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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

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APR 1 1 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Market Entry and Regulation of	)	IB Docket No. 95-22
Foreign-affiliated Entities	)	RM-8355
	)	RM-8392

TO: The Commission

COMMENTS OF DEUTSCHE TELEKOM AG

DEUTSCHE TELEKOM AG

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SUMMARY

In this proceeding, the Commission is considering whether to adopt an "effective market access" test under Sections 214 and 310(b)(4) of the Communications Act as a means of coercing foreign governments to open their telecommunications markets to greater competition. This proposed approach to regulating foreign entry and investment, Deutsche Telekom AG ("DT") submits, is beyond the Commission's delegated authority, is unlikely to achieve the goals identified in the Notice of Proposed Rulemaking (NPRM), and is ill-timed. For these and other reasons set forth in the Comments, the Commission should decline to adopt the "effective market access" test and either terminate or postpone this proceeding.

These comments make four basic points. First, the Commission lacks the authority to impose an "effective market access" requirement on foreign governments. The Commission has not previously claimed the authority under the Communications Act to regulate "the global market for communication services." NPRM ¶26. Until this proceeding, it has been content to regulate international "communications" and "transmissions" originating or terminating in the United States. 47 U.S.C. §§ 152(a), 153(f). In the past, however, the Commission has attempted to forge a broader institutional role for itself with regard to trade issues. In the Regulatory Policies and International Telecommunications proceeding,[1] the Commission proposed to judge the progress of other countries against an ideal economic model and to apply reciprocity requirements against foreign governments in an effort to leverage open markets abroad. Executive Branch agencies charged with pursuing United States trade policy vehemently objected to that proposal, and Congress expressly declined to give the Commission such trade authority when it passed the Telecommunications Trade Act

[1] See Notice of Proposed Rulemaking, 2 FCC Rcd 1022 (1987).

of 1988. These developments, along with the actions of Congress and the Executive Branch on multilateral fronts, demonstrate that the Commission lacks the authority to impose an "effective market access" test. Indeed, such authority on the part of an independent agency would be incompatible with the Executive Branch's overarching responsibility for trade matters, and would eviscerate the detailed structure for bi- and multilateral negotiations that Congress has established to accomplish the very goals pursued by the Commission in this proceeding.

Second, the "effective market access" test is seriously flawed and should be rejected. The Commission's use of this factor is likely to be worse than ineffective; it will be counterproductive. Not only is the test insufficient for a variety of reasons to motivate governments to lower trade barriers, but it will almost certainly trigger a hostile response, thus leading foreign governments to retrench and perhaps even retaliate in the area of telecommunications trade. More fundamentally, the measure is, at bottom, an anticompetitive means of seeking to achieve greater competition. It throws up barriers to new competitors and new capital infusions in the hope of lowering barriers in the longer run. But the Commission has offered no evidence to show that this tactic will be effective, and there is every reason to believe that it will fail. Instead of pursuing this flawed strategy, the Commission should continue its traditional pro-competitive approach of encouraging foreign entry and investment while at the same time relying on safeguards where necessary to guard against anticompetitive conduct.

Third, even if the Commission is empowered to adopt the "effective market access" test and that test is worthy of implementation, now is not the time for the Commission to engage in this rulemaking. Congress is in the midst of considering broad reforms to the Nation's telecommunications laws, including changes to Section 310(b)(4) that could affect

the Commission's authority to employ the "effective market access" test. In addition, the United States' trade negotiators are engaged in multilateral General Agreement on Trade in Services (GATS) talks concerning trade issues relating to basic telecommunications services. As part of those trade negotiations, the United States agreed to a standstill provision under which it has pledged, during the negotiations, not to "apply any measure affecting trade in basic telecommunications services in such a manner as would improve its negotiating position and leverage." This rulemaking proceeding arguably afoul of that international commitment by the United States. And as if that were not enough reason to terminate this rulemaking proceeding, the European Union (EU) in general (and Germany, its largest and most important telecommunications market, in particular) are in the midst of an ambitious reform program aimed at opening up telecommunications markets to full competition. German authorities have recently announced an implementation schedule that will assure the rapid development of competition, and have reaffirmed their longstanding commitment to markets free of all barriers to foreign investment. The FCC's action risks derailing this important and salutary process.

Fourth, if the Commission nevertheless decides to adopt an "effective market access" test, it should at least continue to define "affiliation" as control for purposes of Section 214. That approach would best serve the Commission's avowed objectives in this proceeding. In addition, if the Commission concludes (incorrectly, in DT's view), that affiliation should include non-controlling ownership interests, then it makes no sense for the Commission to exclude non-ownership interests falling short of control that raise, in theory, equivalent "incentives" to engage in anticompetitive conduct. A contrary rule will only favor AT&T and its WorldPartners group, to the detriment of competition in U.S. international services.

