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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

In the Matter of )  
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VOICESTREAM WIRELESS )  
CORPORATION, )  
 )  
Transferor, )  
 )  
and )  
 )  
DEUTSCHE TELEKOM AG, )  
 )  
Transferee, )  
 )  
Application for Consent to Transfer of Control. )

No. \_\_\_\_\_

APPLICATION FOR TRANSFER OF CONTROL  
AND PETITION FOR DECLARATORY RULING

Cheryl A. Tritt  
Louis Gurman  
Doane F. Kiechel  
Nina A. Mrose  
Christa M. Parker  
MORRISON & FOERSTER  
2000 Pennsylvania Ave., N.W.  
Washington, D.C. 20006

William T. Lake  
John H. Harwood II  
William R. Richardson, Jr.  
Matthew A. Brill  
Julie A. Veach  
WILMER, CUTLER & PICKERING  
2445 M Street, N.W.  
Washington, D.C. 20037

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

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

David A. Miller  
Brian T. O'Connor  
Robert A. Calaff  
VOICESTREAM WIRELESS CORP.  
1300 Pennsylvania Ave., N.W., Suite 700  
Washington, D.C. 20004

*Counsel for Deutsche Telekom AG*

*Counsel for VoiceStream Wireless Corp.*

In sum, the net impact of the proposed merger on competition will be overwhelmingly positive. Therefore, this transaction easily satisfies the standard adopted in *Bell Atlantic-NYNEX* and applied in subsequent orders.<sup>28/</sup>

**B. The Merger Is Consistent with Section 310(b)(4), Because DT's Foreign Ownership Poses No Threat to Competition, and Any Concerns Regarding National Security or Law Enforcement Will Be Addressed in Cooperation with Executive Branch Officials.**

Because DT will acquire 100 percent of VoiceStream through the merger — and therefore will exert *indirect* control over VoiceStream's licensee subsidiaries — the Commission must determine under section 310(b)(4) of the Act that the merger is in the public interest.<sup>29/</sup> In addition, the applicants seek a declaratory ruling that the transfer to DT of VoiceStream's noncontrolling interests in other wireless carriers (*see supra* n.5) also is in the public interest. In similar proceedings, the Commission has said that it is “guided . . . by the U.S. Government's commitment under the World Trade Organization (“WTO”) Basic Telecommunications Agreement, which seeks to promote global markets for telecommunications so that consumers may enjoy the benefits of competition.”<sup>100/</sup> The Commission accordingly adheres to the principles that “additional foreign investment can promote competition in the U.S. market,” and that “the public interest will be served by permitting more open investment by entities from WTO Member countries in U.S. common carrier wireless licensees.”<sup>101/</sup> Based on these principles, the Commission has adopted a “strong presumption that no competitive concerns are

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<sup>28/</sup> See *supra* n.57.

<sup>29/</sup> See 47 U.S.C. § 310(b)(4).

<sup>100/</sup> *VoiceStream-Aerial* ¶ 9; *Vodafone AirTouch-Bell Atlantic*, 12 FCC Rcd at 20008-09 ¶ 13.

<sup>101/</sup> *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23939, ¶ 111 (1997) (“*Foreign Participation Order*”).

raised by . . . indirect foreign investment[s] from WTO Member countries."<sup>102/</sup> As Chairman Kennard testified recently before the Congress, pursuant to this presumption the Commission will approve a merger between a U.S. carrier and one based in a WTO country unless "the proposed merger poses a *very high risk to competition* [in the United States], or raises national security or law enforcement concerns."<sup>103/</sup>

That strong presumption applies here, because DT's home country, Germany, is a WTO member. And the presumption cannot be rebutted in light of the overwhelmingly procompetitive nature of the transaction and the utter absence of anticompetitive effects. To the extent that the Executive Branch raises concerns relating to national security, law enforcement, or other matters, the parties will address those concerns in an agreement similar to the one adopted in *VoiceStream-Omnipoint* and *VoiceStream-Aerial*.

**1. There Is Nothing To Rebut the Strong Presumption in Favor of DT's Acquisition of VoiceStream.**

The Commission adopted the strong presumption in favor of open entry into the U.S. wireless market for carriers in WTO Member countries because "there is no possibility of leveraging foreign bottlenecks in order to create advantages for some competitors in U.S. [wireless] markets."<sup>104/</sup> Consistent with that analysis, the Commission easily concluded that

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<sup>102/</sup> *VoiceStream-Omnipoint* ¶ 16.

<sup>103/</sup> *Foreign Government Ownership of American Telecommunications Companies, Hearing before House Commerce Committee, Subcommittee on Telecommunications, Trade and Consumer Protection* (Sept. 7, 2000) (statement of William E. Kennard, Chairman, FCC) (emphasis added).

<sup>104/</sup> *Foreign Participation Order*, 12 FCC Red at 23940 ¶ 112.

Vodafone's acquisition of 100 percent of AirTouch was in the public interest,<sup>105/</sup> as it did with respect to VoiceStream's merger with partially foreign-owned Omnipoint.<sup>106/</sup>

Here, too, the strong presumption in favor of foreign investment cannot be rebutted. Far from diminishing competition in the United States, DT's investment will enhance competition significantly. *See supra* Part III.A.2. Indeed, this transaction provides a textbook example of the need for, and advantages of, an open telecommunications market. Whereas VoiceStream's GSM-based network meshes perfectly with DT's network, the fact that most U.S. wireless carriers have invested in networks based on the CDMA and TDMA standards would make an alliance with a domestic company a strategic mismatch for VoiceStream. Therefore, VoiceStream's transaction with a non-U.S. carrier such as DT not only makes sense for VoiceStream and its subscribers, but it might represent one of the *only* means for VoiceStream to attain the resources and scale it needs to compete effectively with the larger mobile telephony operators.

