in The Netherlands. Wavecrest Netherlands BV is not a monopoly provider of domestic or international communications services in any country and does not hold a market share in excess of 50% in any market.
2. Buyer/Transferee will comply with the terms and conditions contained in Sections 63.21, 63.22 and 63.23 of the Commission's rules, 47 C.F.R. §§ 63.21-63.23
3. Buyer/Transferee seeks approval for transfer of Applicant's Section 214 authorization and, as a result, authority to provide international resale telecommunications services from the United States to, among other destinations, The Netherlands and to the countries to which Wavecrest Netherlands BV provides international services from The Netherlands. Applicant has petitioned the Commission for a declaratory ruling that the public interest would not be served by prohibiting its indirect foreign ownership by Wavecrest Netherlands BV in excess of the Commission's 25% benchmark.
4. Buyer/Transferee has not agreed to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market and will not enter into such agreements in the future.
5. No party to this application is subject to a denial for Federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 853(a).
6. Wavecrest Netherlands BV is no longer affiliated with or under any common ownership with Wavecrest (UK) Ltd., a formerly Russian-owned entity located in London, England, which provides service in other European markets. Wavecrest Netherlands BV has no operations in London, Paris, Frankfurt or Milan and does not provide domestic telecommunications in any country other than the Netherlands. The information on Wavecrest Netherlands BV posted at <http://www.wavecrestcom.com> is inaccurate and outdated.

7. I have reviewed the foregoing Application for Transfer of Control and Petition for Declaratory Ruling as to Indirect Foreign Ownership and, to the best of my knowledge, information and belief, all of the factual matters set forth therein are true and correct.

By: 
Thierry Mbandi
Title: Chief Executive Officer
Date: 10/14/09