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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Fostering Innovation and Investment in the | ) | |
| Wireless Communications Market | ) | GN Docket No. 09-157 |
| | ) | |
| A National Broadband Plan for Our Future | ) | GN Docket No. 09-51 |

**COMMENTS OF CENTENNIAL VENTURES, COLUMBIA CAPITAL, AND M/C VENTURE PARTNERS**

Centennial Ventures, Columbia Capital, and M/C Venture Partners (hereinafter the "Investors"), by their attorneys, hereby respond to the Commission's above-captioned *Notice of Inquiry* ("NOI").[1] In the NOI, the Commission recognizes the important public interest in bolstering continued innovation in the U.S. wireless sector. The Commission also recognized that its policies can foster innovation or hinder the progress of innovation and investment.[2] The NOI asks for input on specific obstacles and deterrents to innovation and investment that exist and what the Commission can do to reduce or eliminate them.[3] The Investors submit these brief comments and specific recommendations in response.

## I. Introduction

The Investors are private equity funds whose contributing members have invested in or would be interested in investing in the U.S. wireless telecommunications sector. At the outset, the Investors applaud the Commission's commitment to fostering continued innovation in the U.S. wireless industry by, among other things, considering changes in rules and procedures that may inhibit investment in this sector. Many innovations that exist in the telecommunications

---

[1] *Fostering Innovation and Investment in the Wireless Communications Market; A National Broadband Plan For Our Future*, GN Docket Nos. 09-157 and 09-51, *Public Notice*, FCC 09-66 (rel. Aug. 27, 2009) ("NOI").

[2] *Id.* at para. 5.

[3] *Id*. at para. 11.

sector today were fueled by private equity investments made at critical stages of those companies' development. The Investors believe that wireless innovators should also have ready access to private equity and other funding and therefore welcome this opportunity to recommend ways to improve the Commission's processes in order to facilitate investment in the wireless communications market. Under existing Commission regulations and precedent, private equity funds, hedge funds, and widely held companies face significant barriers to investing in wireless ventures in the United States. Even small amounts of foreign ownership or the use of off-shore investment entities, such as Bermuda or Cayman Islands corporations, trigger onerous and prolonged regulatory proceedings at the Commission even for indirect, passive investments above a certain level.

While it is true that section 310(b)(4) of the Communications Act requires the FCC to review foreign investment 25% or above in common carrier wireless licensees, the current means of implementing these restrictions has had the unintended consequence of stifling investment even when U.S. citizens are in control, and there are no conceivable trade or national security concerns elicited by the investment. The current FCC approval process for non-U.S. investment typically injects significant delay, uncertainty and expense in any investment transaction without any countervailing regulatory purpose. Open market trades for wireless interests are virtually impossible in some circumstances, particularly when a wireless licensee has close to 25% foreign investment already, but not enough to trigger the need for a section 310(b)(4) ruling. Investors and licensees expend significant time and effort to structure around these requirements. This burdensome process is unnecessary and simply stifles the flow of capital to wireless enterprises thereby limiting the sources of potential funding for expanded wireless operations and

innovation. In short, these requirements disadvantage prospective investors and U.S. wireless companies.

The Investors urge the Commission to reduce and, where possible, eliminate, these unnecessary barriers to investment in the U.S. wireless industry by reforming the process by which it implements section 310(b)(4). The Investors are mindful of the continued interest of and oversight by the Commission and other federal agencies of national security and trade issues relevant to foreign investment  Accordingly, the Investors propose several specific regulatory streamlining measures identified below that are carefully tailored to preserve the Commission's interest and discretion to act in such matters while removing outdated and unnecessary barriers to investments involving non-U.S. parties.[4]

## II. Proposal to Reduce Regulatory Roadblocks to Investments Involving Non-U.S. Parties

In the NOI, the Commission stated its goal to eliminate or reduce barriers to investment in U.S. wireless companies and replace them with new rules that affirmatively encourage capital investment and innovation.  We believe that the FCC should eliminate or reduce the regulatory roadblocks to investment in this sector by reforming the way it treats investments from non-U.S. parties.

### A. Immaterial Non-U.S. Party Investments

There are many times when benign investments from non-U.S. parties, whether they are relatively minute ownership interests or from U.S. controlled entities, can still trigger a lengthy review process.  The following streamlining measures will address most of these situations.

