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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554  
December 13, 2000

In the Matter of	)	
	)	
VoiceStream Wireless Corporation	)	IB Docket No. 00-187
Powertel, Inc.	)	
	)	
Applications under Section 214 and 310(d) of	)	
the Communications Act of 1934, as amended,	)	
for transfer of control to Deutsche Telekom AG	)	

COMMENTS

I. Summary of Argument

The Federal Communications Commission ("FCC") must reject the merger application of Deutsche Telekom ("DT") and VoiceStream Wireless Corp. ("VoiceStream") as that transaction is flatly prohibited by 47 U.S.C. Section 310(a). Section 310(a) prohibits the FCC from granting or permitting the transfer of telecommunications licenses to foreign governments or their representatives. That prohibition is unequivocal and cannot be waived. A combined Deutsche Telekom-VoiceStream falls squarely within the reach of this prohibition. Indeed, the evidence clearly and amply demonstrates that the German government will exercise direct control over and will influence the combined entity post-transaction. This evidence even demonstrates that the parties themselves believe that Deutsche Telekom will continue to be a representative of the German government post-transaction.

47 U.S.C. Section 310(b)(4) does not provide the FCC the authority to waive the prohibition contained in Section 310(a). To find otherwise would read Section 310(a) out of the law and would contravene the plain language of the statute. Moreover, the FCC's only action in this area involved a bureau level decision that appears to be incorrectly decided, lacks

Telekom appears to be implicitly retaining its sovereign immunity as an "agency or instrumentality of government" with respect to other legal actions not relating to the merger agreement. The retention of such sovereign immunity is direct proof that a combined DT-VoiceStream will continue to operate as a representative of the German government as contemplated by 47 U.S.C. Section 310(a).

The German government apparently agrees with Deutsche Telekom that DT is an arm of the German government. In response to a request to contribute to a foundation to compensate the victims of Nazi era forced and slave laborers, the German Finance Ministry determined that Deutsche Telekom's contributions to the fund would be classified as state or government contributions, rather than as private corporate contributions.<sup>20</sup>

### III. Section 310(b)(4) Does Not Give the FCC Authority to Waive the Prohibition on Foreign Government Control

VoiceStream and Deutsche Telekom have applied for a waiver of the FCC's foreign ownership rules under section 310(b)(4). The FCC does not have authority, however, under section 310(b)(4) to waive the requirements of section 310(a). Section 310(b)(4) only gives the FCC the power to find that foreign government ownership interests *below* control might be in the public interest.

#### A. Sections 310(a) and 310(b)(4)

As noted above, section 310(a) specifically prohibits the FCC from granting authorizations to entities *controlled* by foreign governments, either directly or indirectly. Section 310(b)(3) and (4) then fill the gap as to how to address foreign government ownership that amounts to less than control. Under section 310(b)(3), direct foreign government ownership interests above 20% are forbidden without any exceptions. Under section 310(b)(4), the FCC is given some discretion to allow indirect foreign government ownership of broadcast, common carrier, and aeronautical licenses in amounts above 25% if the public interest is served. However, nowhere does section 310(b)(4) state that the FCC can find the public interest served by allowing a "foreign government or the representative thereof" to control a "station license." To interpret this section otherwise, would be to read out of existence section 310(a). The only way to reconcile these two sections, then, is to conclude that section 310(b)(4) allows the FCC to find the public interest is served by allowing indirect foreign control, and/or ownership up to 100% of "station licenses" only when the foreign ownership is by a non-government controlled entity. If a foreign government controlled entity indirectly invests in an FCC licensee subject to section 310, then the entity can invest indirectly up to 25% without triggering section 310(b)(4), but investments above 25% have to be approved by the FCC, and must not give the foreign government controlled entity control of the FCC "station license" holder. Such control would contravene Section 310(a). To find otherwise, would be contrary to the Act.

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<sup>20</sup> "Debate Over Telecom State Mires Bid," *The Financial Times*, October 18, 2000.

It appears that the FCC has only addressed the Section 310(a) issue once, when a decision by the International Bureau incorrectly determined that indirect foreign government control of an FCC licensee was permissible under section 310(b)(4).<sup>21</sup> The order found, however, that there was no guiding Commission precedent on the matter. Instead, the bureau level decision appeared to twist the statute and its language to read out of existence section 310(a), and determined that any level of indirect foreign government ownership and control of FCC licenses could be allowed so long as the FCC found it to be in the public interest. This order ignored the fact, however, that Section 310(a) is not subject to waiver. Rather, Section 310(a) is a flat bar on foreign government control.

Moreover, and perhaps more importantly, the bureau level decision was never reviewed by the Commission or a court and is therefore not of any value as a precedent in the instant case. Indeed, the International Bureau likely overstepped its delegated authority in deciding, incorrectly, to permit indirect foreign government control of an FCC licensee. The International Bureau does not have the authority to act on any application that "presents new or novel arguments not previously considered by the Commission." 47 C.F.R. Sec. 0.261(b)(1)(i). Because there was no prior precedent permitting indirect government control of a U.S. licensee, much less precedent that effectively reads Section 310(a) out of the statute, the International Bureau could not lawfully have addressed the issue. Such a matter could only be resolved by the full Commission. Accordingly, the Bureau decision has no binding effect on the matter at issue.

#### **B. The 1997 WTO Telecommunications Agreement Fails to Alter the Statutory Framework Applicable to this Transaction**

Section 310(a) of the Communications Act forbids the FCC from approving a transfer of telecommunications licenses to foreign governments or their representatives. Section 310(b)(4) prohibits the transfer of licenses to companies that are more than 25 percent foreign owned, unless the FCC determines that a waiver would be in the public interest. These provisions have not been altered in any significant fashion since they were originally enacted. In 1997, the United States entered into a WTO telecommunications agreement that was never ratified by the United States Senate. As such, this Executive Agreement does not supersede, nor can it even be read into, the governing statutory framework set forth in Section 310 of the Communications Act.

Nonetheless, the FCC proceeded to implement the WTO Telecommunications Agreement in a manner that clearly violated this prevailing statutory scheme. Rather than prohibiting transactions involving the transfer of licenses to foreign governments or their representatives, the FCC's implementation order presumes approval of such a transfer if the acquiring foreign government is a member of the WTO.

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<sup>21</sup> Telecom Finland, Ltd., File No. ISP-97-002, 12 FCC Rcd 17,648 (Int. Bur. 1997).

It is worth noting that the European Union ("EU") appears to agree that the WTO Telecommunications Agreement is inconsistent with 47 U.S.C. Section 310. In a 1999 trade barriers report, the EU stated that Section 310 retains force and effect notwithstanding the 1997 WTO Telecommunications Agreement. Specifically, the EU report states: "Section 310 of the Communications Act of 1934 remains basically unchanged following the adoption of the new Communications Act of 1996 . . . This situation has not changed through the Basic Telecom Agreement."<sup>22</sup> As the EU correctly recognizes, and as the FCC should recognize, an executive agreement cannot and does not repeal existing United States statutory law.