Nor is DT's partial government ownership a valid basis for rebutting the strong presumption in favor of approval.<sup>107/</sup> When the United States negotiated the WTO Basic Agreement on Telecommunications, it could have taken an exception for foreign-government

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<sup>105/</sup> *See Vodafone-AirTouch* ¶ 9 ("Because the United Kingdom is a Member of the World Trade Organization (WTO), under the Commission's *Foreign Participation Order*, we presume that the public interest would be served by authorizing, under section 310(b)(4), common carrier radio licenses held by entities indirectly owned by Vodafone and citizens of the United Kingdom. No party has raised an argument rebutting this presumption, as we are aware of no other reason to rebut the presumption here.") .

<sup>106/</sup> *See VoiceStream-Omnipoint* ¶ 19 ("Under the *Foreign Participation Order*, VWHC is entitled to a strong presumption that no competitive concerns are raised by Hutchison's increased investment to 30.6 percent of VWHC's stock. We see no reason to rebut that presumption.") .

<sup>107/</sup> *See Letter from Senator Ernest F. Hollings to FCC Chairman William Kennard of July 12, 2000.*

ownership to the open-market standard. But it did not.<sup>108/</sup> Accordingly, in adopting the strong presumption in favor of open entry, the Commission drew no distinction between investment by a firm with foreign-government ownership and any other foreign investment.<sup>109/</sup> That presumption therefore applies with full force in this proceeding.

In any event, as shown below, DT's remaining government ownership — which the merger with VoiceStream will substantially dilute, from 58.2 percent to 45.7 percent — will not have any effect on the U.S. mobile telephony market.<sup>110/</sup> DT is a private corporation subject to the same German laws as those applicable to other corporations in Germany, without distinction. The German government does not provide any state assistance or other special treatment to DT. Nor does DT enjoy superior access to capital. Indeed, it would be unlawful for the government to direct subsidies to DT. The structure of the government's role as shareholder in DT provides additional protection against any theoretical risk of cross-subsidization. DT in turn does not have any incentive to charge inflated rates for its local facilities in order to cross-subsidize predatory wireless rates in the United States.

**The German Government Does Not and Cannot Subsidize DT's Services.** DT is a private corporation subject to applicable German federal law such as the German Stock Corporation Act and German tax laws. Thus, DT has the same rights and responsibilities as any other private enterprise in Germany. DT does not receive any assistance from the German

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<sup>108/</sup> See *Fourth Protocol to the General Agreement on Trade in Services*, 36 I.L.M. 354, 366 (1997).

<sup>109/</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23939-40 ¶¶ 111-12; see also *Telecom Finland*, 12 FCC Rcd at 17650 ¶ 7 (expressly approving of indirect holdings by foreign governments).

<sup>110/</sup> After completion of the Powertel merger (in addition to the VoiceStream merger), the German government's ownership interest would be approximately 44%.

government, whether in the form of direct subsidies, preferential tax treatment, or any other special benefit. Even if the government wished to direct subsidies to DT, such conduct would violate European Union law prohibiting state aids that distort competition.<sup>111/</sup>

In any event, the government's noninvolvement in the management of DT — including its noninvolvement as a shareholder in establishing rates for DT's services — effectively precludes it from providing subsidies. The German government does not confer on DT any special advantages, such as subsidies, tax preferences, or licensing benefits.<sup>112/</sup> Indeed, the recent third-generation spectrum auction in Germany is telling: RegTP's choice of an auction, rather than a "beauty contest," ensured that DT received no favoritism. DT participated on the same terms as all other bidders, and was thereby required to pay as much as its competitors — nearly \$7.7 billion — for new spectrum.<sup>113/</sup> DT derived no benefit from its partial government ownership.

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<sup>111/</sup> See European Commission Treaty art. 87 (prohibiting state aid that would distort competition); European Commission, Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector, Official Journal No. C 233, at 2 (Sept. 6, 1991)

<sup>112/</sup> See, e.g., Deutsche Telekom AG, Articles of Incorporation (Exhibit A). While some critics of DT's proposed acquisition of VoiceStream have noted that a substantial minority of DT's employees are former civil servants, see Peter S. Goodman, *Takeover by German Firm Tests Free Trade*, Washington Post, Sept. 7, 2000, this byproduct of DT's past governmental control is a burden, not a benefit. When DT became a private corporation more than five years ago, its civil service employees were granted the same employment rights vis-a-vis DT that they had with the Federal Republic of Germany. The obligation to maintain these employees' former level of benefits imposes costs that DT's competitors need not bear. By law, the Federal Republic of Germany shifted all responsibility to steer and monitor the civil servants to DT. Moreover, the fact that DT's employees include civil servants has nothing to do with the *present* ownership of the Federal Republic of Germany's stake in DT: Even if the German government had divested 100 percent of its holdings in DT by now, that would not alter DT's obligations to its employees.

<sup>113/</sup> See, e.g., *German 3G Spectrum Auction Tops U.K. Bidding Total by \$10 Billion*, Telecommunications Reports Daily, Aug. 17, 2000.

Far from conferring special benefits on DT, the German government possesses the same rights as other shareholders. In particular, it does not have special voting rights (e.g., a “golden share”). Therefore, the German government cannot bring about important decisions such as capital increases or decreases or changes to the articles of association without the support of other shareholders.<sup>114/</sup> While the German government and KfW, based on their shareholdings, could select all 10 shareholder-appointed members of DT’s 20- member Supervisory board, each has appointed only one member of that Board.<sup>115/</sup> Thus, because the Supervisory board must approve certain transactions, including major structural changes, the German government and its representatives could not bring about such changes unilaterally.<sup>116/</sup> In addition, the government has always cast its votes in line with the majority of other shareholders and has never opposed a proposal of the Management Board or Supervisory Board. Moreover, there is no government representative on the Management Board, which oversees the day to day operations of DT.<sup>117/</sup> Finally, the German government’s hands-off approach is documented in reports required under German law, which are issued by DT’s Management Board on a regular basis and reviewed and confirmed by independent auditors.