[4] Although these comments focus on fostering investment in the common carrier wireless industry, the proposed changes would work equally well in encouraging new investment in broadcast facilities. The broadcast industry has been hit particularly hard by the recession and changes to consumer viewing habits.  By adopting similar changes to the Commission's review of foreign investment in the broadcast industry, the Commission also would be facilitating and fostering new sources of important capital to this industry.

**1. No prior section 310(b)(4) approval should be required for investments by non-U.S. entities holding less than a combined indirect 5% interest in the licensee.**

Under existing precedent, ownership interests by non-U.S. parties below 5 % generally are not disclosed or reviewed. For instance, applications for a new common carrier wireless license and applications for a section 214 authorization, as well as applications to transfer control of these licensees, require only disclosure of 10% or greater owners. The Securities Exchange Commission allows entities to acquire blocks of less than 5% in publicly traded companies without disclosure. Further, even the Executive Branch, in reviewing license applications for national security issues, generally only requires disclosure of owners with 5% or greater interests. Therefore, a general finding by the Commission that investments by non-U.S. entities holding a less than 5% combined interest in a licensee are in the public interest would give licensees significantly greater flexibility in attracting smaller investments without departing from the way that non-U.S. parties are treated in other contexts..

**2. If a licensee with non-U.S. party investment of 25% or more has already received section 310(b)(4) clearance for the initial investment, it should be allowed to increase its foreign ownership an additional 25% from other foreign investors without further approval.**

This proposal merely codifies an existing practice of the Commission and provides investors needed certainty. When requested by the applicant, the Commission has typically included in the grant of a section 310(b)(4) petition flexibility for the licensee to acquire up to and including an additional, aggregate 25 percent indirect foreign equity and/or voting interests from new non-U.S. investors without seeking further Commission approval under Section 310(b)(4).

**3. If a licensee with non-U.S. party investment of 25% or more has already received section 310(b)(4) clearance for the initial investment, it should be allowed to increase its foreign ownership from existing investors up to any amount short of control without further approval.**

This proposal also codifies an existing practice of the Commission. When requested by the applicant, the Commission has included in the grant of a section 310(b)(4) petition flexibility for the licensee to increase both its indirect foreign equity and/or voting interests from existing foreign investors without seeking further Commission approval under Section 310(b)(4). Existing investors whose qualifications have already been passed upon by the Commission should be able to make an unlimited amount of additional indirect investment in the licensee without additional Commission approval, except in the case where doing so would result in a transfer of control of the licensee.

**4. No prior approval should be required for non-U.S. party investments through either a non-U.S. or U.S. limited partnership (LP) or limited liability company (LLC) where the general partner or managing members are U.S. entities.**

Private equity funds, and other entities established for making passive investments, often use off-shore investment entities, such as Bermuda or Cayman Islands corporations, for various business reasons to make their investments. However, even if these entities are controlled by U.S. entities or citizens, the use of this investment vehicle can trigger onerous and prolonged regulatory proceedings at the Commission. The purpose of the Commission's foreign ownership review is to identify investments that might raise national security or other trade issues. However, when an entity is controlled by U.S. citizens, none of these concerns is present. In the case of limited partnerships and LLCs, if properly insulated, the limited partners and non-managing members do not have any control of the entity. Their interest is truly passive. Therefore, the Commission could find that there is a presumption of no harm to the public

interest when investments in wireless entities come from limited partnerships or LLCs where the general partners or managing members are U.S. citizens. The easiest way to implement this would be for the Commission to affirmatively state that when controlled by U.S. entities or citizens, an entire limited partnership's or LLC's interest in a wireless licensee would be considered as being from the United States.

### B. The Commission Should Undertake Additional Streamlining

The Commission should carefully examine ways to streamline its approval process for those applications that still require prior approval before an investment by a non-U.S. party can be made. The current approval process hinders open market trades and can be lengthy, expensive, and plagued with unnecessary procedures. The Commission could clear up many of the illogical consequences of its current practices, and speed up the review process by making some or all of the changes noted below to the way it reviews and approves section 310(b)(4) petitions for declaratory ruling.