#### **IV. The Acquisition of VoiceStream by Deutsche Telekom Will Severely Harm Competition in the U.S. Market and therefore is Contrary to the Public Interest**

In addition to the fact that Section 310(a) a bar to the acquisition of VoiceStream by Deutsche Telekom, the FCC must find that this acquisition is contrary to the public interest. Indeed, FCC approval would be tantamount to a complete abandonment of the FCC's obligations to safeguard the public interest. This conclusion is inescapable in light of the tremendous threat posed by foreign government control of U.S. licensed telecommunications carriers to our competitive market and our national security. In this instance, the potential abuses caused by the German government's control of Deutsche Telekom cannot be remedied by the imposition of safeguards and conditions by the FCC.

In reviewing these potential abuses, the Commission must focus on the unique per se anticompetitive aspects of substantial government ownership. By permitting its widespread entry into the U.S. market, grant of the instant application will provide Deutsche Telekom strong incentives to use its financial backing from the German government to compete anticompetitively in the United States. As the dominant telecommunications provider in Germany, the FCC already has found that Deutsche Telekom possesses the ability to discriminate against other U.S. carriers on the U.S.-Germany route. Indeed, the FCC in the past has expressed concern about competition in the German telecommunications market, especially regarding unfair limitations on interconnection with Deutsche Telekom's local exchange.

Approval of the VoiceStream acquisition will permit Deutsche Telekom to offer end-to-end services to U.S. customers at rates subsidized by monopoly rents reaped in Germany to undercut economically the services offered by true U.S. competitors. In other words, this acquisition increases the incentive, and ability, of Deutsche Telekom to behave anticompetitively against U.S. carriers, to the detriment of U.S. consumers. Thus, the addition of this government owned telecommunications power to the U.S. marketplace can only create the harm to the public interest that the FCC has long sought to avoid.

As in many countries, telecommunications in Germany is dominated by a single player

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<sup>22</sup> Report on United States Barriers to Trade and Investment, p. 55, European Commission, Brussels, August 1999.



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 CORPORATION, )  
 Transferor, )  
 and )  
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 DEUTSCHE TELEKOM AG )  
 Transferee, )  
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 Application for Consent )  
 to Transfer of Control )  
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IB Docket No. 00-187

To: The Commission

COMMENTS OF THE UNITED STATES CHAMBER OF COMMERCE

The United States Chamber of Commerce ("the Chamber") respectfully submits its comments in the above-captioned proceeding. The Chamber is the world's largest not-for-profit business federation representing over 3,000,000 businesses, 3,000 state and local chambers, 830 business associations, and 88 American Chambers of Commerce abroad. Its members include businesses of all sizes and industries, from every corner of America. Although the majority of our nation's largest companies are active Chamber members, more than 96% of our members are small businesses with 100 or fewer employees.

Some, however, are urging the Federal Communications Commission to take action in this proceeding that risks stifling these benefits. Specifically, some are urging the Commission to interpret the Communications Act either as prohibiting this merger because of Deutsche Telekom's partial governmental ownership or as requiring a highly intrusive examination of competitive conditions in foreign markets wholly unrelated to the merger. Such an interpretation could lead to a counterproductive and damaging trade war with our foreign trade partners.

The Chamber opposes any such action for several reasons:

- It would potentially violate the World Trade Organization ("WTO") Basic Agreement on Telecommunications and would likely lead the European Union ("EU") and other member WTO countries to retaliate by closing markets to American goods and services.
- Foreign investment in U.S. telecommunications providers would diminish markedly, limiting the competitive benefits of such investment to U.S. consumers and truncating technological innovation and economic expansion.
- The *Foreign Participation Order* already enables the Commission to act in the event of competition or security risks.

## **II. REJECTION OF THIS MERGER SOLELY ON THE BASIS OF FOREIGN GOVERNMENT OWNERSHIP WOULD LEAD TO FOREIGN RETALIATION AGAINST U.S. PRODUCERS AND CONSUMERS**

Since 1995, the United States has worked hand-in-hand with the WTO to ensure that foreign trading partners open their markets to American businesses and abide by fair trading practices. Although the United States has not won every case before the WTO, American businesses and workers have clearly benefited. Indeed, "studies estimate that

the effect of full implementation of the WTO Agreements will be to boost U.S. GDP by \$125-250 billion per year (in 1998 dollars).”<sup>2</sup>

In the area of telecommunications, the United States and 68 other countries reached an accord on a set of commitments under the 1995 General Agreement on Trade in Services (“GATS”) that fundamentally changed the structure of the global telecommunications market.<sup>3</sup> This set of commitments, known as the WTO Basic Telecommunications Agreement, is guided by a worldwide commitment to opening markets, promoting competition, and preventing anti-competitive behavior. Specifically, the United States agreed to the following:

- Market Access, under which the United States must provide treatment to WTO-member telecommunications carriers no less favorable than that provided for in the terms, limitations, and conditions specified in the U.S. schedule of commitments.<sup>4</sup>
- Most Favored Nation (“MFN”), under which the United States must offer the same treatment to like telecommunications services and service suppliers from all other WTO Members.<sup>5</sup>
- National Treatment, under which United States must treat like telecommunications services and service suppliers no less favorably than it treats its own services and service suppliers.<sup>6</sup>

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<sup>2</sup> United States Trade Representative, *America and the WTO* (available at [http://www.ustr.gov/html/wto\\_usa.html](http://www.ustr.gov/html/wto_usa.html)).

<sup>3</sup> See Fourth Protocol to the General Agreement on Trade in Services (WTO 1997) (reprinted in 36 I.L.M. 354, 366).

<sup>4</sup> See GATS art. XVI.

<sup>5</sup> See GATS art. II.

<sup>6</sup> See GATS art. XVII.

Significantly, these agreements were made without regard to foreign-government ownership. When the United States negotiated the Basic Telecom Agreement, it expressly represented that “[t]here will be no limits on indirect foreign ownership of such [wireless telecommunications] licenses by foreign governments (including government-owned corporations) . . . .”<sup>7</sup> The United States also stated that, under U.S. law as reflected in the U.S. offer of commitments, “[t]here is a limit on direct ownership, but it is one of form not substance.”<sup>8</sup> For the Commission to block this merger solely on the issue of foreign government ownership or affiliation would therefore place the United States, we believe, in violation of its commitments under the Basic Telecom Agreement.

There is also little doubt such action would spark counterproductive and damaging retaliation by our foreign trading partners. Indeed, the EU has already threatened retaliation with respect to proposed legislation that would bar foreign-government ownership of U.S. telecom carriers.<sup>9</sup>

Such retaliation would not necessarily be limited to WTO action. For example, the United States and Japan recently concluded a bilateral agreement on interconnection

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<sup>7</sup> See WTO, Negotiating Group on Basic Telecommunications, Communication from the United States, Conditional Offer on Basic Telecommunications (Revision), S/NGBT/W/12/Add.3/Rev.1 (Feb. 26, 1996).

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

<sup>9</sup> On July 24, 2000, EU Trade Commissioner Pascal Lamy wrote to United States Trade Representative Charlene Barshefsky regarding congressional efforts to restrict foreign telecommunications ownership: “This [the proposed legislation] would clearly violate US commitments in the WTO . . . .” Lamy further urged Barshefsky to “resist such legislation and indicate clearly to the Congress the opposition of the US Administration to its adoption . . . . We have to avoid a very damaging trade fight in this highly important sector.” Letter from Pascal Lamy to Charlene Barshefsky (July 24, 2000).

rates.<sup>10</sup> Under the agreement, Japan has agreed to reduce interconnection fees now charged by Nippon Telegraph and Telephone to U.S. telecommunications companies. This agreement will begin to allow U.S. telecommunications companies to compete more effectively in the Japanese market. The Chamber believes it is almost inconceivable that such an agreement would have been reached in the wake of the Commission action to limit foreign entry, such as that urged by some in this proceeding.