**DT Does Not Enjoy Preferential Access to Capital.** The German government also could not give DT preferential access to capital without knocking down the wall it has erected between its role as investor in DT, on the one hand, and as sovereign, on the other. Thus, since

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<sup>114/</sup> An interest of 25 percent plus one share is sufficient under German corporate law to veto such changes. See German Stock Corporation Act § 179.

<sup>115/</sup> See Deutsche Telekom AG, Articles of Incorporation § 10; see also Deutsche Telekom AG, SEC Form 20-F, at 115-16 (filed Apr. 19, 2000) (discussing role of Supervisory Board and listing members).

<sup>116/</sup> See Deutsche Telekom AG, Articles of Incorporation § 9.

<sup>117/</sup> See Deutsche Telekom AG, SEC Form 20-F at 114-15 (discussing Management Board).

January 2, 1995, the date of DT's registration in the Commercial Register as a private corporation, the government has not provided — and by law may not provide — any guarantee of the debts or liabilities of DT.<sup>118/</sup>

The difference between the bond ratings of DT and those of the German government is telling: Whereas the major credit-rating agencies have given German government bonds their highest rating (AAA), those agencies rate DT's bonds at a lower level (Moody's: Aa2; Standard & Poors: AA-) and have put DT on their "credit watch" list, signaling the possibility of an impending downgrade.<sup>119/</sup> Moreover, DT's rating is the same as that of a number of large U.S. carriers, such as BellSouth and Verizon, and *lower* than that of British Telecommunications Plc ("BT") (Moody's: Aa1; Standard & Poors: AA+).<sup>120/</sup> If DT enjoyed preferential access to capital as a result of the German government's ownership stake, DT's bond rating presumably would be comparable to that of the German government, or at least significantly higher than the bond ratings of fully private carriers.

#### **The Competitive Marketplace in Germany and the Regulatory Framework**

**Preclude Cross-Subsidization Between DT and Its Affiliates.** DT's position in the German market, and in particular its control of local facilities there, is irrelevant to this merger

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<sup>118/</sup> Any debt incurred before DT was privatized is guaranteed by the German government, because at that time DT was a government entity. To remove that guarantee would require the consent of the holders of the debt instruments. In the five years since privatization, DT already has paid off about half of the debt that was outstanding at the time it was privatized; the remaining debt will be paid off by 2004 under DT's scheduled payments.

<sup>119/</sup> See *Mergent Bond Record*, at 184 July 2000; Claudia Barros Semerei, *S&P Sees Gloomy Outlook for Telecom Operators*, *Capital Markets Report*, May 26, 2000; *AFX Top Stories-Afternoon*, *AFX News*, Aug. 16, 2000; *Credit Profile, Deutsche Telekom*, Bloomberg L.P., Aug. 28, 2000.

<sup>120/</sup> See *Credit Profile, Deutsche Telekom, BellSouth Telecommunications, British Telecom Plc, Verizon Corp.*, Bloomberg L.P., Aug. 18, 2000.

proceeding. As the Commission has recognized, a foreign carrier with a dominant position in its home market for local exchange services would not be able to “leverag[e] foreign bottlenecks” in U.S. wireless markets.<sup>121/</sup> If DT sought improperly to cross-subsidize VoiceStream’s operations by charging inflated local service rates in Germany, it would be unable to do so for several reasons. The German regulatory authority regulates DT’s local rates and ensures that they are based on DT’s costs.<sup>122/</sup> And DT would not be able to shift costs from VoiceStream to DT in an effort to justify local rate increases, because the companies — unlike incumbent LECs in the U.S. and their in-market wireless affiliates — will not have shared facilities and personnel.<sup>123/</sup> Even assuming for the sake of argument that such cost-shifting were nevertheless possible — and that the German government would cause DT to charge German consumers inflated rates so that VoiceStream could charge American consumers below-cost rates — accounting and other

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<sup>121/</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23940 ¶ 112. The Commission has recognized this point in other contexts, as well. The BOCs are forbidden to provide long distance in the “in-region” markets where they have bottleneck local exchange facilities, because the sharing of local and long-distance facilities might create opportunities for anticompetitive conduct; but the BOCs may provide long distance services “out of region,” where they do not own bottleneck facilities and thus have no real opportunity to engage in discriminatory conduct. See 47 U.S.C. § 271. For the same reasons, the Commission’s safeguards that apply to BOCs’ provision of wireless services apply only within the BOCs’ local service regions. See *Amendment of the Commission’s Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, 12 FCC Rcd 15668, 15688-89 ¶¶ 27-28, 39 (1997) (“*CMRS Safeguards Order*”).

<sup>122/</sup> See German Telecommunications Act §§ 24, 25, 27, 29. DT is subject to strict sector-specific regulation of wholesale and retail tariffs. Tariffs must reflect the costs of efficient service provision based on the long-run incremental costs of providing a particular service, and these tariffs are subject to thorough scrutiny by RegTP. See *id.* § 24; *Telekommunikations-Entgeltregulierungsverordnung* (Telecommunications Rates Regulation) § 3. In particular, RegTP makes certain that these tariffs contain no surcharges that result from the provider’s dominant position, or discounts that prejudice other companies’ competitive opportunities in a telecommunications market sector. See German Telecommunications Act § 24.