#### 1. The FCC should automatically grant after public notice routine section 310(b)(4) foreign ownership approvals instead of spending significant time seeking comments and generating a customized order with a detailed ownership analysis.

Entities that file a petition for a declaratory ruling that their foreign ownership above 25% is in the public interest should be entitled to rely on a quick review by the Commission. It is not unusual for petitions to languish for months at a time creating delay and uncertainty that could adversely affect parties ability to consummate an investment and discourage other investments. In situations where a policy review is unnecessary, applicants should have the benefit of a reliable and streamlined regulatory process. Similar to the streamlining mechanisms used for section 214 authorizations, the Commission should put the petitions on public notice for a certain number of days, and then consider the petitions granted at the end of the public notice period.

Only in the rarest of circumstances when the Executive Branch raises concrete national security concerns should the Commission remove the petition from the automatic approval process. This approach would give licensees the certainty they need to make important financial decisions in operating their businesses, rather than having them constantly guess as to how long it will be before they can legally accept certain investments from non-U.S. parties.

**2. In calculating the foreign ownership interests of an LP or LLC, the FCC should treat these entities the same as corporations where only aggregate ownership data below 10% is required.**

One very time consuming, and often near impossible requirement imposed on limited partnerships and LLCs is the requirement for a list of all of their indirect ownership interests up the chain, regardless of the size of the investment, and the obligation to determine what percentage of that ownership comes from WTO and non-WTO countries. In contrast, corporations, in listing their ownership interests, are only required to identify 10% or greater ownership interests. The Commission could greatly streamline the application process, and reduce unnecessary regulatory burdens by treating limited partnerships and LLCs the same as corporations, and require them to only list owners having a 10% or greater interest in them, and for interests below 10% only require a breakdown of what percentage of the investment is from WTO and non-WTO member countries.

**3. The FCC should eliminate the need for entities to do a two step "by/through" analysis of their foreign ownership.**

Recently the Commission started requiring entities to determine and seek approval for both the direct interests of their non-U.S. investors, as well as indirect combined interests of these investors through various ownership vehicles. This "by/through" analysis has been the source of much debate and resulted in increased delays and the expenditure of considerable energy without any tangible benefits. Implementing the streamlining measures already

mentioned above, in particular limiting ownership disclosures to above 10% and automatic approvals of interests below 5%, will already reduce the need to do a by/through analysis. Currently, entities must undertake complex mathematical calculations on small diversified ownership interests to reach a combined ownership interest that is often still rather small. Eliminating the need for two separate "by" and "through" analyses will increase certainty, reduce delays, and conserve valuable resources for both licensees and Commission staff.

#### 4. The FCC may consider standardizing certain national security safeguards routinely required by the Executive Branch when reviewing license applications with non-U.S. ownership.

In reviewing the various network security agreements and letters of assurance entered into by entities with non-U.S. ownership, there are several conditions related to CPNI and other network safeguards that seem to be routinely required by the Executive Branch. The Commission should explore with the Executive Branch if there might be some standard conditions to be either imposed, or voluntarily agreed to by petitioners at the time they file a petition, that might streamline, or even eliminate the need for, the Executive Branch review process.

## III. Conclusion

The Commission's processes for reviewing investments where a non-U.S. party is involved in wireless licensees requires prospective investors and licensees to engage in a process that is typically cumbersome, time consuming, expensive and often confusing to potential investors. Over time, the process has become even more complicated and discouraging to investments that may include non-U.S. interests either as ultimate owners or as intervening entities organized in other jurisdictions for business reasons. These barriers to investment also inhibit continued innovation in the wireless sector by artificially constricting sources of potential

funding. At a time when the economy continues to struggle, and wireless licensees are looking for additional capital, the Commission has the opportunity now to change its policies and rules to reflect the realities of the marketplace, and encourage new sources of capital in wireless licensees. The Investors have suggested several ways the Commission could streamline its processes, and update its rules to reflect the realities of today's marketplace. We encourage the Commission to adopt these methods, and seek additional ways to further its streamlining.

Respectfully submitted,

/s/

Andrew D. Lipman
Catherine Wang
Troy F. Tanner
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
(202) 373-6000

*Counsel to Centennial Ventures, Columbia Capital, and M/C Venture Partners*

Dated: September 30, 2009