### **III. REJECTION OF THIS MERGER ON THE BASIS OF FOREIGN GOVERNMENT OWNERSHIP WOULD HURT AMERICAN CONSUMERS**

Consumers benefit from competition in the global marketplace. Greater competition and greater market opportunities for American producers and consumers provide for greater choice at better prices in the U.S. and abroad. Clearly, American businesses and consumers will suffer if foreign governments retaliate against Commission action by closing their markets to American goods and services.

Moreover, American businesses and consumers will also be harmed by the loss of foreign investment in this country. Access to capital is the lifeblood that pulses through the American economy. Access to capital is what has energized the technological advancements and innovation so fundamental to the recent economic expansion. Billions of dollars of foreign investment is made annually in the U.S. This investment has helped

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<sup>10</sup> See *United States and Japan Agree on Interconnection Rates*, United States Trade Representative Press Release (rel. July 18, 2000) (available at <http://www.ustr.gov/releases/2000/07/00-55.pdf>).



**Securities Industry Association**

1401 Eye Street, NW • Washington, DC 20005-2225 • (202) 296-9410, Fax (202) 296-9775  
www.sia.com, info@sia.com

12-12

December 12, 2000

Chairman William E. Kennard  
Federal Communications Commission  
Room 8-A302C  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Commissioner Susan Ness  
Federal Communications Commission  
Room 8-B201H  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Commissioner Harold W. Furchtgott-Roth  
Federal Communications Commission  
Room 8-B115H  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Commissioner Gloria Tristani  
Federal Communications Commission  
Room 8-C302C  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Commissioner Michael K. Powell  
Federal Communications Commission  
Room 8-A204C  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Dear Chairman Kennard, and Commissioners Ness, Furchtgott-Roth, Tristani, and Powell:

On behalf of the Securities Industry Association, I am writing to express our concern about certain statements made in letters sent to you by Senator Ernest Hollings (D-SC), regarding the proposed merger of Deutsche Telekom and VoiceStream Wireless, which is now being considered by the Federal Communications Commission. Senator Hollings, in recent correspondence, appears to be urging the Commission to adopt an interpretation of Section 310 of the Communications Act that would bar Deutsche Telekom from indirectly owning an FCC license, because after the merger the German government would still have a 44% ownership interest in Deutsche Telekom. We urge the Commission not to adopt such an interpretation, which would squarely contradict statements made by the United States government during negotiations of the WTO Basic Telecommunications Agreement, and which would violate the U.S. commitments in that agreement. Such an interpretation is not necessary to protect legitimate U.S. government interests under existing law, and would certainly undercut the United States' ability to further open foreign markets to U.S. consumers, investors and businesses.

Interpreting 310(a) categorically to prohibit substantial government ownership of a company that indirectly, rather than directly, holds a U.S. wireless license would violate our commitments in

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And )  
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Deutsche Telekom AG )  
Transferee, )  
)  
Application for Consent )  
to Transfer of Control )

IB Docket No. 00-187

COMMENTS OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT

Todd Malan  
Executive Director  
Organization for International Investment  
1901 Pennsylvania Ave., N.W.  
Suite 807  
Washington, D.C. 20006

December 13, 2000

OFII's members have a strong interest in U.S. trade policies, and in market access conditions in the United States. OFII's members would be adversely affected by Commission action that would unilaterally abrogate U.S. WTO commitments.

## II. ANALYSIS

### A. **The Commission Should Affirm its Established Interpretation that Section 310 of the Communications Act Allows Unlimited Indirect Foreign Investment.**

The FCC has interpreted Section 310 of the Communications Act to allow unlimited indirect foreign ownership by firms from WTO-member countries of companies holding common carrier radio licenses.<sup>1</sup> This interpretation is not only clearly correct as a matter of law, it was also crucial to the successful conclusion of the WTO Basic Telecom Agreement. Based on this settled understanding of the law, the United States made binding commitments in the WTO to allow foreign companies to own indirectly up to 100 percent of a U.S. company that holds common carrier radio licenses. As the Commission is well aware, the United States did not schedule any limitations on this commitment of market access.

In the present case, the FCC must honor the commitment made by the United States in the Basic Telecom Agreement. When the United States makes commitments in international trade agreements, it puts its national credibility on the line. Any breaches of U.S. commitments therefore affect not just present agreements, but the potential for reaching favorable resolutions to future trade issues. If the Commission were to interpret Section 310 of the Communications Act in a manner inconsistent with the U.S. WTO

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<sup>1</sup> *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23891, 23940 (1997) ("*Foreign Participation Order*")

commitments, it could in a single stroke cripple U.S. trade policy. Such devastating consequences would clearly not be consistent with the public interest standard expressly embodied in Section 310(b)(4).<sup>2</sup>

During the negotiation of the Basic Telecom Agreement, the United States made clear to its negotiating partners that it would commit to allow up to 100 percent indirect foreign ownership of companies holding common carrier radio licenses, pursuant to Section 310(b)(4) of the Communications Act. In an official communication from the United States to the Negotiating Group on Basic Telecommunications dated February 26, 1996, the United States specifically stated that: "There will be no limits on indirect foreign ownership of such licenses by foreign corporations (including government-owned corporations) . . ."<sup>3</sup> The United States also stated that "[t]here is a limit on direct ownership, but it is one of form not substance."<sup>4</sup>

Moreover, the Administration has consistently and publicly taken the position that U.S. WTO commitments are fully consistent with U.S. law. Before the Basic Telecom Agreement was finalized, in response to a written question from Sen. Bob Kerrey, the United States Trade Representative stated that:

Section 310(a) prohibits direct ownership of a radio license by a foreign government or its representative. Similarly, Section 310(b)(1) prohibits direct ownership of a radio license by an alien or its representative. Section (b)(2) contains the same prohibition for foreign corporations. Section 310(b)(3) prohibits direct ownership of more than 20% of a U.S. corporation holding a radio

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<sup>2</sup> See 47 U.S.C. § 310(b)(4) (imposing foreign ownership restrictions on licensees only "if the Commission finds that the public interest will be served by the refusal or revocation of such license").

<sup>3</sup> See WTO, Negotiating Group on Basic Telecommunications, Communication from the United States, Conditional Offer on Basic Telecommunications (Revision), S/NGBT/W/12/Add.3/Rev.1 (Feb. 26, 1996).

<sup>4</sup> *Id.*

license by a foreign government, an alien or a foreign corporation. All these prohibitions on direct ownership are contained in the U.S. offer.