<sup>123/</sup> See *CMRS Safeguards Order*, 12 FCC Rcd at 15688-89 ¶¶ 27-28, 39 (describing how LEC control of bottleneck facilities could permit improper cost shifting where the LEC provides CMRS in the same geographic market, but not otherwise).

safeguards imposed by the German regulatory authority would enable German, E.U., and U.S. regulators to detect and respond to any anticompetitive behavior.<sup>124/</sup>

Similarly, even if DT could somehow charge inflated rates in order to price VoiceStream's wireless services below their cost, competition in Germany would make such predatory pricing self-defeating. As discussed above, as a result of broad-based new entry by U.S. and other companies, the German telecommunications market is now subject to fierce price competition, with prices being driven toward competitive levels. Indeed, the extent of competitive entry indicates that entrants do not fear cross-subsidization in Germany, and it is even less probable that DT could cross-subsidize outside its home market. Inflating DT's local rates in Germany would cause DT to lose market share to ever-stronger local service competitors, and the lost revenue in its principal line of business would more than offset any gains in the U.S. wireless market.<sup>125/</sup>

Not only would competition in Germany make any cross-subsidy scheme infeasible, but so too would the strength of wireless competitors in the United States. Any of the well-heeled wireless incumbents in the U.S. market could incur losses in anticipation of future profits, just as DT theoretically could. And even if DT could somehow drive VoiceStream's much larger competitors from the market, their spectrum and facilities would remain and new entrants would

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<sup>124/</sup> See German Telecommunications Act, §14 (requiring transparent financial relations between and among services for dominant providers); §§ 29-30 (regulating rates); § 33 (preventing abuse of dominant position); § 35 (requiring dominant providers to grant competitive access to their networks). See also Christoph Engel, *The Path to Competition for Telecommunications in Germany*, in *COMPETITION AND REGULATION IN TELECOMMUNICATIONS: EXAMINING GERMANY AND AMERICA* (J. Gregory Sidak, et al. Kluwer Academic Press 2000) (describing German safeguards against cross-subsidization).

<sup>125/</sup> Moreover, under German corporate law, DT's executives and Board members are bound by a duty to preserve the long-term profitability of the company rather than by any allegiance to the German government. See German Stock Corporation Act §§ 76, 93. This fiduciary duty further militates against any counterproductive cross-subsidy scheme.

appear as soon as VoiceStream raised prices to recoup earlier losses.<sup>126/</sup> VoiceStream could not obtain spectrum owned by any failed competitor without the Commission's consent.

All these reasons explain why the Commission saw no need to impose any conditions to guard 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>127/</sup> There is similarly no warrant for any such conditions here.

**2. Any Executive Branch Concerns Will Be Addressed Through Cooperation with the Relevant Agencies and the Adoption of Appropriate Safeguards.**

In addition to competition-related issues, the Commission's analysis under the public interest standard includes consideration of potential threats to national security, law enforcement, foreign policy, and trade.<sup>128/</sup> The Commission consults "with the appropriate Executive Branch agencies regarding those concerns."<sup>129/</sup> The applicants already have begun discussions with Executive Branch officials. As in the Commission's prior merger-review proceedings involving VoiceStream, the applicants are receptive to agreements with the Department of Justice and

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<sup>126/</sup> See generally *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-26 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986); Robert H. Bork, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 144-59 (Free Press, rev. ed. 1993); Richard A. Posner, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 184-96 (University of Chicago Press 1976).

<sup>127/</sup> See *Sprint Corp.*, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1866-72 ¶¶ 96-133 (1996) (imposing various conditions but none relating to cross-subsidization of domestic wireless operations); *The Merger of MCI Communications Corp. and British Telecommunications Plc*, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15459-69 ¶¶ 282-307 (1997) (same); *AT&T Corp., British Telecommunications, Plc, VLT Co. LLC, Violet License Co. L.L.C., and TNV Limited Applications*, Memorandum Opinion and Order, 14 FCC Rcd 19140, 19193-95 ¶¶ 107-110 (1999) (same).

<sup>128/</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23940 ¶ 113.

<sup>129/</sup> *Id.*



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Application for Consent to Transfer	)
of Control and	)
Petition for Declaratory Ruling	)

IB Docket No. 00-187

**COMMENTS OF**  
**GLOBAL TELESYSTEMS, INC.**

December 13, 2000

Grier Raclin  
Global TeleSystems, Inc.  
on behalf of Global TeleSystems  
(Deutschland) GmbH  
4121 Wilson Boulevard  
8<sup>th</sup> Floor  
Arlington, VA 22203  
(703) 236-3710 (Telephone)  
(703) 236-3605 (Facsimile)

Troy F. Tanner  
David D. Rines  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
(202) 424-7500 (Telephone)  
(202) 424-7645 (Facsimile)

Counsel for Global TeleSystems, Inc.

conditions or at least obtain voluntary commitments from DTAG as outlined in Part II below. These measures will prevent the type of conduct in which DTAG has regularly engaged -- particularly in Germany -- from having an adverse effect on the U.S. market.

## **II. Proposed Conditions to be Attached to the Merger**

The Commission has complete discretion to enforce any conditions necessary on the merging parties in order to protect competition in the U.S. market.<sup>6</sup> In this case, because many of the anti-competitive activities DTAG engages in occur in Germany, but have effects here, the Commission will need to craft conditions, or enforce conditions reached through voluntary commitments by the parties, that get to the root of the problem in Germany if the Commission hopes to protect competition here in the United States. In particular, the Commission should find that the planned ownership transfer is only in the public interest if, at a minimum, DTAG agrees to the following conditions governing its actions in Germany:

- (1) To offer competitive carriers leased line access (especially end-user links) at terms and conditions that enable them to offer competitive broadband services in Germany;
- (2) To adhere to binding provisioning intervals;
- (3) To accept effective contractual penalties for late delivery or non-delivery;
- (4) To accept shorter forecasting intervals by competitors and to reduce the contractual penalties for ordering shortfalls to a reasonable level; and
- (5) To grant access to DTAG's internal provisioning standards in order to establish an effective system for automatic performance measurement.