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COMMENTS OF DEUTSCHE TELEKOM AG

Pursuant to Section 1.415(a) of the Rules of the Federal Communications Commission ("FCC" or "Commission"), Deutsche Telekom AG ("DT"), by its attorneys, submits these Comments in response to the Notice of Proposed Rule Making ("NPRM") released on February 17, 1995, in the captioned proceeding.

The NPRM seeks comment on whether the Commission should incorporate an "effective market access" test into its public interest calculus for (1) foreign carriers and their affiliates seeking authorization to provide U.S. international facilities-based service under 47 U.S.C. § 214 ("Section 214"), or (2) foreign entities seeking to obtain an indirect ownership stake of more than 25% in a U.S. radio licensee under 47 U.S.C. § 310(b)(4) ("Section 310(b)(4)"). Comment is also requested on whether the Commission possesses the authority "to consider the availability of "effective market access" to foreign markets" (NPRM ¶ 39); whether the Commission's proposed formulation and use of the market access test is sound (NPRM ¶ 43); whether this rulemaking is untimely (Separate Statement of Commissioner James H. Quello, February 7, 1995, at 1)); what level of ownership should give rise to an affiliation, triggering application of the "effective market access" test under Section 214 (including in situations where "more than one foreign carrier * * * has ownership interests in a U.S. carrier") (NPRM ¶¶ 52, 57, 61); and

whether the NPRM's proposals, as a general matter, are "administratively feasible and * * * will best serve [the Commission's] goals." NPRM ¶ 5. All of these subjects are addressed herein.

STATEMENT OF INTEREST

DT is the largest provider of telecommunications services in the Federal Republic of Germany ("Germany"). Although currently owned by the state, DT was recently transformed by law into a joint stock company as the first step in the process of privatization. DT expects to sell the first tranche of its shares to the public in mid-1996, with further offerings of shares in the years ahead. Currently, DT is subject to competition in all German telecommunications markets except network infrastructure and public switched voice service; those markets will be opened to competition on January 1, 1998, with licenses to be offered in early 1997. (Market liberalization and foreign investment in Germany are described in greater detail at pp. 48-51, infra.)

Together with the Sprint Corporation ("Sprint") and France Télécom ("FT"), DT is forming a Global Partnership that will offer new seamless international services, including sophisticated voice, data, and video services offered to businesses; card-based services offered to travelers; and international transport services offered to other carriers. Under the proposed arrangement, which the Commission is reviewing,[1] DT and FT each will acquire up to ten percent of Sprint's outstanding common stock by purchasing a new class of shares. That investment would provide Sprint with a multi-billion-dollar infusion of new capital.

DISCUSSION

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[1] Sprint Corporation Petition for Declaratory Ruling Concerning Sections 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as Amended, File No. ISP-95-002 (filed Oct. 14, 1994). The partnership structure is described in Sprint's Petition for Declaratory Ruling.

These comments make four basic points concerning this rulemaking and the Commission's proposed use of an "effective market access" test under Sections 214 and 310(b)(4) of the Communications Act. First, the Commission lacks the authority to impose such a requirement on foreign governments. Second, the "effective market access" test is flawed on its own terms and should be rejected. Third, even if the Commission is empowered to adopt the "effective market access" test and that test is worthy of implementation, now is not the time for the Commission to engage in this rulemaking. Fourth, if the Commission nevertheless decides to impose the "effective market access" test, it should at least continue to define "affiliation" as control for purposes of Section 214. And if the Commission concludes (incorrectly, in DT's view) that affiliation should include non-controlling ownership interests, then it makes no sense for the Commission to exclude non-ownership interests falling short of control that present, at least in theory, equivalent "incentives" to engage in anticompetitive conduct. A contrary rule will only favor AT&T and its WorldPartners group, to the detriment of competition in the market for U.S. international services.