Section 310(b)(4) explicitly allows indirect ownership by all three – a foreign government or its representative, an alien or its representative or a foreign corporation, unless the FCC determines that such ownership is not in the public interest. This is also reflected in the U.S. offer . . . .<sup>5</sup>

The Trade Representative also made clear, however, that the Commission would be able “to continue to apply these public interest criteria, as long as they do not distinguish among applicants on the basis of nationality or reciprocity, consistent with the obligations of the General Agreement on Trade in Services.”<sup>6</sup>

The repeated assurances of the U.S. Government that U.S. law allowed up to 100 percent indirect foreign ownership and that the United States would honor this commitment were critical to the successful conclusion of the Basic Telecom Agreement. Other Members of the WTO relied on these assurances in agreeing to open their markets to U.S. companies and to other foreign companies. If other Members of the WTO had not been assured that the world’s largest telecom market would be open to foreign investment, they most assuredly would not have opened their markets to U.S. and other foreign investment. Of course, as the Commission has stated:

An efficient and cost-effective global telecommunications marketplace is essential to an emerging information economy. The substantial resources required to build a global infrastructure are unlikely to come from regulated monopolies or multilateral international organizations. . . . we find that it serves the public interest to adopt rules . . . to complete our goal of opening the U.S. market to competition from foreign companies, in parallel with our major trading partners.<sup>7</sup>

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<sup>5</sup> 105 *Cong. Rec.* S1963 (1997).

<sup>6</sup> *Id.*

<sup>7</sup> *Foreign Participation Order* 12 FCC Rcd at 23893-'94.

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The Commission clearly understood both the benefits of liberalization and the imperatives of U.S. trade obligations when it adopted new rules governing foreign participation in the U.S. market in the wake of the WTO Agreement. The *Foreign Participation Order* is based on a sound reading of Section 310 of the Act and the Commission must not now adopt a contrary interpretation of Section 310 that would vitiate the clear terms of U.S. WTO commitments. Such an action would have ramifications far beyond telecommunications, and hurt the United States' ability to negotiate trade agreements for years to come.

**B. The Commission's *Foreign Participation Order*, Consistent With U.S. WTO Commitments, Precludes Examination of Foreign Market Conditions in the Absence of a Very High Risk to U.S. Competition.**

OFII also strongly supports the Commission's legal framework for reviewing foreign ownership and investment in U.S. telecommunications firms, as enunciated in the Commission's *Foreign Participation Order*. That order implements, and is consistent with, U.S. international obligations. It provides a clear path for the Commission's review of the pending applications. The Commission should not stray from that path by adding market access conditions not present in the U.S. WTO commitments.

To implement the U.S. WTO commitment that there would be no limitation on indirect foreign ownership, the Commission in the *Foreign Participation Order* removed its previous Effective Competitive Opportunities ("ECO") test for foreign carrier entry and replaced it with a "strong presumption that no competitive concerns are raised by . . . indirect foreign investment from WTO Member countries."<sup>8</sup> The presumption may be

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<sup>8</sup> *VoiceStream Wireless Corp. or Omnipoint Corp.*, FCC 00-53 at ¶ 19 (rel. Feb. 15, 2000) ("*VoiceStream/Omnipoint Order*").

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Consent to Transfer of Control )

**Comments of  
Communications Workers of America**

Debbie Goldman  
George Kohl  
501 Third St. N.W.  
Washington, D.C. 20001  
(202) 434-1194 (phone)  
(202) 434-1201 (fax)  
[debbie@cwa-union.org](mailto:debbie@cwa-union.org)

Dated: December 13, 2000

between DT and its affiliates. Important components of Germany's pro-competitive regulatory environment include independent regulatory authority, no foreign ownership restrictions, no structural market barriers, liberal licensing, cost-based interconnection rates, and unbundling requirements.<sup>26</sup> As a result, competition is thriving in the German telecommunications market, with a growing U.S. presence.

Moreover, Germany's competitive environment precludes its ability to inflate prices in Germany in order to price its U.S. wireless investment below cost. The infeasibility of such a cross-subsidy scheme explains why the Commission saw no need to impose conditions against improper cross-subsidization in its orders approving transactions involving Deutsche Telekom, France Telecom, and Sprint; MCI and BT; or AT&T and BT.<sup>27</sup> There is no competitive concern in this instant transaction, either.

**C. Commission Denial Based on DT's Greater-than-25% Foreign Ownership Would Undermine Progress in Opening Foreign Markets and Invite Retaliation Against U.S. Firms**

Commission denial of the joint Applicants' merger request solely on the basis of DT's greater-than-25% foreign ownership not only violates the Commission's rules, it also threatens to undermine market opening progress abroad. The European Commission has already made clear that U.S. failure to honor the WTO Basic Telecom Agreement's market opening provisions could

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<sup>26</sup> *Id.*, 11-13.

<sup>27</sup> *Id.*, 43.

result in retaliatory moves by other countries and efforts by the WTO to block U.S. companies from entering foreign markets. In a letter to members of the House and Senate Ways and Means, Commerce, and Appropriations committees, EC Washington Delegation Charge D'Affairs John Richardson wrote:

In an area where the U.S. has one of the most competitive industries in the world, it would also send a very negative signal to all those countries that are in the process of liberalizing their own market, only to see the U.S. market being closed to their companies. This initiative may have far-reaching effects on all services sectors, and our common efforts for further trade liberalization in the services negotiations in the WTO would face substantially increased opposition.<sup>28</sup>

Telecommunications is a global marketplace. Not only have foreign firms come to the U.S., but also virtually all major U.S. telecommunications companies have expanded abroad. The presence of U.S. firms in Germany alone is considerable. AOL is the second largest Internet Service Provider, and CompuServe is also a leading provider there. Cisco, IBM, Qwest, UUNet and other American companies provide Internet backbone, data transmission, and computer hardware in Germany. BellSouth is in a joint venture with KPN and is Germany's third largest wireless carrier. AT&T, WorldCom, Sprint, Qwest, Global TeleSystems, and Primus Telecommunications all provide long distance service in Germany. U.S. companies including COMSAT, GE American Communications, and SPACELINK have entered German satellite markets.<sup>29</sup>

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<sup>28</sup> Cited in *Communications Daily*, July 28, 2000, 5.

<sup>29</sup> VoiceStream/DT Application, 13-15.



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**REPLY IN SUPPORT OF**  
**APPLICATIONS FOR CONSENT TO TRANSFER OF CONTROL**

Cheryl A. Tritt  
Louis Gurman  
Doane F. Kiechel  
Christa M. Parker  
MORRISON & FOERSTER  
2000 Pennsylvania Ave., N.W.  
Washington, D.C. 20006  
(202) 887-1500

John T. Nakahata  
Karen L. Gulick  
Samuel L. Feder  
HARRIS, WILTSHIRE & GRANNIS LLP  
1200 Eighteenth St., N.W.  
Washington, D.C. 20036  
(202) 730-1300

*Counsel for VoiceStream Wireless Corp.*

William T. Lake  
John H. Harwood II  
William R. Richardson, Jr.  
Matthew A. Brill  
WILMER, CUTLER & PICKERING  
2445 M Street, N.W.  
Washington, D.C. 20037  
(202) 663-6000

Hans-Willi Hefekäuser  
Wolfgang Kopf  
Andreas Tegge  
DEUTSCHE TELEKOM, INC.  
1020 Nineteenth Street, N.W., Suite 850  
Washington, D.C. 20036  
(202) 452-5100

*Counsel for Deutsche Telekom AG*

Applicants are confident that this forthcoming agreement will address all potential concerns regarding national security and law enforcement.