As described in more detail below, these conditions will help ensure that DTAG will be unable to import its anti-competitive practices and their effects to the U.S. market. They will

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<sup>6</sup> *Foreign Participation Order*, ¶ 51.

also help to minimize the possible threat to the public interest posed by the entry of a dominant foreign carrier owned and controlled by a foreign government into the U.S. market.

### **III. The Legal Standard for Approval for Foreign Applicants**

#### **A. U.S. Law Places Strict Limits on Foreign Ownership of Licenses to Safeguard the Public Interest**

One of the guiding principles of telecommunications regulation in the United States has been and continues to be the safeguarding of the public interest. It was for this very purpose that foreign ownership limitations were incorporated into Section 214 and Section 310 of the Communications Act of 1934, as amended,<sup>7</sup> (the "Act") and were retained by Congress when it reformed the Act in 1996. In its decision to retain Section 214 and Section 310, Congress clearly intended foreign ownership to be a factor in the granting of licenses, including an assessment of the state of competition in foreign markets. A narrow interpretation of the public interest mandate of Section 310 that would preclude any inquiry into the environment in which a foreign carrier such as DTAG operates would both frustrate Congress's intent and eviscerate the public interest safeguards written into the law.

As the Commission itself has recognized, the public interest inquiry to be undertaken within the context of reviewing applications for foreign participation in the U.S. telecommunications market involves several factors<sup>8</sup> and would necessarily incorporate a review of concerns raised by the manner in which an applicant such as DTAG conducts itself in its home market, including the market and regulatory environment in which it operates. In addition to competition concerns, other public interest concerns identified by the Commission include the presence of cost-based accounting rates and any national security, law enforcement, foreign

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<sup>7</sup> 47 U.S.C. §§ 201 *et seq.* (2000).

<sup>8</sup> See, e.g., *Foreign Participation Order*, ¶¶ 50, 61, 65, 113.

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Comments of Novaxess  
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IB Docket No. 00-187

COMMENTS OF NOVAXESS B.V.

December 13, 2000

Marc Destree  
Chief Executive Officer  
Novaxess B.V.  
Adammium  
Joop Geesinkweg 222  
1096 AV Amsterdam  
Netherlands  
(31) 20 798-9898 (Telephone)  
(31) 20 798-9899 (Facsimile)

Andrew D. Lipman  
Axel Spies  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
(202) 424-7500 (Telephone)  
(202) 424-7545 (Facsimile)  
  
Counsel for Novaxess B.V.

Novaxess believes that DTAG should be allowed to invest in the U.S. telecom market if it satisfies conditions necessary to pry open the German market to further competition. Novaxess suggests that:

- (1) DTAG must make specific binding commitments to cease immediately its anti-competitive activities such as artificially creating bottlenecks for interconnection; forcing competitors to accept burdensome interconnection rules; chronically exceeding provisioning intervals for collocation space; impeding billing and collection services; and pursuing a strategy of predatory pricing in emerging telecom markets;
- (2) DTAG's regulators must commit to enforce these commitments vigorously, promptly and in a manner which displays no favoritism toward DTAG; and
- (3) The German Government should commit itself to sell its stake in DTAG within a reasonable time period.

## **II. DTAG's and VoiceStream's Application and Petition Cannot be Approved Without Conditions**

### **A. Scope of the Foreign Participation Order**

Section 214 and Section 310 of the Communications Act require the Commission's consent to the transfer of control of VoiceStream's licenses to DTAG. Section 310(b)(4) of the Communications Act places strict limits on the foreign ownership of the wireless licenses held by VoiceStream in order to safeguard the public interest. Novaxess understands the Commission has adopted standards for addressing these foreign ownership limits in its Foreign Participation

Order.<sup>1</sup> In that Order, the Commission adopted a rebuttable presumption that indirect foreign ownership of wireless licenses is in the public interest if the acquiring party stems from a WTO Member State. However, there are several arguments *against* applying this presumption in the present merger case.

First, the *Foreign Participation Order* discusses this presumption in the context of whether to grant or deny a Section 214 authorization and Section 310(b)(4) waiver request. The Commission states that it will deny entry if the transaction poses a “very high risk” to competition. Novaxess does not submit that the entry of DTAG poses a “very high risk” to competition in the United States, which would force the Commission to deny the application.<sup>2</sup> However, Novaxess believes that there are sufficient public interest reasons to mandate that conditions be placed on the applicants to protect competition. The Commission also should establish a system of fines and forfeitures for violations of these conditions.

Second, the distinction between WTO and Non-WTO countries in the Foreign Participation Order should not apply if the applicant is a global player – such as DTAG. DTAG is a major force throughout the world, both in WTO and Non-WTO countries. The description of DTAG’s activities and corporate structure in the Application (p. 4) is too narrow, and therefore does not adequately describe DTAG’s relevant activities abroad. DTAG has shareholdings in major telecommunications companies, fixed and wireless, in Austria (Max. Mobil), Hungary (Matáv), Slovakia (Slovenske telekomunikácie), U.K. (One-2-One), Switzerland (Multilink), Poland (PTC), Ukraine (UTEL), Malaysia (TRA), Indonesia (Satelindo), and the Philippines

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<sup>1</sup> Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order, 12 FCC Rcd 23891 (hereinafter *Foreign Participation Order*).

<sup>2</sup> *Foreign Participation Order* at 40.

(ISLACOM). Therefore, it is not appropriate to analyze DTAG as merely a "German" company.

Finally, and most importantly, neither the Foreign Participation Order, nor the former Effective Competitive Opportunities ("ECO") test found in the Foreign Carrier Entry Order<sup>3</sup>, have addressed the problem of foreign government control, which requires specific safeguards by the Commission. DTAG is and will be controlled by a foreign government (the Federal Government of the Federal Republic of Germany). The German Government, before and after the planned merger, will hold a stake of more than 44% in DTAG for the foreseeable future. The German Government has not committed itself to reduce this stake further or even bring it down to 0% within a defined time period. Novaxess believes that DTAG's government ownership, as described below, will have a negative impact on the U.S. telecommunications market, which the Commission can and must prevent by imposing merger conditions.