I. THE FCC LACKS THE AUTHORITY TO IMPOSE TRADE MEASURES AIMED AT LEVERAGING OPEN FOREIGN TELECOMMUNICATIONS MARKETS

As a threshold matter, the NPRM requests comment on "the scope of th[e] Commission's statutory jurisdiction to consider the availability of effective market access to foreign markets as one factor in [its] public interest analyses under Sections 214 and 310(b)(4)." NPRM ¶ 39. For three independent reasons, the Commission lacks the authority to impose a reciprocity requirement aimed at coercing foreign governments to lower trade barriers in foreign telecommunications markets. To begin with, the Communications Act of 1934, 47 U.S.C. §§ 151 et seq., as amended, does not confer such trade authority on the Commission (and indeed expressly reserves authority of this kind to situations not present here). In addition, both

Congress and the President have made it clear through formal actions that the proper forum for resolution of telecommunications market access issues is the multilateral General Agreement on Trade in Services (GATS) negotiation, which is currently underway. And finally, any residual authority to engage in bilateral trade negotiations aimed at opening foreign telecommunications markets has been expressly assigned under the Telecommunications Trade Act of 1988, 19 U.S.C. §§ 3101-3111, to the United States Trade Representative (USTR) rather than to the Commission. Indeed, in passing the 1988 Act, Congress rejected a broader role for the FCC and indicated that the Commission's function was limited to gathering information and offering advice to Executive Branch officials charged with trade responsibilities.

A. The Communications Act of 1934 Does Not Authorize The Commission to Impose An "Effective Market Access" Test

In this proceeding, the Commission is proposing new rules that would apply to its public interest determinations under Sections 214 and 310(b)(4) of the Communications Act. See 47 U.S.C. §§ 214, 310(b)(4). In addition to authority delegated by those provisions, the Commission invokes its "authority to regulate foreign commerce in communication by wire and radio." NPRM ¶ 39 & n.29 (citing Section 1 of the Communications Act, 47 U.S.C. § 151). None of these statutory provisions, however, confers on the Commission the power sought to be exercised in this proceeding. The structure of the Communications Act, moreover, strongly suggests that the FCC lacks the authority to impose an "effective market access" test under Sections 214 and 310(b)(4).

1. Section 214

Section 214 provides no basis for the actions proposed by the NPRM. Review by the Commission under Section 214 is authorized only upon certain triggering events: (1) "construction of a new line or of an extension of any line"; (2) "acqui[sition] or operat[ion] [of]

any line, or extension thereof"; (3) "engag[ing] in transmission over or by means of such additional or extended line"; or (4) "discontinuance, reduction, or impairment" of service. 47 U.S.C. § 214(a). Here, the Commission is proposing new rules for situations where a foreign carrier enters the U.S. international services market by "acquir[ing] or operat[ing]" a "line."

The NPRM proposes to adopt an affiliation standard that would trigger Section 214 review merely upon a non-controlling investment. See NPRM ¶¶ 52-64; see also pp. 6-9, infra (discussing proposal). The NPRM does not explain how a non-controlling investment could qualify as an "acquisition" of a "line" (as opposed to the purchase of a minority stake in a carrier that owns a line). Nor does it explain how a non-controlling investment in a carrier that is already operating a line in the U.S. international market would allow a foreign investor to "operate" the affiliate's "line." In fact, no such "acquisition" or "operation" of a line can occur when a foreign carrier merely makes a non-controlling investment in a U.S. carrier. See MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223, 2230 (1994) (invalidating Commission's permissive detariffing policy as inconsistent with language of Section 203(b)(2) authorizing Commission to "modify" any requirement under Section 203). To the extent that the Commission defines affiliation to include non-controlling interests, there is no requisite jurisdictional event triggering the Commission's authority to regulate.[2]

The NPRM also proposes, of course, to apply an "effective market access" test under Section 214 to controlling investments made by foreign carriers. In such situations, the Commission's Section 214 authority is triggered by an acquisition or operation of a line, and the only remaining question is whether the Commission may seek to employ its approval power

[2] It is not clear that the Commission has the power to revoke a final, unconditioned Section 214 authorization where there is no change in control over the carrier holding the certificate. See 47 U.S.C. § 214(c).

under Section 214 as a means of coercing foreign governments to open up their markets. For several reasons, DT believes that the Commission lacks such authority.

First, as the D.C. Circuit has explained, the principal purpose behind Section 214 is "prevention of unnecessary duplication of facilities, not regulation of services"; Section 214 has only "a limited office with respect to regulation of service offerings on existing lines." MCI v. FCC, 561 F.2d 365, 375 (D.C. Cir. 1977) (emphasis added), cert. denied, 434 U.S. 1040 (1978). For that reason, whenever the Commission strays beyond the core purpose of Section 214 and seeks to use its approval power as a means of regulating services, its authority is necessarily on shakier grounds. And that is particularly true where, as here, the Commission proposes a means of regulating services that would have an uncertain and highly indirect impact on the services sought to be regulated.[3]

Second, Section 214 makes no mention of any authority to impose reciprocity requirements on foreign governments. Although such silence might not be dispositive in other contexts, it is highly significant in view of the unusual and extraordinary nature of the power sought to be invoked in this proceeding. If Congress meant to delegate to the FCC authority to exercise such coercive trade powers, it surely would have said so expressly.[4]