**II. GRANT OF THE APPLICATIONS IS FULLY CONSISTENT WITH SECTION 310(a) OF THE ACT.**

Senator Hollings argues that DT's acquisition of VoiceStream is barred by section 310(a) of the Act, which prohibits a "foreign government or the representative thereof" from holding a common carrier radio license.<sup>85/</sup> His argument misconstrues section 310 and the relevant facts, and would reverse wholesale the United States' settled interpretation of section 310. Because DT is applying to obtain only *indirect* control over VoiceStream's and Powertel's licenses, section 310(a), which prohibits only *direct* control, does not apply. Senator Hollings's argument also is diametrically and avowedly contrary to the position of the U.S. government in its commitments to the WTO. If adopted, the Senator's argument would reverse the trend of market liberalization abroad, subject the United States to a complaint before the WTO, and gravely damage the United States' credibility in future trade negotiations. The Commission should construe section 310 in a manner that avoids such damaging results. Even if Senator Hollings's reading of the law were correct, DT is not a "representative" of the German government, making section 310(a) inapplicable in any event.

**A. Section 310(b)(4), Rather Than Section 310(a), Applies to DT's Application To Assume *Indirect* Control of Commission Licenses.**

Senator Hollings argues that section 310(a) "plainly prohibits" the proposed transactions, because, in his view, it is irrelevant whether a carrier more than 25-percent owned by a foreign government holds a license directly or indirectly.<sup>86/</sup> But Senator Hollings's argument ignores the

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<sup>85/</sup> 47 U.S.C. § 310(a).

<sup>86/</sup> Comments of Senator Hollings at 2-3.

plain language of section 310(b)(4), which expressly permits foreign governments to obtain indirect ownership of more than 25 percent of a common carrier radio license. *See* 47 U.S.C. § 310(b)(4) (a license can be held by any corporation that is more than 25 percent owned “by aliens, their representatives, or by a *foreign government or representative thereof*” if the Commission decides that allowing such a transaction would serve the public interest).<sup>87/</sup> Because DT will not directly hold any of the licenses and will not directly own the licensees, section 310(a) is irrelevant and section 310(b)(4) authorizes the Commission to approve the pending Applications.<sup>88/</sup>

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<sup>87/</sup> 47 U.S.C. § 310(b)(4) (emphasis added).

<sup>88/</sup> We respond briefly here to Senator Hollings’s argument that DT’s \$5 billion investment in VoiceStream exceeds the 25 percent benchmark of section 310(b)(4). *See* Letter from Ernest F. Hollings, Ranking Democrat, Committee on Commerce, Science and Transportation, U.S. Senate, to William E. Kennard, Chairman, FCC, IB Docket No. 00-187 (filed Nov. 30, 2000). In approving the transfer of control of certain licensees (the “CIVS entities”) from Cook Inlet Region, Inc. (“CIRI”) to VoiceStream, the International and Wireless Telecommunications Bureaus stated the Commission would examine the Senator’s argument on this issue in the instant proceeding. *See Applications of Cook Inlet Region, Inc., Transferor, and VoiceStream Wireless Corporation, Transferee, Order, DA 00-2397, WT Docket No. 00-207, n.33* (rel. December 13, 2000) (“*CIRI/VoiceStream Order*”). While this issue has no bearing on whether the proposed license transfers are in the public interest, DT’s \$5 billion investment in VoiceStream did not cause DT to acquire more than 25 percent of VoiceStream.

On September 6, 2000, DT purchased 3,906,250 shares of VoiceStream voting preferred stock, which is convertible at DT’s option to 31,250,000 shares of VoiceStream common stock in the event that DT’s merger with VoiceStream is terminated. As of September 6, 2000, DT’s stock constituted approximately a 1.79 percent voting interest and, on a fully diluted basis, an 11.49 percent equity interest in VoiceStream. *See CIRI/VoiceStream Order* at n.30. While it is well settled that options and other convertible instruments are not considered part of a company’s capital stock and, therefore, not relevant in a Section 310(b)(4) inquiry, *see, e.g., Application of Fox Television Stations, Inc., for Renewal of License of Station WNYW-TV, New York, New York, Second Memorandum Opinion and Order, 11 FCC Rcd 5714, 5720 ¶ 16* (1995) (“*Fox II*”), VoiceStream has consistently reported DT’s beneficial ownership interest on the substantially higher “as-converted” basis. Since VoiceStream’s recent acquisition of the CIVS entities, CIRI has become a stockholder of VoiceStream and, along with other VoiceStream stock that has been issued, all stockholder interests in VoiceStream, including DT’s, have been slightly diluted. Accordingly, DT’s voting interest is now 1.53 percent and its equity interest, on a fully diluted basis, is only 11.08 percent.

Senator Hollings's interpretation of section 310 also is flatly inconsistent with the United States' commitments to the WTO in the Basic Telecom Agreement,<sup>89/</sup> as the Chamber of Commerce, Securities Industry Association, and Organization for International Investment all point out.<sup>90/</sup> In its WTO commitments, the United States expressly agreed that, while it would maintain limited restrictions on direct ownership of a common carrier radio license, it would maintain none at all on *indirect* ownership.<sup>91/</sup> At the time the Agreement was negotiated, most

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Senator Hollings argues that, in assessing whether DT's \$5 billion investment in VoiceStream put VoiceStream's foreign ownership over the 25 percent threshold in section 310(b)(4), the Commission must compare the amount of DT's investment with VoiceStream's paid-in capital. That argument misunderstands the law. The Commission looks to paid-in capital rather than reported share holdings only when the facts presented in a particular case suggest that reported shares do not correspond to actual beneficial ownership. *See Application of Fox Television Stations, Inc., for Renewal of License of Station WNYW-TV, New York, New York*, Memorandum Opinion and Order, 10 FCC Rcd 8452, 8468, 8473-74 ¶¶ 36, 48 (1995) ("*Fox I*") (considering paid-in capital where a single foreign investor in the licensee's parent paid in more than 99 percent of the capital for 24 percent of the common stock and voting power of the corporation). No such facts have been presented here. Because VoiceStream is not a start-up company and relative interests in the company's capital stock are not difficult to ascertain, examining investor paid-in capital is simply inappropriate. *Compare Applications of Nextwave Personal Communications, Inc., for Various C-Block Broadband PCS Licenses*, Memorandum Opinion and Order, 12 FCC Rcd 2030, 2675 ¶ 98 (1997) (rejecting an alleged foreign ownership violation as speculative, "because no market value of NTI's stock yet exists"). VoiceStream is a public company whose market value is easily ascertainable from the public market. DT bargained for its shares against the backdrop of the public market for VoiceStream stock and the Boards of both companies stand accountable to their shareholders to warrant that the transaction represented fair value. Given the efficiency of the stock market as an indicator of market value, it makes no sense at all to argue that DT owns a higher percentage of VoiceStream's capital stock than the shares that it actually owns (or could own on conversion).

<sup>89/</sup> See Fourth Protocol to the General Agreement on Trade in Services, 36 I.L.M. 366 (1997) ("Basic Telecom Agreement").

<sup>90/</sup> See Comments of Chamber of Commerce at 3; Comments of SIA at 1; Comments of OFII at 2-5.