**1) The German Government's influence on DTAG**

In their Application (p. 10), the Applicants state that "the German government exercises no right beyond those of other shareholders" in DTAG. In reality, the German Government's ways and means of controlling DTAG are many and far exceed the legal possibilities and the factual scope of influence of a private shareholder.

**a) Government Influence on Management Decision**

As stated in the written testimony that the German Competitive Carrier Association ("VATM") filed with the House Telecommunications Subcommittee on September 7, 2000<sup>4</sup>, the

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<sup>3</sup> Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order, FCC 95-475, 11 FCC Rcd. 3873 (1995).

<sup>4</sup> VATM Testimony, see Annex A, p. 11.

DTAG management meets with Government officials on a regular basis. Within the German Ministry of Finance, a specific division is in charge of administering the shareholdings of the German Government. It coordinates the activities and monitors DTAG's strategy.<sup>5</sup> The German Government, for instance, by way of its recent Position Paper released by the German Federal Ministry of Economics and Technology ("BMW"), has announced that in the near future DTAG will be released from many of its dominant carrier restrictions. The goal of this Position Paper is to create a favorable market environment for DTAG.<sup>6</sup> DTAG is not the only case of direct interference by the German Government to protect a former monopolist. Recently, the German Government bypassed successfully the German regulator, RegTP, to promote another government-controlled entity, the German Post, by determining the charges for domestic mail of the German Post.

The German Government exerts its rights as a majority shareholder during DTAG's annual shareholder meetings, such as approving the annual financial statements of DTAG, and appointing representatives to DTAG's Supervisory Board under the German Stock Corporation Act. By doing so, it influences DTAG's management decisions indirectly.

Moreover, DTAG's Supervisory Board plays a key role in appointing the company's top managers and determining its strategy. According to DTAG's SEC Filing F-4 of October 4, 2000 for the VoiceStream Merger<sup>7</sup>, of the current members on DTAG's Supervisory Board, more than half of them are government officials or at least close to the government (marked in

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<sup>5</sup> Division VII of the Ministry controls the Federal Agency of Post and Telecommunications, DTAG's principal shareholder and more generally the "policy regarding the public shareholdings" of the Federal Republic of Germany: See the Ministry's organizational chart at <http://www.bundesfinanzministerium.de/>.

<sup>6</sup> VATM Testimony p. 13 and 25.

<sup>7</sup> <http://www.sec.gov/Archives/edgar/data/946770/0000950123-00-009118.txt>, at 248 to 249

italics in the list below). Many of them represent institutions controlled by the government or trade unions that traditionally are very close to the German ruling party SPD, many of them being former government officials themselves.

Current List of Members of DTAG's Supervisory Board:

1)	Dr. Hans-Dietrich Winkhaus, chairman of the Supervisory Board, chairman of the management board of Henkel KgaA
2)	<i>Rudiger Schulze, vice-chairman, Member of the Central Executive Committee of the German Postal Union</i>
3)	Gert Becker, former chairman of the management board of Degussa AG
4)	<i>Josef Falbisoner, chairman of Deutsche Postgewerkschaft trade union, Bavarian District</i>
5)	Dr. Hubertus Von Grunberg, chairman of the supervisory board of Continental AG
6)	Dr. Sc. Techn. Dieter Hundt , managing shareholder of Allgaier Werke GmbH & Co. KG; president of the National Union of German Employers Associations
7)	<i>Rainer Koch, chairman of the Workers Council of DeTeImmobilien</i>
8)	Dr. H.C. Andre Leysen, chairman of the supervisory board of GEVAERT N.V.
9)	<i>Waltraud Litzenberger, chairwoman of the Workers Council of Branch Office Bad Kreuznach</i>
10)	<i>Michael Loeffler, chairman of the Workers Council at Leipzig Branch Office 1, Deutsche Telekom AG</i>
11)	<i>Hans-W. Reich, speaker of the management board, Kreditanstalt fur Wiederaufbau (remark: the KfW is a vehicle for the German Government to administer a large part of its stake in DTAG)</i>
12)	<i>Rainer Roll, vice-chairman of the Central Workers Council at Deutsche Telekom</i>
13)	<i>Wolfgang Schmitt, head of Freiburgz I.B. Regional Directorate, Deutsche Telekom</i>
14)	Prof. Dr. Helmut Sihler, chairman, Member of the Shareholders' Committee of Henkel KgaA
15)	<i>Michael Sommer, vice-chairman of the Deutsche Post Gewerkschaft (Post trade union)</i>
16)	<i>Ursula Steinke 1995 chairwoman of the Workers Council at DeTeCSM Northern District Service and Computer Center</i>
17)	<i>Prof. Dr. H.C. Dieter Stolte, director general of the Zweites Deutsches Fernsehen (ZDF) broadcasting organization (remark: the ZDF is administered jointly by the German States)</i>
18)	Bernhard Walter, former chairman of the management board of Dresdner Bank
19)	<i>Wilhelm Wegner, chairman of the Central Workers Council at DTAG</i>
20)	<i>Prof. Dr. Heribert Zitzelsberger, state secretary in BMF, the Federal Finance Ministry (Bundesministerium der Finanzen).</i>

In the DTAG/VoiceStream merger agreement, DTAG has agreed to use reasonable efforts after the closing to recommend to the shareholders and organizational bodies of DTAG that they include on the Supervisory Board a person nominated by VoiceStream in consultation with DTAG. One may doubt whether this commitment is a firm legal obligation. In any event, one representative of the U.S. interest (out of 20) will *not* significantly diminish the German Government's influence.