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[3] In cases where the Commission has approved foreign entry but conditioned such entry on compliance with various safeguards, the Commission is at least directly regulating the new market participant in a manner designed to affect U.S. international services (by ensuring that the entrant will not engage in anticompetitive conduct). By contrast, the Commission's effective market access test is designed to operate on foreign governments by coercing them to lower trade barriers. If that outcome is achieved (DT believes it would not be, see pp. 33-36, infra), then, according to the Commission, competition would be enhanced in the market for U.S. international services. Greater competition would in turn improve overall services in that market. In sum, the effective market access test is a highly indirect means of regulating services.

[4] The NPRM notes that the Commission has previously "considered" the "degree of market openness for the purpose of ensuring" both (1) "the efficacy of our competition safeguards" and (2) "compliance with our International Settlement Policy," and poses the question whether the

Significantly, Congress (or the President) has authorized the FCC to impose reciprocity measures, but only in limited contexts not applicable here. For example, Section 2 of the Submarine Cable Landing License Act of 1921 ("SCLA"), 47 U.S.C. § 35, authorizes the President to withhold or revoke submarine cable landing licenses in order to assist in (1) securing rights for landing or operating cables in foreign countries, (2) maintaining the rights of the U.S. or its citizens in foreign countries, or (3) promoting national security. The President delegated SCLA authority to the FCC, which it may exercise only with the concurrence of the Secretary of State. Executive Order No. 10530, § 5(a), 19 Fed. Reg. 2709 (1954). The FCC therefore has reciprocity authority, concurrent with the Department of State, over submarine cable landing licenses.[5]

Similarly, Congress delegated to the FCC under Title III the power to consider reciprocity issues in granting international radio licenses in certain limited circumstances. Section 308(c) provides that the Commission, in deciding whether to grant an international radio license, "may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title." 47 U.S.C. § 308(c). Under Section 310(c), moreover, the Commission is authorized to "permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States," but only if "there is in effect a multilateral or bilateral

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Commission may "consider" this factor in this context as well. NPRM ¶ 39. This characterization, however, obscures the fact that in this proceeding the Commission's avowed goal is to coerce action by foreign governments, whereas its goal in the earlier proceedings was to prevent anticompetitive conduct in the U.S. international services market. Put differently, the Commission here is not merely "considering" foreign market conditions but seeking to alter them through a measure directed at foreign governments.

[5] The Commission has acknowledged that its SCLA review is a presidential function delegated to it by Executive order. See, e.g., International Telecommunications Development Corporation, 70 F.C.C.2d 663 (1978).

agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States radio operators." 47 U.S.C. § 310(c) (emphasis added). See also id. §§ 303(l)(1), (3). And under Section 305, the President is authorized to allow foreign governments to construct and operate radio stations, but only "where such foreign government has provided reciprocal privileges to the United States." 47 U.S.C. § 305(d). Clearly, Congress (and the President) know how to authorize the FCC to consider reciprocity issues. Congress's failure to do so in Section 214 is persuasive evidence that the Commission lacks the authority to consider reciprocity issues in that context. See Chan v. Korean Airlines, 490 U.S. 122 (1989).

2. Section 310(b)(4)

The Commission also lacks authority under Section 310(b)(4) to impose its proposed "effective market access" test. Among other things, that provision forbids indirect foreign ownership in excess of 25% of a radio licensee "if the Commission finds that the public interest will be served by the refusal or revocation of the license." 47 U.S.C. § 310(b)(4) (emphasis added). As an initial matter, the highlighted language suggests that the Commission's inquiry must focus on the anticipated public-interest benefits that will result from the denial or revocation of a specific license. The Commission's proposed "effective market access" test, in contrast, is designed broadly to coerce foreign governments to open their markets, not narrowly to evaluate the transaction at hand.

In addition, Section 310(b) does not expressly authorize the Commission to consider reciprocity issues — in marked contrast to the other provisions of title 47 described above, including its companion provision, Section 310(c). Although the term "public interest" is broad, it is not unlimited and must be read according to its context. See National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). At a minimum, the term should not be read to

encompass a power that Congress has granted in only limited circumstances elsewhere in the statute (and that implicates the United States' foreign affairs and trade powers).