<sup>91/</sup> See United States of America, Schedule of Specific Commitments, Fourth Protocol to the General Agreement on Trade in Services, GATS/SC/90/Suppl.2, at 2 (Apr. 11, 1997) (Regarding limitations on market access for ownership of a common carrier radio license, the Schedule specifies: "Indirect: None." It then lists several restrictions on "[d]irect" ownership that track section 310.). See also Laura B. Sherman, "*Wildly Enthusiastic*" About the First Multilateral

European and other foreign carriers were wholly or partly government owned. Excluding those companies from the U.S. market, as Senator Hollings advocates, would have scuttled the Agreement by depriving those trading partners of most of the benefits of that Agreement. Ambassador Barshefsky put it bluntly: "There would be no agreement in Geneva if we were not in a position to let our trading partners know that they could invest, in an indirect manner, up to 100 percent in a common carrier license, provided, however, that the public interest test was met."<sup>92/</sup>

During the negotiations of the Basic Telecom Agreement, U.S. trading partners had specifically asked the U.S. Trade Representative ("USTR") to clarify the meaning of the U.S. offer on foreign ownership. USTR provided written assurances that the offer to permit indirect ownership extended even to government-owned corporations:

The United States offers up to 100% foreign indirect ownership of common carrier radio licenses — there will be *no limits on indirect ownership of such licenses by foreign governments (including government-owned corporations)* . . . . There is a limit on direct ownership, but it is *one of form not substance*. A foreign government (including a government-owned corporation) . . . can

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*Agreement on Trade in Telecommunications Services*, 51 Fed. Comm. L.J. 61, 97 (1998) ("Sherman") ("The U.S. offer limited *direct* ownership of a common carrier radio license [, but] . . . [o]ne hundred percent *indirect* ownership through U.S. holding companies is allowed.") (emphasis added).

<sup>92/</sup> *The WTO Telecom Agreement: Results and Next Steps: Hearing on Serial No. 105-11 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 32 (1997) (statement of Ambassador Charlene Barshefsky). As USTR recently observed in a letter to the Chairman Bliley, Congressman Tauzin and Congressman Oxley, in 1995 governments in 24 WTO member countries constituting 95 percent of world telecommunications revenues held majority stakes in their national telecommunications providers. Letter of Hon. Charlene Barshefsky, United States Trade Representative, to the Hon. Billy Tauzin, Chairman, House Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection, dated September 21, 2000. As USTR anticipated, increasing privatization has since lowered the number of majority state-owned providers to 16, and the figure will drop further when the proposed transactions are approved. *Id.*

directly own or control a U.S. holding company, which directly owns or control[s] a U.S. corporation holding a common carrier radio license.<sup>23/</sup>

After the Agreement was concluded, but before it took effect, USTR again confirmed — this time to Congress — that the final U.S. commitment allowed full indirect foreign ownership, including by government-owned companies:

The U.S. offer is to allow indirect foreign ownership, *up to 100%* under this provision [Section 310(b)(4)]. . . .

Section 310(b)(4) explicitly allows indirect ownership by all three — a foreign government or its representative, an alien or its representative or a foreign corporation, unless the FCC determines that such ownership is not in the public interest.<sup>24/</sup>

Far from violating the Communications Act, this commitment mirrors the structure and language of section 310. By its terms, section 310(a) prohibits a foreign government or its representative from being the holder or grantee of a Commission wireless license. In these applications, the holder or grantee — what the Commission has always referred to as the direct licensee — will not be the German government or DT, but will be U.S.-incorporated subsidiaries of VoiceStream (and, in turn, DT). The agreement in the Basic Telecom Agreement to maintain restrictions on direct ownership of licenses acknowledges the prohibition in section 310(a) on direct control by a foreign government or its representative and commits to extend that

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<sup>23/</sup> See Communication from the United States, World Trade Organization, S/NGBT/W/12/Add.3/Rev.1 (Feb. 26 1996) (emphasis added). See also Comments of OFII at 2-5.

<sup>24/</sup> 143 Cong. Rec. S1962-63 (daily ed. Mar. 5, 1997) (Written Response to Questions from Senator Lott and Written Response to Questions from Senator Bob Kerrey) (emphasis added). Assistant U.S. Trade Representative Richard Fisher recently confirmed that USTR continues to view section 310(a) as prohibiting only “*direct* ownership of certain categories of telecom licenses by a foreign government or its representative,” because “section 310(b)(4) authorizes *indirect* ownership of certain telecom licenses by a . . . foreign government to exceed 25 percent unless the FCC finds that the public interest will be served by the refusal or revocation of such license.” *Fisher Testimony* at 6 (emphasis added).

prohibition no further than the statute mandates. Section 310(b)(4), in turn, establishes the conditions under which a foreign government or its representative may own a U.S.-incorporated holding company that owns the holder or grantee of a Commission license. Section 310(b)(4) permits the Commission to prohibit indirect ownership interests in excess of 25 percent “if the Commission finds that the public interest will be served by the refusal or revocation of such license.”<sup>25/</sup> The commitment in the Basic Telecom Agreement to impose no restrictions on indirect foreign control of licenses (including by foreign governments or their representatives) recognizes the authority conferred on the Commission by section 310(b)(4) to permit such indirect control.

The United States’ interpretation of section 310 during the WTO negotiations thus considered both section 310(a) and section 310(b)(4), paying heed to “the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.”<sup>26/</sup> By contrast, Senator Hollings’s proposed interpretation — that a representative of a foreign government is absolutely barred from holding a license, whether directly or indirectly — would render superfluous the explicit reference in section 310(b)(4) to foreign governments.<sup>27/</sup> The

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<sup>25/</sup> 47 U.S.C. § 310(b)(4).

<sup>26/</sup> *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

<sup>27/</sup> The legislative history of section 310 confirms both the plain meaning of these provisions, and the error of reading section 310(a) in isolation from Section 310(b)(4). The Radio Act of 1927 limited direct foreign ownership of licensees, and did *not* limit indirect ownership of those licensees. See Pub. L. No. 69-632, § 12, 44 Stat. 1167. During consideration of the Communications Act of 1934, the Senate passed a bill that would have added a flat ban on indirect foreign ownership of more than 25 percent of a radio licensee. See S. 3285, 73d Cong. § 310 (1934). The House then struck this language and substituted an entirely new bill, which readopted without change the limitation on direct foreign ownership contained in the 1927 Act. S. 3285 (Reported in the House), 73d Cong. § 301 (1934). The conference report, whose version was enacted into law, adopted a middle ground. It added the Senate’s 25 percent limit on indirect ownership (which continued not to differentiate among aliens, foreign governments, and

Commission should not adopt an interpretation that violates a core canon of statutory construction. *See, e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n. 11 (1988) (courts should not interpret one provision of a statute in a manner that renders another provision superfluous); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) (same).<sup>28/</sup>

Because the U.S. obligations under the WTO Basic Telecom Agreement are clearly consistent with the plain meaning of section 310, the Commission must give effect to those obligations, contrary to Senator Hollings's contention.<sup>29/</sup> Indeed, even if there were any other

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foreign corporations), but "with the addition" of placing that question in each case within the new Commission's public interest mandate. H.R. Rep. No. 1918, 73d Cong. 2d Sess. at 48-49 (1934). And in doing so it combined all of the restrictions now embodied in sections 310(a) and 310(b) into a single unified section. *See* Pub. L. No. 73-416, §§ 310(a)(1)-(5), 48 Stat. 1086. That unification was altered only in 1974, but for wholly unrelated reasons. *See* S. Rep. No. 93-795 at 1-3 (1974).

