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

In the Matter of	)	
	)	
Review of Foreign Ownership Policies for	)	IB Docket No. 11-133
Common Carrier and Aeronautical Radio	)	
Licensees under Section 310(b)(4) of the	)	
Communications Act of 1934, as Amended	)	

<u>COMMENTS OF AT&T INC.</u>

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December 5, 2011

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AT&T Inc., on behalf of its affiliates, ("AT&T") submits the following comments in response to the Notice of Proposed Rulemaking in the above-referenced proceeding.[1]

SUMMARY

AT&T welcomes this proceeding and supports its proposals. Foreign ownership restrictions remain a significant barrier to effective market entry in a number of important existing or potential foreign markets for U.S. carriers, and should be removed. The United States should lead by example in this endeavor, and this proceeding is an important further step in that process, building on the open market entry procedures the Commission established fourteen years ago in the *Foreign Participation Order*.[2]

The U.S. WTO commitments in telecommunications require the U.S. to allow the unrestricted indirect ownership of U.S. carriers by natural and juridical persons of WTO Member countries.[3] The proposed streamlining and simplification of the Commission's foreign

[1] Notice of Proposed Rulemaking, FCC 11-121 (rel. Aug. 9, 2011) ("Notice").

[2] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23891 (1997) ("Foreign Participation Order").

[3] *See WTO, United States – Schedule of Specific Commitments*, Apr. 15, 1997, at 2.

ownership regulatory framework would reduce compliance burdens for U.S. companies and make clear to foreign governments that the indirect ownership required to comply with Section 310 does not restrict U.S. market entry by carriers from WTO Member countries.

The Commission also should take action to revise the 2004 Foreign Ownership Guidelines with respect to the treatment of foreign indirect non-controlling ownership of U.S. common carriers.[4] The Guidelines incorrectly suggest that the U.S. does not act in accordance with its WTO commitments on this issue, and therefore may serve to undermine U.S. efforts to remove FDI restrictions in foreign countries. Indeed, any action by the Commission to complicate procedures for compliance with Section 310, rather than to streamline these rules, may lead to assertions by foreign governments that the U.S. is limiting market entry, which would impede the effectiveness of U.S. efforts to reduce global foreign ownership barriers.

I. THE U.S. SHOULD MAINTAIN A LEADERSHIP ROLE IN REMOVING FOREIGN OWNERSHIP BARRIERS IN TELECOMMUNICATIONS

Restrictions on foreign ownership are a major impediment to market access in telecommunications. No other technical barrier has the same impact as prohibiting the ability to own, control and set the strategy for a business. In recognition of the adverse effects of these restrictions, the United States and the European Union recently affirmed that the elimination of foreign ownership barriers is a key requirement for the global development of informational and communication technology (ICT) networks and services.[5] As the World Bank similarly has

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[4] International Bureau, *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, DA 04-3610, Nov. 17, 2004 ("2004 Foreign Ownership Guidelines," or "Guidelines").

[5] The U.S. agreement with the European Union on best practice principles to encourage the global development of informational and communication technology (ICT) networks and services affirms that "full foreign participation" should be allowed in ICT services sectors. *See*

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emphasized, foreign ownership restrictions are a major impediment to market access, competition and economic growth in telecommunications. Foreign direct investment ("FDI") has "typically been the driver of [telecommunications] sector growth in liberalizing countries" and has brought "new management approaches, technology, and skills transfer to the host countries."[6] Moreover, "FDI restrictions not only place a maximum limit on potential foreign private investment, they can also deter such investments altogether."[7] These restrictions obstruct competitive market entry by raising the cost of capital for incumbents and new entrants alike and by impeding efficient management.

U.S. operators seeking to expand into foreign markets must overcome significant strategic and financial inefficiencies as a result of these restrictions. Partners that are new to the telecommunications sector may lack relevant operational expertise, while telecom providers in the foreign market may be more focused on protecting their existing business than on promoting the success of a new venture. Restricting foreign ownership to a minority stake increases these problems by denying the U.S. operator operational control of the joint enterprise and giving rise to concerns that the domestic controlling partner may not be committed to full implementation of

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European Union-United States Trade Principles for Information and Communication Technology Services, Apr. 4, 2011, Sect. 5. http://www.ustr.gov/countries-regions/europe-middle-east/europe/european-union

[6] World Bank, *Information and Communications for Development 2006: Global Trends and Policies*, at 16.