Nor should it be read in a fashion that has no logical relationship to the congressional purpose underlying Section 310(b). As the NPRM acknowledges, the statutory restrictions on foreign ownership were enacted out of a "concern for national security" and to "prevent alien activities against the government during a time of war." NPRM ¶ 16 & n.16.[6] But there is no logical connection between this purpose and the "effective market access" test proposed by the NPRM. The fact that a particular foreign country has an open or closed telecommunications market has nothing whatsoever to do with whether particular citizens of that country, if permitted to hold an indirect interest in a U.S. radio licensee, might pose a threat to United States security.

3. The Commission's "Ancillary Jurisdiction"

The NPRM also cites Section 1 of the Communications Act, 47 U.S.C. § 151, as authority for the proposed market access test. NPRM ¶ 49 n.29. See also 47 U.S.C. § 154(i) ("The Commission may * * * make such rules and regulations * * * not inconsistent with this chapter, as may be necessary in the execution of its functions."). These general provisions, however, do not delegate the trade authority claimed by the Commission in this proceeding.

Section 1, the enacting clause, "contains a declaration of the purposes of and necessity for the [Communications Act] and establishes the [] Commission." H.R. No. 1850, 73d Cong., 2d Sess. 4, reprinted in A Legislative History of the Communications Act of 1934, at 726 (Max Paglin ed. 1989). Section 1 states that the Commission was created "[f]or the purpose of

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[6] For that reason, the Commission has taken a stricter approach in the area of broadcast licenses (which involve control over content and thus carry a greater risk of propaganda) than it has in the area of common carrier licenses. NPRM ¶ 18.

regulating interstate and foreign commerce in communication * * * ." 47 U.S.C. § 151. This general statement of purpose behind the legislation, however, does not constitute a delegation of specific authority by Congress. Congress, in Section 1, charged the Commission with doing just one thing: to "execute and enforce the provisions of this Act." Ibid. Section 1 does not confer broad authority to regulate "foreign commerce" in communication by wire and radio.

Nor is Section 154(i) of any assistance to the Commission. That provision grants the Commission general jurisdiction to engage in rulemaking that is (1) "not inconsistent with this chapter" and that (2) "may be necessary in the execution of its functions." 47 U.S.C. § 154(i). In the domestic context, the Commission's powers under this provision have been "'restricted to that reasonably ancillary to the effective performance of [its] responsibilities' under titles II and III of the Act." Southwestern Bell Telephone v. FCC, 19 F.3d 1475, 1479 (D.C. Cir. 1994) (quoting United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968)); see also FCC v. Midwest Video Corp., 440 U.S. 689, 706 (1979) (Commission's ancillary jurisdiction is properly invoked where "necessary to ensure the achievement of the Commission's statutory responsibilities"). Use of an "effective market access" test, however, is hardly "necessary" (47 U.S.C. § 154(i)), or even "reasonably ancillary," to the effective performance of the Commission's functions under Sections 214 or 310(b)(4).[7] See also MCI Communications, 114 S. Ct. at 2233 (in declining to sustain an FCC interpretation of word "modify" in Section 203(b) that departed from plain meaning of statute, rejecting argument that Court could rely on "the Communication Act's broad purpose of promoting efficient telephone service"). Use of the

[7] In delegating authority, "Congress did not purport to transfer its legislative power to the unbounded discretion of the [FCC]." FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953). Rather, Congress intended that there be "a specific statutory basis for the Commission's authority." American Telephone and Telegraph v. FCC, 487 F.2d 865, 872 (2d Cir. 1973).

"effective market access" test, moreover, would be a projection of regulatory authority beyond the Communication Act's jurisdictional limits.

Sections 2 and 3 of the 1934 Act delineate the statute's applicability and define key jurisdictional terms. In essence, they limit the Commission's jurisdiction to certain kinds of communications and certain types of persons. Section 2 states that the Act applies to "all * * * foreign communication by wire or radio * * * which originates and/or is received within the United States, and to all persons engaged within the United States in such communication * * * ." 47 U.S.C. § 152(a) (emphasis added). Section 3 defines the critical term "foreign communication" as "communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States." 47 U.S.C. § 153(f) (emphasis added). And Section 2 generally forbids the Commission to exercise jurisdiction over, among other things, "any carrier engaged in * * * foreign communication[s] solely through physical [inter]connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier." 47 U.S.C. § 152(b)(2).

For several reasons, the Commission's proposed "effective market access" test falls outside of these jurisdictional grants. First, the Commission's jurisdiction is limited to the regulation of "communication or transmission," not investment. As the Commission explained in refusing to impose foreign ownership restrictions on cable companies as a means of leveraging open foreign markets:

> The Commission's responsibilities relate to 'interstate and foreign communications' (47 U.S.C. 1), that is to telecommunications within the United States and between the United States and foreign countries. This does not imply, however, any responsibility for investment policy with respect to communications systems in foreign countries. We do not believe a desire for reciprocity in international investment policies by itself provides an adequate basis for action on our part.