**b) Financial backing of the Government**

According to DTAG's recently released 3 Q financial report of October 31, 2000, the accumulated debts of DTAG have increased dramatically to a gigantic DM 121.5 billion (approximately US\$ 53 billion). It is only possible for DTAG to bear this burden because its lenders must believe that the German Government, as DTAG's principle shareholder, will bail the company out in case it runs into serious financial difficulties. Counting on this support, international banking consortia were prepared to fund DTAG's recent bid in the German UMTS auction of DM 16.6 billion and high bids in other European countries. In view of the tremendous debts of DTAG, the current rating of single A reflects the financial backing of the German Government appropriately. In addition, it is highly unlikely that the German Government will reduce its participation in DTAG. Although the Applicants, state in their SEC filing that "the Federal Republic of Germany has publicly stated its intention to substantially reduce its ownership of DTAG's shares,"<sup>8</sup> there is no commitment to any reasonable time frame and no definition what the term "substantially" means. In fact, it is improbable that the German Government will sell its shares in DTAG in the near future. A German government official

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<sup>8</sup> At p. 123.

recently stated in a Wall Street Journal interview that with DTAG's shares slumping, "There's no way we're going to sell."<sup>9</sup>

**c) Constitutional Protection of DTAG**

As shown below, DTAG enjoys special protection under Art. 143b of the German Constitution ("Basic Law") as a former integral part of the German Post monopoly ("Deutsche Bundespost Telekom").

**Article 143b [Privatization of the Deutsche Bundespost (Federal Post)]**

(1) The special trust Deutsche Bundespost (German Federal Post) shall be transformed into enterprises under private law in accordance with a federal law. The Federation shall have exclusive power to legislate with respect to all matters arising from this transformation.

(2) The exclusive rights of the Federation existing before the transformation may be transferred by a federal law for a transitional period to the enterprises that succeed to the Deutsche Bundespost Postdienst and to the Deutsche Bundespost Telekom. The Federation may not surrender its majority interest in the enterprise that succeeds to the Deutsche Bundespost Postdienst until at least five years after the law takes effect. To do so shall require a federal law with the consent of the Bundesrat (Second Chamber of Parliament).

(3) Federal civil servants employed by the Deutsche Bundespost shall be given positions in the private enterprises that succeed to it, without prejudice to their legal status or the responsibility of their employer. The enterprises shall exercise the employer's authority. Details shall be regulated by a Federal law.

Although the standstill period of 5 years for giving up its majority interest in DTAG expired August 20, 1999, the German Government has not given up its majority interest. In addition, this Article would allow the German Government to keep a stake of more than 25% for an indefinite period of time while at the same time maintaining the protection of the former federal civil servants under Article 143b (3) Basic law. Therefore, Novaxess does not agree with

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<sup>9</sup> Wall Street Journal 10/24/2000, Page C1.

the Applicants' statement that the German Federal Government "has divested its stake as rapidly as possible taking into account the prevailing market conditions."<sup>10</sup>

**d) Immunity**

In the proposed JV Agreement between DTAG and VoiceStream, the German Government is *not* treated as an "ordinary" (private) shareholder. DTAG and its subsidiaries waive their immunity "on the ground of sovereignty or otherwise based on its status as an agency or an instrumentality of the government relating to the JV Agreement".<sup>11</sup> The only conclusion is that DTAG is an "instrumentality" of the government, or at least that this danger exists. The German Government never agreed to a similar immunity waiver to allow claims against it as DTAG's shareholder, whereas a private DTAG shareholder could never raise this defense.

**2) DTAG's Government Control has a Negative Effect on the U.S. Market**

There are no entities controlled by the U.S. Government active in the telecommunications market in the United States or in Germany. DTAG, a government-controlled entity, is one of the world's largest and most powerful government-controlled carriers. The Commission must address this imbalance because globally telecommunications markets, in particular wireless markets, are converging. The Commission cannot rely on the Applicants' argument that the only relevant market to examine is the U.S. domestic wireless market. For instance, the European Commission is clearly promoting a trans-national market approach in its recently proposed "Directive on the 1999 Review Proposal for a Directive of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and

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<sup>10</sup> Merger Application, p. 9.

<sup>11</sup> Sec. 9.10. of the Agreement and Plan of Merger between DTAG and VoiceStream.

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

In the Matter of )  
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VoiceStream Wireless Corporation, )  
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Transferor, and )  
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Deutsche Telekom AG, Transferee, )  
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Application for Consent to Transfer )  
of Control and )  
Petition for Declaratory Ruling )  
 )

IB Docket No. 00-187

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COMMENTS OF  
QS COMMUNICATIONS AG

December 13, 2000

Dr. Rudolf Dehmer  
Bereichsleiter Recht und Personal  
QS Communications AG  
Mathias-Brüggen-Str. 55  
D-50829 Köln  
Germany  
+49-221-6698-800 (Telephone)  
+49-221-6698-809 (Facsimile)

Andrew D. Lipman  
Michael Schunck  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
(202) 424-7500 (Telephone)  
(202) 424-7545 (Facsimile)

Counsel for QS Communications AG

obtain significant concessions from competitors who are under rising time pressure to reach an agreement for those DTAG billing services they cannot function without. Fortunately the regulator has unofficially announced that it intends to extend the existing billing regime if DTAG and the competitors do not reach a fair agreement on these issue in a timely matter.

The foregoing examples are by no means comprehensive but rather chosen for their current and illustrative nature. Numerous other instances of anti-competitive, discriminatory and just plain illegal actions by DTAG exist and have been commented on at length elsewhere, and most recently before the U.S. Congress in hearings called to inquire into foreign government ownership of telecommunications carriers. *See* Comments of VATM (attached as Annex 1).