[7] World Bank Working Paper No. 65, *Financing Information and Communication Infrastructure in the Developing World* (2005), at 16. *See also, e.g.*, Procter & Oliver, *Capital Flows and Cost of Capital: The Importance of Liberalized Investment Rules for a Competitive Telecommunications Sector* (2002), at 22 (FDI restrictions "have a negative effect on both the ability to gain access to capital, and the cost of what is available, particularly for smaller and newer players in the telecom sector.")

the service portfolio, or may manage the network in ways that do not meet customers' service level expectations.[8]

Countries that have removed their former foreign ownership barriers have realized significant resulting benefits in the form of increased investment, competition and economic growth.[9] In the U.S.-Korea Free Trade Agreement, Korea has now agreed to allow 100 percent foreign ownership of facilities-based suppliers in Korea other than Korea Telecom and SK Telecom.[10] But a number of important U.S. trading partners still limit the foreign ownership of facilities-based operators to minority shares, including Canada, China, Mexico, Philippines, South Africa, Taiwan, Thailand and Vietnam. The removal of foreign ownership restrictions in these and other foreign markets is therefore a longstanding U.S. priority in telecommunications trade negotiations, including in the current Doha Round of WTO negotiations.

The U.S. will increase its prospects for success in these efforts by ensuring that the procedures for compliance with Section 310 place no restrictions on U.S. market entry by

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[8] *See Financing Information and Communication Infrastructure in the Developing World*, at 16 ("Complex ownership arrangements de-link management from facing investor risks and reduce foreign investor incentives for transfer of management expertise to the firm, thereby curbing effective, profit-oriented management. Further, lack of a clear policy for such investment prolongs negotiation, increases the risk for long-term partnership, and discourages future investments.").

[9] *See*, *e.g*., *id.*, at xiii ("There is plentiful evidence that countries that have introduced private competition under capable regulators have seen faster rollout of services and lower costs. Independent regulation and competition together raise private investment by 50 percent."); World Bank, *Broadband Infrastructure Investment in Stimulus Packages: Relevance for Developing Countries* (2009), at 5 ("A considerable amount of empirical work concludes a positive and significant link between telephone infrastructure and long-term growth.").

[10] *See* U.S.-Korea Free Trade Agreement, Sect. 24, Korea Annex 1, at 18-19. http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text. As shown by this example, foreign countries may maintain FDI restrictions for incumbent operators while still taking steps to increase competition in their markets by removing FDI

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carriers from WTO Member countries. Indeed, foreign governments often use the existence of Section 310 as purported justification for their FDI restrictions. The adoption of the Commission's proposals to simplify and streamline these policies and procedures would further demonstrate the inaccuracy of such comparisons and support efforts by the U.S. government and industry to persuade all countries to remove these barriers.

II. THE COMMISSION SHOULD REVISE THE 2004 FOREIGN OWNERSHIP GUIDELINES

U.S. efforts to remove foreign ownership restrictions in foreign countries are also likely to be frustrated if the United States erects new market entry barriers of this type. Although not addressed by the Notice, the Commission also should take action to revise the 2004 Foreign Ownership Guidelines with respect to the treatment of foreign indirect non-controlling ownership of U.S. common carriers under Section 310(b)(3), which undermines the good standing of the U.S. on this issue and could harm U.S. efforts to remove foreign FDI restrictions.

The Guidelines treat foreign indirect *non-controlling* interests as subject to Section 310(b)(3), which limits foreign ownership to 20 percent, and allows the Commission no discretion to waive this limit.[11] At the same time, the Guidelines treat foreign *controlling* indirectly-held interests as subject to Section 310(b)(4), which allows up to 100 percent indirect ownership unless the Commission makes an adverse public interest determination. In contrast to the Guidelines' irrational approach of treating non-controlling interests more restrictively than controlling interests, the statute and its legislative history, as well as Commission practice and

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restrictions for other operators.