Second Cable Foreign Ownership Order, 77 F.C.C. 2d at 78-79 (emphasis added). That reasoning applies with equal force here.

Second, the FCC's jurisdiction is clearly limited in geographic scope to communications beginning or ending in the U.S. To the extent that the "global" market for telecommunications repeatedly mentioned in the NPRM extends beyond such communication, that market and those communications are beyond the FCC's delegated power. In seeking to extend its regulatory powers to the global telecommunications markets, the Commission is "effectively * * * introduc[ing] * * * a whole new regime of regulation (or of free-market competition), which may well be a better regime but it is not the one that Congress established." MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223, 2233 (1994).

Third and finally, it is well established that the FCC lacks the regulatory authority over trade matters. Here again, the Second Cable Foreign Ownership Order is instructive. In refusing to adopt a rule of reciprocity with respect to foreign ownership of cable companies, the Commission there explained that "[q]uestions of international trade seem to us more appropriately addressed to other branches of the government." 77 F.C.C. 2d at 81. The Commission also acknowledged that it was not "in a position to know if such a policy on our part would in fact have the result intended or if, to the contrary, it would lead to increasing trade barriers in other areas." Id. at 79. Noting that conflicting arguments had been made concerning the wisdom of requiring reciprocity, the Commission observed that the choice was "obviously a matter that does not come within the sphere of the ordinary concerns of the Commission" but rather one "which we believe is appropriately considered by other branches of the government." Ibid.

More recently, this fundamental limitation on the Commission's authority was confirmed in the Regulatory Policies and International Telecommunications proceeding. See

Notice of Proposed Rulemaking, 2 FCC Rcd 1022 (1987), Report and Order and Notice of Supplemental Rulemaking, CC Docket No. 86-494 (Released Mar. 25, 1988) ("Report and Order"). In that proceeding, which combined an inquiry and a proposed rulemaking, the Commission considered the questions (1) whether "the public interest requires that [it] consider the telecommunications policies of foreign governments in the formulation of U.S. regulatory policy," (2) whether it should apply a proposed "international model" as a benchmark against which to judge the progress toward competition of foreign governments, and (3) whether the Commission should assume a broader role in developing and implementing trade policy with respect to telecommunications. Report and Order at 7389-90. In the rulemaking portion, the Commission decided to impose certain reporting requirements on foreign carriers in order to gather information concerning foreign procurement practices and other matters. Id. at 7390. In imposing these requirements, the Commission acknowledged that "many foreign governments * * * may treat [open and competitive procurement] as a major trade 'concession' that should await completion of negotiations in the Uruguay Round." Id. at 7408.

Of even greater significance, however, was the position taken in the coordinated comments filed by NTIA, USTR, and other Executive Branch agencies in Regulatory Policies and International Telecommunications. In response to the FCC's inquiry into whether it should assume a broader role, including the adoption of a "pro-active, 'sectoral reciprocity' regime," the Executive Branch agencies explained:

> Existing law * * * provides no authority for the FCC to take unilateral retaliatory action and, indeed, the whole notion of any such unilateral action by the FCC is inimical to the plain need for consistency in developing and implementing U.S. trade policy.

Comments of the NTIA of Behalf of the U.S. Department of Commerce, No. 86-494, at 5 (filed Apr. 17, 1987) (footnote omitted) (emphasis added). The government's trade professionals and

other Executive Branch agencies were equally critical of the FCC's proposal to employ an "international model" in formulating regulatory policy concerning international telecommunications:

> The provisions of the FCC's notice which inquire into the feasibility and desirability of adopting an international competitive "model," and the retaliatory procedures possibly associated with that approach, are matters of concern. Executive branch agencies are responsible for the development and implementation of U.S. trade policy under existing law. Regulatory agencies including the FCC may have a limited role to play, subject to the overall direction of the Executive branch, but there is no room under existing law — nor should there be — for unilateral initiatives undertaken by independent regulatory agencies in the trade policy field.

Id. at 7. The foregoing analysis applies with equal force to bar the NPRM's proposals in this proceeding. The Commission simply lacks the authority under the Communications Act to impose an "effective market access" test, or to take other independent action in matters concerning trade. That lack of authority, which was already clear in 1987, has become even clearer since, for reasons explained in the following two sections.