<sup>28/</sup> Nor does Senator Hollings's reliance on pre-Basic Telecom Agreement statements regarding section 310 by Scott Blake Harris, former Chief of the International Bureau, advance the Senator's cause. *See* Comments of Senator Hollings at 2-3. As an initial matter, Harris made clear in the testimony and news commentary in question that he was stating his own views (rather than those of the Bureau or Commission), *Hearing on Telecommunications Policy Reform 104-216 Before the Senate Comm. on Commerce, Science, and Transportation*, S. Hrg. 104-216, 104th Cong. 223 (1995) (statement of Scott Blake Harris, Bureau Chief, International Bureau, FCC). In any event, his statements are consistent with the position ultimately adopted by USTR in the WTO process. Harris's statement that there is a "general ban on license ownership by foreign Governments," *id.* at 224, nowhere mentioned *indirect* control; Harris simply recognized the ban on *direct* ownership in section 310(a). Any suggestion in Harris's later *National Law Journal* article that section 310 bars indirect ownership of a radio license by a firm with majority foreign government ownership (as DT has now, but will not have following the mergers) does not reflect his considered judgment. *See Sen. Hollings Calls on Kennard To Address Foreign Ownership Issue*, TR Daily, July 13, 2000.

<sup>29/</sup> *See* Comments of Senator Hollings at 9-10. In fact, Senator Hollings's contrary position is simply a recycling of one that he advanced on the Senate floor less than a month after the February 1997 execution of the Basic Telecom Agreement, and that was overwhelmingly rejected by the Senate itself at that time. During the debate on S.J. Res. 5, which waived certain provisions of the Trade Act relating to the nomination of Ambassador Barshefsky, Senator Hollings proposed an amendment to that joint resolution that would have required Congress to approve any international trade agreement which would "in effect amend or repeal statutory

plausible reading of section 310, the U.S. Supreme Court has often emphasized that “[a]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . .”<sup>100/</sup> Because section 310 and the Basic Telecom Agreement can be read as operating consistently rather than in conflict, the United States is obliged to honor that agreement.<sup>101/</sup> Needless to say, the Commission is not free to take any action in contravention of the United States’ binding foreign policy commitments.<sup>102/</sup>

The consistency between the WTO Basic Telecom Agreement and section 310 also made Senate ratification unnecessary for the agreement to bind the United States and its agencies. To the extent that Senator Hollings suggests that the Agreement is invalid in the absence of ratification even if it is consistent with section 310, he is clearly wrong about the legal force of

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law.” In proposing this amendment, Senator Hollings advanced the argument that the Basic Telecom Agreement “just gave away 100 percent in violation of 310(a).” 143 Cong. Rec. S1945-49 (daily ed. Mar. 5, 1997) (statement of Sen. Hollings). In response, Senator McCain and others vigorously opposed this amendment. They not only disagreed with Senator Hollings’s view, but also endorsed USTR’s position that “Section 310(b)(4) explicitly allows indirect ownership by all three — a foreign government or its representative, an alien or its representative or a foreign corporation, unless the FCC determines that such ownership is not in the public interest.” *Id.* at S1963. After extensive debate, Senator Hollings’s proposed amendment was tabled by the overwhelming vote of 84-16. *Id.* at S1970. Given the Senate’s rejection of Senator Hollings’s argument based on the plain language of section 310(b)(4), it would be clear error for the Commission to accept his resubmission of the argument here.

<sup>100/</sup> *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); see also *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963) (construing the National Labor Relations Act in a manner consistent with State Department regulations to avoid foreign policy implications, where to do otherwise would have been contrary “to a well-established rule of international law”).

<sup>101/</sup> See Vienna Convention on the Law of Treaties, rt. 26 (1969), entered into force Jan. 27, 1980, 1155 U.N.T.S. 1331 (embodying the principle, *pacta sunt servanda*: an international agreement is binding on the parties and must be performed by them in good faith); Restatement (Third) of the Law of Foreign Relations of the United States § 111(1) (“international law and international agreements of the United States are law of the United States”).

<sup>102/</sup> See *Humane Soc. of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) (a federal agency is not free to violate the terms of a treaty or a law that has the force of a treaty).

such an agreement. The General Agreement on Trade in Services (“GATS”)<sup>103/</sup> and the U.S. schedule of commitments for basic telecommunications thereunder constitute a congressional-executive agreement — the most frequently used form of international agreement.<sup>104/</sup> The Supreme Court has recognized that Senate ratification of such agreements is unnecessary where, as here, “the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to ‘invite’ ‘measures on independent presidential responsibility.’”<sup>105/</sup> Congress provided the requisite executive authority by enacting the Uruguay Round Agreements Act (“URAA”), in which Congress both expressly approved of the GATS and authorized USTR to conduct further negotiations on liberalization of trade in basic telecommunications services.<sup>106/</sup>

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<sup>103/</sup> See General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167 (1994).

<sup>104/</sup> See Laurence H. Tribe, *American Constitutional Law* 652 (3d ed. 2000) (“[S]ince 1934, the treaty form has been largely abandoned for trade agreements, even for an agreement as far-reaching as the one establishing the World Trade Organization.”) (citations omitted).

<sup>105/</sup> *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (citations omitted) (finding that Congress implicitly approved the practice of claims settlement by executive agreement, and that the President’s suspension of claims against Iran through the Algiers Accords was binding as a matter of U.S. law). See also *Weinberger v. Rossi*, 456 U.S. 25, 30 n.6 (1982) (recognizing that “the President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause of the Constitution”); Restatement (Third) of the Foreign Relations Law of the United States § 303(2) (1987) (“the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution”); Tribe at 652 (Congressional-executive agreements have “come to be treated as the equivalent of the treaty form with respect to supremacy over state or prior federal law.”); Louis Henkin, *Foreign Affairs and the United States Constitution* 217 (2d ed. 1996) (A congressional-executive agreement “[l]ike a treaty, . . . is the law of the land, superseding inconsistent state laws, as well as inconsistent provisions in earlier treaties, in other international agreements, or in acts of Congress.”).

<sup>106/</sup> See Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994) (“URAA”), codified at 19 U.S.C. §§ 3501-3624 (approving and implementing the Uruguay Round Agreements); *id.* § 3555(b) (outlining the U.S. objective in the negotiations: “to obtain the

Moreover, Congress adopted the URAA against the backdrop of the authoritative Statement of Administrative Action regarding the WTO negotiations, which correctly recognized that there would be no need for further implementation of the results of the negotiations, because the U.S. commitments were consistent with existing law.<sup>107/</sup>

For all these reasons, Senator Hollings is wrong that the International Bureau's decision in *Telecom Finland* is not good law.<sup>108/</sup> To the contrary, as shown above, the Bureau's conclusion that section 310(b)(4) allows a foreign-government-controlled carrier to hold indirectly up to 100 percent of a radio license not only is consistent with section 310, but is *required* under the WTO Basic Telecom Agreement.<sup>109/</sup> The Commission should ratify that holding here.<sup>110/</sup>

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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”).

<sup>107/</sup> See *The Uruguay Round Agreements Act, Statement of Administration Action*, H. Doc. 103—316, Vol. 1, at 307-08 (1994) (describing the negotiations on basic telecommunications to implement the GATS, and the Administration's plan to “consult with Congress” but not to seek further legislation before deciding whether the results of the negotiations are satisfactory or whether to reject them by taking an MFN exemption to the GATS for the basic telecommunications sector). See also Sherman at 98 (“The United States considered the WTO Basic Telecom Agreement as an extension of the WTO Agreement, the conclusion of which was foreseen by Congress when it approved the WTO Agreement. The United States also did not need congressional action to implement its scheduled commitments, as these commitments were consistent with existing law.”) (citing *inter alia*, 19 U.S.C. § 3555(b) and the *Foreign Participation Order*).