[11] *Guidelines at 6 & 20. See also* 47 U.S.C. Sect. 310(b)(3).

precedent, require all indirectly held interests in common carriers, both controlling and non-controlling, to be subject to Section 310(b)(4), and limit the application of Section 310(b)(3) to direct foreign interests in common carriers.[12]

As the Commission stated in 2001, "[n]othing in the language of section 310(b)(4) limits its application to holdings that amount to less than control."[13] The Commission further noted that before the enactment of the provision now contained in Section 310(b)(4), "foreign ownership of domestic holding companies that directly or indirectly controlled" licensees was "not previously covered" by the foreign ownership restrictions, which had included "language quite similar to" Section 310(b)(3).[14] Moreover, it is illogical to treat non-controlling interests more harshly than controlling interests, by interpreting Section 310 to *prohibit* foreign indirectly held *non-controlling* interests over 20 percent, and to *allow* foreign indirectly held *controlling* interests up to 100 percent. Under the rules of statutory construction, Section 310 must be "construed so as to avoid" such an absurd result.[15]

Prohibiting indirectly held, non-controlling foreign ownership interests above 20 percent is also inconsistent with the recently-agreed U.S.-European Union ICT Trade Principles, as well

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[12] *See, e.g., Voicestream Wireless Corp., et al.,* 16 FCC Rcd. 9779, ¶¶ 127-142 (2001) (approving indirect non-controlling above 20 percent foreign interests under Section 310(b)(4)); *Bell Atlantic New Zealand Holdings, Inc. and Pacific Telecom Inc*., 18 FCC Rcd. 23140, n.70 (2003) (a transaction not involving direct foreign investment "does not trigger section 310(b)(3)").

[13] *Voicestream Wireless Corp., et al.*, ¶ 39.

[14] *Id.*, ¶¶ 35-36.

[15] *Holy Trinity Church v. United States*, 143 U.S. 457, 460 (1898) ("If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.") *See also, Red River Broadcasting Co., Inc. v. FCC*, 98 F. 2d 282, 287 (D.C. Cir. 1938) ("A well-settled rule of statutory construction enjoins courts not to attribute to the Legislature a construction which leads to absurd results." (citations omitted)).

as being contrary to a key U.S. commitment in the WTO basic telecommunications negotiations. Specifically, the binding U.S. commitments in those negotiations list the limitations on the indirect foreign ownership of a common carrier radio license as being "None."[16] The former chief lawyer for the U.S. delegation in those negotiations reports that "[t]he major demand from U.S. trading partners was the elimination of the foreign ownership restrictions on common carrier licenses."[17] Therefore, "[w]orking with the FCC, the U.S. negotiating team crafted commitments that took advantage of the discretion granted to the FCC in Sect. 310(b)(4)."[18] In accordance with this commitment, the Commission adopted open entry policies in 1997 to "presumptively allow *any amount of indirect investment* by investors whose home markets are in WTO member countries."[19]

Unfortunately, the Commission's record of full compliance with this WTO commitment is not reflected in the language of the 2004 Foreign Ownership Guidelines. To avoid continuing to suggest that the U.S. does not observe this WTO obligation, which could impede U.S. efforts to persuade other countries to remove their FDI restrictions, the Commission should reject the interpretation set forth in the Guidelines, as requested by a Petition for Reconsideration filed by Wilkinson Barker Knauer LLP.[20] The Commission should now affirm that it will continue to

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[16] *See WTO, United States – Schedule of Specific Commitments*, Apr. 15, 1997, at 2.

[17] Laura B. Sherman, *A Fundamental Misunderstanding: FCC Implementation of U.S. WTO Commitments*, 61 Federal Communications Law Journal 395, 402 (Mar. 2009) (stating that this account is based on her participation in the negotiations leading up to the 1997 WTO Basic Telecommunications Agreement, in which "to obtain market-opening commitments from its trading partners, the U.S. had to make an equally market-opening commitment").

[18] *Id*.

[19] *Foreign Participation Order*, ¶ 98 (emphasis added). *See also, id.*, ¶¶ 111-116.

[20] Petition for Reconsideration, DA 04-3610, filed Dec. 17, 2004.

consider all indirectly-held foreign interests under Section 310(b)(4), as required by the statute and Commission precedent, the U.S. obligations under the WTO agreement, the recently agreed EU-U.S. trade principles, and the U.S. public interest in setting the very best example for the policy and practice of open markets.

III. THE COMMISSION SHOULD ADOPT THE PROPOSED STREAMLINING OF THE FOREIGN OWNERSHIP REGULATORY FRAMEWORK

While the Commission should continue to distinguish between WTO and non-WTO Member investment in order to maintain market-opening incentives in non-WTO Member countries, it should also take action to reduce the costs and burdens to U.S. carriers associated with non-WTO investment. The Commission should also adopt the proposals set forth in the Notice to reduce the burdens associated with Section 310(b)(4) petitions. Streamlining these requirements would not only further the Commission's efforts to eliminate unnecessary regulation but, as noted above, would also encourage foreign countries to remove similar regulatory burdens that hamper U.S. carriers in entering foreign markets.