B. Congress And The Executive Branch Have Chosen Multilateral Trade Negotiations As The Principal Method To Resolve Telecommunications Market Access Issues

Not only does the FCC lack authority to venture into the field of international reciprocity but its efforts to do so undermine the international telecommunications strategy established by Congress nearly a decade ago and pursued by successive Presidents ever since. Under that strategy, the United States achieves market access objectives, not through agency rulemaking, but through multilateral and bilateral trade negotiations. The multilateral approach is discussed in this section, the bilateral approach in the next section. Within this strategy the role of the FCC has been explicitly limited by Congress to one of data collection and analysis, not one of policymaking.

The Uruguay Round negotiations, conducted under the auspices of the General Agreement on Tariffs and Trade ("GATT"), spanned nearly a decade. The United States' participation was initiated by President Reagan in 1986, continued by the Bush Administration, and completed by President Clinton in 1994. Congress set forth the United States' negotiating objectives in the Uruguay Round in passing the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107. In approving the results of this decade-long multilateral negotiation, Congress reviewed the progress of negotiations concerning trade in telecommunications services and endorsed the continuation of a multilateral approach to these issues.

The Uruguay Round recognized telecommunications services as a distinct sector of economic activity.[8] Within the new General Agreement on Trade in Services ("GATS"), the Annex on Telecommunications called for greater access to public telecommunications networks and services, as well as network transparency. The principles articulated in GATS, as well as the agenda for further negotiations on telecommunications issues,[9] were approved by Congress just last December. See Uruguay Round Agreements Act, §§ 101(a), 101(d)(14), Pub. L. No.

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[8] Office of the United States Trade Representative, Uruguay Round of Multilateral Trade Negotiations, General Agreement on Tariffs and Trade 313-17 (1994). Discussions on telecommunications market access played a prominent role in the Uruguay Round negotiations. See, e.g., Resumed Services Talks Focus on Finance, Transport, Telecommunications, Bureau of National Affairs Daily Report for Executives, Sept. 17, 1991, at A-17. The USTR, a member of the Executive Branch, conducted these negotiations.

[9] The United States and other parties to GATS made a commitment to "enter into successive rounds of negotiations * * * with a view to achieving a progressively higher level of liberalization" in the services sector. GATS, art. XIX, § 1. Under a schedule to which the United States has agreed, "[n]egotiations on basic telecommunications" services pursuant to GATS are already underway and "expected to conclude by April 30, 1996." Id. at 976, 1994 U.S.C.C.A.N. at 4276; see also Ministerial Decision on Negotiations in Basic Telecommunications, §§ 4, 5 (noting the United States' participation and setting forth April 30, 1996 deadline by which negotiations shall be concluded).

465, 103d Cong., 2d Sess., 108 Stat. 4809 (Dec. 8, 1994) (codified at 19 U.S.C. §§ 3511(a), 3511(d)(14)). At that time, Congress also approved the "Statement of Administrative Action" that had been submitted by the President along with the Uruguay Agreements and that set forth "significant administrative actions proposed" by the Clinton Administration "to implement the Uruguay Round Agreements." Id. § 101(a)(2), 108 Stat. 4814 (19 U.S.C. § 3511(a)(2)); The Uruguay Rounds Agreements Act Statement of Administrative Action ("Clinton Administration Plan"), reprinted in H.R. Rep. No. 826(II), 103d Cong., 2d Sess. 656, 1994 U.S.C.C.A.N. 4013, 4040.

GATS is "designed to reduce or eliminate governmental measures that * * * discriminate against locally-established service firms with foreign ownership" and "provides a legal framework for addressing barriers to trade and investment in services" as well as "a forum for further negotiations to open services markets around the world." Clinton Administration Plan, reprinted in H.R. Rep. No. 826(II), at 966, 1994 U.S.C.C.A.N. at 4269. Consistent with those objectives, GATS requires parties to "enter into consultations with a view toward eliminating" business practices on the part of service suppliers that "may restrain competition and thereby restrict trade in services" (GATS, art. IX, §§ 1, 2), and sets forth dispute-resolution procedures to govern that process (GATS, arts. XXII-XIII). GATS also contains a most-favored-nation (MFN) provision requiring the parties to "accord * * * to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country." GATS, art. II, § 1. In addition, GATS includes two annexes that are specifically directed toward telecommunications services. The Annex on Basic Telecommunications suspends the MFN provision of GATS until the date of implementation set forth in the agreement on basic services now being negotiated or, if no agreement is reached, until April 30, 1996. The considerably more detailed Annex on

Telecommunications is aimed at "elaborating upon the provisions of [GATS] with respect to measures affecting access to and use of public telecommunications transport networks and services." Annex on Telecommunications § 1. Among other things, it forbids all but certain "conditions * * * imposed on access to and use of public telecommunications transport networks and services other than as necessary." Id. § 5(e). It also recognizes the valid role of the International Telecommunications Union (ITU) in developing standards for global compatibility and commits the parties to "promote such standards" through the ITU. Id. § 7(a).