<sup>108/</sup> See Comments of Senator Hollings at 9 (citing *Telecom Finland, Ltd.*, Order, 12 FCC Rcd 17648, 17651 ¶ 7 (1997) (“*Telecom Finland*”).

<sup>109/</sup> Whether the International Bureau exceeded its delegated authority in the *Telecom Finland* decision, as Senator Hollings asserts, *id.*, is beside the point. The Bureau's decision is persuasive precedent that the Commission may consider in reaching its decision.

<sup>110/</sup> The Commission's decisions in *Orion* and *Intelsat* do not compel a contrary result. In *Orion*, the Commission stated in a footnote that section 310(a) prohibited *de facto* or *de jure* control of the license by a foreign government or its representative, a statement repeated in

As many commenters appropriately emphasize, the practical consequences of adopting Senator Hollings's reading of section 310 would be profoundly negative.<sup>111/</sup> Such an interpretation would categorically deny American consumers the undisputed procompetitive benefits associated with the transactions proposed in the Applications, including a greater choice of providers, better and more innovative wireless service offerings, and lower prices.<sup>112/</sup> And the consequences would extend far beyond U.S. shores. The United States has been one of the leading proponents — and one of the leading beneficiaries — of the Basic Telecom Agreement.<sup>113/</sup> Indeed, the Commission has recognized that, “[a]s a result of the WTO Basic Telecom Agreement, 44 WTO Members (representing 99 percent of WTO Members’ total basic telecommunications services revenues) will permit foreign [including U.S.] ownership or control of all telecommunications services and facilities . . . .”<sup>114/</sup> Abandonment of the open-entry standard adopted in the *Foreign Participation Order* would risk irreparable harm to this important market-liberalizing process. In particular, as several commenters have observed,

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*Intelsat*. See *Orion Satellite Corp.*, Memorandum Opinion, Order and Authorization, 5 FCC Rcd 4937, 4944 n.26 (1990) (“*Orion*”); *The Applications of Intelsat LLC*, Memorandum Opinion, Order and Authorization, FCC 00-287 ¶ 48 (rel. Aug. 8, 2000) (“*Intelsat*”). In both cases, the Commission found that there was no control by a foreign government, so its footnote reference to *de jure* and *de facto* control under section 310(a) was mere dicta. Moreover, the licenses at issue were not held indirectly, so the scope of section 310(b)(4) was not at issue. See *Orion*, 5 FCC Rcd at 4939 ¶¶ 18, 20; *Intelsat* at ¶ 50.

<sup>111/</sup> See Comments of OFII at 5; Comments of CWA at 11-12; Comments of Chamber of Commerce at 3-6; Comments of IIE at 1; Comments of SIA at 1.

<sup>112/</sup> See *supra* Part I.A.

<sup>113/</sup> *Basic Telecom Agreement*, 36 I.L.M. 366. See Office of the United States Trade Representative, *2000 Trade Policy Agenda and 1999 Annual Report*, Annex 1, at 111 (“Through this agreement, the United States has successfully exported a model based on the U.S. experience of telecommunications liberalization, focused on unimpeded market access, fair rules, and effective enforcement of key regulatory principles.”).

<sup>114/</sup> *Foreign Participation Order*, 12 FCC Rcd at 23891 ¶ 27.

closing the U.S. market to foreign corporations with partial governmental ownership in excess of 25 percent would violate the Basic Telecom Agreement, invite retaliation, and undermine the incentive for other WTO members to honor their own market-access and market-opening commitments.<sup>115/</sup>

In addition to harming consumers and curtailing opportunities for foreign acquisitions by American businesses, the perception that the United States has abandoned its WTO commitments would undermine USTR's standing to insist that other countries lower trade barriers, such as the high interconnection fees charged in Japan to U.S. telecommunications carriers.<sup>116/</sup> Reneging on the commitments of the United States to its closest trading partners also would destroy this country's credibility in future international negotiations. As one commenter explained,

[w]hen the United States makes commitments in international trade agreements, it puts its national credibility on the line. Any breaches of U.S. commitments therefore affect not just present agreements, but the potential for reaching favorable resolutions to future trade issues. If the Commission were to interpret Section 310 of the Communications Act in a manner inconsistent with the U.S. WTO commitments, it could in a single stroke cripple U.S. trade policy.<sup>117/</sup>

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<sup>115/</sup> See Letter from Pascal Lamy, Member of the European Commission, to Ambassador Charlene Barshefsky, USTR, dated July 24, 2000 (referring to legislation sponsored by Senator Hollings, which would have eliminated open-entry standard, as "clearly violat[ing] US commitments in the WTO"); Comments of CWA at 11-12 (denying applications would invite retaliation against U.S. businesses); Comments of Chamber of Commerce at 3-6 (same); Comments of OFII at 5 (same); Comments of IIE at 1 (same).

<sup>116/</sup> See Comments of Chamber of Commerce at 6.

<sup>117/</sup> See Comments of OFII at 2; see also Comments of SIA at 1.

**B. Section 310(a) Does Not Apply in Any Event Because DT Is Not a “Foreign Government or the Representative Thereof.”**

Senator Hollings’s argument fails for a second key reason: DT is not a representative of the German government, and neither the German government nor any representative thereof will exercise *de jure* or *de facto* control over the licensee.<sup>118/</sup> The Commission has defined *de jure* control as control of more than 50 percent of a corporation’s shares.<sup>119/</sup> The German government currently owns 43.2 percent of DT’s shares and KfW, the German public bank, owns an additional 16.8 percent (for a total governmental stake of 60 percent).<sup>120/</sup> As a result of DT’s mergers with VoiceStream and Powertel (taking into account France Telecom’s recent sale of its DT shares to KfW), the German government’s interest (held directly or through KfW) will be reduced to approximately 45 percent.<sup>121/</sup> Therefore, the German government (either separately, or together with KfW) will lack *de jure* control over DT — and, in turn, over DT’s licensee subsidiaries — following the Commission’s approval of the proposed transactions.

Senator Hollings’s assertion that the Commission should consider the German government’s *premerger* interest, rather than its *postmerger* interest, is both logically unsound and at odds with the Commission’s precedents. Contrary to the Senator’s assertion that

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<sup>118/</sup> See *Intelsat* at ¶ 48 (applying control test); *Starsys Global Positioning Inc.*, Declaratory Ruling, 10 FCC Rcd 9392, 9393 ¶ 9 (1995) (“*Starsys*”) (same).

<sup>119/</sup> *Starsys* at 9393 ¶ 9.

<sup>120/</sup> DT reported in the Applications that KfW’s interest was 15 percent. As reported in DT’s SEC Form 20-F, in 1998 France Telecom purchased from KfW what amounts today to a 1.8 percent stake in DT. On December 15, 2000, France Telecom decided unilaterally to exercise its option to sell that stake in DT back to KfW. As a result of that transaction, KfW’s ownership interest will increase to 16.8 percent, and the overall *premerger* governmental interest in DT will increase to 60 percent.

<sup>121/</sup> This is Applicants’ current estimate and is subject to certain adjustment mechanisms set out in the Agreement and Plan of Merger Between Deutsche Telekom AG and VoiceStream Wireless Corporation, dated July 23, 2000.