Continuation of the distinction between WTO and non-WTO Member investment remains necessary to encourage non-WTO Member countries to open their telecommunications markets. The Commission adopted this different treatment in 1997 based on its belief that the continued application of the ECO test to non-WTO Member countries "may encourage some of those countries to take unilateral or bilateral steps toward opening their markets to competition and may provide incentives for many of them to join the WTO."[21] Subsequent developments have amply justified this expectation, with 20 countries having joined the WTO since 1998,

[21] *Foreign Participation Order*, ¶ 125.

many of which have made binding WTO commitments to open their telecom markets.[22] The Commission should maintain this policy to provide continued incentives for the large number of countries that remain outside the WTO to take similar action.[23] This approach would further the Commission's longstanding goal of promoting effective competition in the global market for communications services, as well as encourage new foreign market opportunities for U.S. carriers.[24]

The Commission also should reduce the burdens for U.S. companies associated with non-WTO investment by adopting the proposal (¶ 31) to allow U.S. parent companies to exclude five percent or lesser interests held by single or "group" non-WTO investors from calculations of non-WTO investment. As stated by the Notice (¶ 33), the Commission's mass media attribution rules use this benchmark based on the finding that holders of such interests do not have the

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[22] *See* Notice, ¶ 26, n.57. *See also, e.g.*, WTO, Telecommunications Commitments and Exemptions, http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm (listing post-1997 WTO accession schedules with commitments on telecommunications by Albania, China, Croatia, Georgia, Jordan, Kyrgyz Republic, Latvia, Lithuania, Moldova & Oman); WTO, *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia*, Nov. 1, 2005, at 14 (listing telecommunications commitments); WTO, *Report of the Working Party on the Accession of Tonga*, Dec. 2005 (listing telecommunications commitments); WTO, Vietnam, Schedule of Specific Commitments, Mar. 19, 2007, at 23-27 (listing telecommunications commitments); USTR, *Results of Bilateral negotiations on Russia's Accession to the World Trade Organization*, Nov. 17, 2011, at 2 (summarizing telecommunications commitments)

[23] *See* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm#observer (listing over 30 "observer" countries). Additionally, a further group of countries are neither WTO Members nor observers.

[24] *See Reporting Requirements for U.S. Providers of International Telecommunications Services*, 19 FCC Rcd. 6460, ¶ 17 (2004) (listing the Commission's goals in regulating the U.S. international marketplace).

ability to influence or control the licensee. For similar reasons, the Commission's cable landing license rules use a similar ownership threshold to identify required licensees.[25]

AT&T also supports the adoption of the proposals to reduce the burdens associated with Section 310(b)(4) petitions and maintaining compliance with the conditions of the ruling. These are: the issuance of Section 310(b)(4) rulings to the licensee's U.S parent (¶ 39); allowing named foreign investors to increase non-controlling investments to 49.99 percent (¶ 43), and controlling interests to 100 percent (¶ 45); and approving 100 percent aggregate foreign ownership by unnamed foreign investors provided no single investor or group of investors acquires an interest exceeding 25 percent, or a controlling interest any level, and that non-WTO investment does not exceed 25 percent (¶ 46). The Commission also should adopt the proposals to allow new foreign-organized entities into the vertical ownership chain without prior approval (¶ 57), and to provide blanket approval for future leasing arrangements and license assignments and transfers in specified services and geographic areas (¶ 59).[26]

AT&T also supports the proposal (¶ 78) that to the extent current policies and rules are modified in this proceeding, all existing Section 310(b)(4) rulings should be modified to incorporate these changes without requiring those petitioners to request new rulings.

The Commission should adopt these proposed changes not only to further the U.S. public interest in reducing unnecessary regulatory burdens but also to underscore the absence of entry

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[25] *See* 47 C.F.R. Sect. 1.767(h)(2); *Review of Commission Consideration of Applications Under the Cable Landing License Act*, 16 FCC Rcd. 22167, ¶ 53 (2001).

[26] Additionally, the Commission should require Section 310(b)(4) petitions to provide ownership information for owners of 10 percent or greater interests, consistent with the disclosure requirements for most common carrier wireless applications (¶ 62). Such information should also be provided for all owners for which prior approval is requested under the proposed procedures described above (¶ 63).

barriers to the competitive U.S. telecommunications market. Such action would support the continuing efforts to remove foreign FDI barriers in telecommunications that remain a significant impediment to U.S. carriers in a number of important foreign markets.

Respectfully submitted,

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Dated: December 5, 2011