In approving GATS, Congress directed that

> [t]he principal negotiating objective of the United States in the extended negotiations on basic telecommunications services to be conducted under the auspices of the WTO is to obtain the opening on nondiscriminatory terms and conditions of foreign markets for basic telecommunications services through facilities-based competition or through the resale of services on existing networks. Uruguay Round Agreements Act § 135, 108 Stat. 4840 (19 U.S.C. § 3555).

As the foregoing makes clear, the Executive and Legislative Branches of government have made an international commitment to participate in a detailed, multilateral process of negotiating trade liberalization (including issues of market access) in the telecommunications sector. That process is now at a critical juncture, with basic principles established by the two Annexes and specific implementation currently being negotiated. Obviously, such a multilateral process cannot proceed smoothly unless each government speaks with a single voice: a GATS party cannot have one of its representatives negotiating to open markets in Geneva while at home an independent agency is proposing its own reciprocity rules and launching its own initiatives to leverage open foreign telecommunications markets. For this very reason, every GATS party, including the United States, has agreed to a standstill provision. The Ministerial Decision on Negotiations in Basic Telecommunications provides:

> Commencing immediately and continuing until the implementation date to be determined [upon conclusion of the negotiations], it is understood that no participant

> shall apply any measure affecting trade in basic telecommunications services in such a manner as would improve its negotiating position and leverage.

Ministerial Decision § 7 (emphasis added). See also Annex on Telecommunications § 5(e). The NPRM makes no mention of this binding commitment on the part of the United States. Nor does it explain how the Commission's proposed action can be reconciled with the letter or spirit of this commitment.

Similarly, and consistent with the terms of the GATS Annex on Telecommunications, the Clinton Administration is currently pursuing U.S. interests under the auspices of the ITU. Vice President Gore introduced the U.S. vision for the Global Information Infrastructure ("GII") at the World Telecommunications Development Conference in Buenos Aires, Argentina, in March of 1994. Key members of the Administration with responsibility for telecommunications issues recently reported on U.S. multilateral efforts with respect to the GII. Global Information Infrastructure: Agenda for Cooperation (Feb. 16, 1995). Among other things, the report recognized the critical role of multilateral and bilateral efforts in "remov[ing] obstacles blocking the effective development of GII." Id. at 29. It also specifically noted the importance of the ongoing GATS negotiations over basic telecommunications services. Id. at 29-30.

In sum, the U.S. Executive Branch is actively pursuing U.S. telecommunications interests in multilateral negotiations. With the approval and direction of Congress, successive Presidents have made international commitments regarding principles and procedures that will govern this process. Executive Branch negotiations on telecommunications, as well as Congressional approval of GATS, indicate that both branches of government agree that pursuit of open telecommunications markets on a multilateral level is to be a presidential responsibility, not an FCC prerogative. Moreover, as described in the next section, the FCC cannot claim the authority to engage in bilateral, market-opening measures, because Congress in the

Telecommunications Trade Act of 1988 has delegated that authority to the USTR while relegating the FCC to a limited role of data collection and analysis.

C. The Commission's Initiative Is Inconsistent With The Telecommunications Trade Act Of 1988

Any doubts about the Commission's authority in light of the provisions of the Communications Act of 1934 and GATS were set to rest by the Telecommunications Trade Act of 1988, 19 U.S.C. §§ 3101-3111. That statute establishes a detailed framework according to which trade issues in the telecommunications area — including the openness of foreign markets to U.S. products and services — may be resolved bilaterally by the Executive Branch in general and the United States Trade Representative (USTR) in particular, with oversight and direction from Congress.

The enactment's purposes closely parallel those pursued by the Commission in this proceeding. They include "to develop an international consensus in favor of open trade and competition in telecommunications products and services" (19 U.S.C. § 3101(b)(3)) and "to achieve a more open world trading system for telecommunications products and services through negotiation and provision of mutually advantageous market opportunities" for U.S. businesses (19 U.S.C. § 3101(b)(5) (emphasis added)). Toward those ends, the statute directs USTR to conduct an investigation of foreign telecommunications trade barriers and compile a list of "priority foreign countries." 19 U.S.C. § 3103(a). The list must be based on various factors, including "the nature and significance" of barriers that deny U.S. firms "mutually advantageous market opportunities" and the existence of "measurable progress being made to eliminate the objectionable acts, policies, [and] practices." 19 U.S.C. § 3103(b). USTR must report to Congress on its findings. 19 U.S.C. § 3103(d).