**IV. The Commission, in Consultation with the Executive Branch and in the Spirit of Regulatory Comity Ought to Seek Conditions upon DTAG's Application and Petition.**

In view of the foregoing evidence and the consequent inapplicability of a "fast-track" review of DTAG's Petition and Application, the *Foreign Participation Order* suggests that the applicant should be evaluated under the standards applied to non-WTO members. As the Commission has stressed, "it continues to serve the public interest to maintain policies directed at encouraging ... countries to open their telecommunications markets to competition."<sup>43</sup> In view of the failure of certain assumptions made in the *Foreign Participation Order* to bear fruit in the specific case of DTAG and the German local access market, the comparative "ECO" standard is the appropriate one to apply in the present case.

Should the Commission in the course of this review determine that a lesser remedy than complete rejection of DTAG's Petition and Application is warranted, the Commission should

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<sup>43</sup> *Foreign Participation Order* at ¶ 125 (*emphasis added*).

devise appropriate conditions to safeguard the public interest, incentivize DTAG to open its markets to competitors and abide by the rules of fair competition. There can be no doubt that the Commission is empowered to create appropriately tailored conditions. In addition to such measures as additional reporting requirements and prior approval for circuit additions, the Commission has affirmed that it has the authority to entertain "other measures."<sup>44</sup> The Commission had with foresight noted that "we are unwilling to foreclose entirely the possibility, that in exceptional circumstances, we may have to attach additional conditions to (or even deny) a particular application."<sup>45</sup> Given the "exceptional circumstance" posed by DTAG's application, the Commission should, using the flexibility it provided itself, tailor conditions which will benefit competition across markets, in the U.S. and abroad.

Moreover, the Commission may rely upon the expertise and support of the relevant Executive Branch agencies for support in dealing with the present petition, in accordance with its own policies laid out in the *Foreign Participation Order*. "Executive Branch concerns regarding . . . foreign policy, and trade policy are legitimately addressed under the Section 310(b)(4) public interest analysis . . .".<sup>46</sup> Now, nearly four years later, the Commission is called upon to take into consideration the concerns of various Executive Branch agencies, particularly those of the United States Trade Representative ("USTR"), the organization charged with monitoring the implementation of the commitments to competitive telecommunications markets under the WTO agreement upon which so much of the *Foreign Participation Order* is based.

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<sup>44</sup> *Id.* at ¶ 51.

<sup>45</sup> *Id.* at ¶ 54.

<sup>46</sup> *Id.* at ¶ 113.

The USTR's conclusions with respect to DTAG's German home market are unlikely to be encouraging. In April of this year, the USTR announced that it had included Germany in its annual review with regard to compliance of certain countries with their respective commitments respecting trade in telecommunications services, further extending this review in June. The USTR was particularly concerned about the anti-competitive actions of DTAG that had resulted in interconnection backlogs. In addition, Ambassador Barshefsky urged the German government to strengthen the regulatory process by finding ways to share with competitors any DT[AG] cost information that is submitted in regulatory proceedings.<sup>47</sup> The USTR's concerns are in response to numerous complaints regarding DTAG including those from the Competitive Telecommunications Association ("Comptel") and the Telecommunications Resellers Association ("TRA," now known as "Ascent"). These not only focus on DTAG's actions with regard to interconnection, the German government's excessive licensing fees, and filing of non-transparent cost data, but also on DTAG's refusal to perform billing and collection services for new entrants.<sup>48</sup> At the time of the report, Ambassador Barshefsky called for further review of the German market.

Fortunately, the Commission had the foresight to retain the flexibility and authority to properly consider these issues when reviewing applications from foreign carriers. When adopting the Foreign Participation Order, the Commission "conclude[d] that a public interest analysis is a valid exercise of U.S. domestic regulatory authority, required by the Communications Act and

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<sup>47</sup> See USTR Press Release 00-46, June 16, 2000 and earlier releases of April 4, 2000. See also Office of the United States Trade Representative, *2000 National Trade Estimate Report on Foreign Trade Barriers* (detailing the concerns leading to USTR's on-going investigation of Germany under Section 1377 of the Omnibus Trade and Competitiveness Act of 1988. Generally, see also, Office of the United States Trade Representative, *1999 Annual Report*, at 111 (all of the above documents are available for download at <http://www.ustr.gov>).

<sup>48</sup> See *supra* Note 45.

consistent with U.S. international obligations,”<sup>49</sup> adding that “we conclude we should continue to find national security, law enforcement, foreign policy and trade policy concerns relevant to our decision to grant or deny section 214 and 310 (b)(4) applications from applicants from WTO Member(s).”<sup>50</sup> Thus the Commission should, if it determines that there are trade policy concerns affecting the competitive entry of U.S. companies into the German market, impose market-opening market measures for DTAG to make in Germany before approving DTAG’s application.

As the Commission noted in the Foreign Participation Order, “there is nothing in the GATS that requires us to refrain from regulating because other WTO members have an obligation to regulate.”<sup>51</sup> Nor, as subsequent practice in other countries has shown, is there anything particularly unusual about extending the reach of a regulatory inquiry based upon a proper domestic nexus into other jurisdictions. Indeed, such comity-tempered multi-jurisdictional analyses have become increasingly common in the European community and, as the close coordination of the USTR and German authorities in the DTAG case suggests, between United States’ agencies and those of its major trading partners.

In the spirit of the foregoing considerations, QSC suggests that the Commission require of DTAG, as a condition of possible approval of its Petition and Application, the creation of self-enforcing conditions, including performance measures, that will become part of the conditions adopted by the Commission in an Order granting the Application and Petition. The Commission is free to impose appropriate and necessary conditions, and has in the past repeatedly

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<sup>49</sup> *Foreign Participation Order* at ¶ 344.

<sup>50</sup> *Id.* at ¶ 61.

<sup>51</sup> *Id.* at ¶ 359.

demonstrated its ability to devise appropriate ad hoc safeguards when dealing with the merger of large domestic actors like SBC and Verizon. Only through the creation of enforceable, objectively measurable standards can DTAG be brought to temper its anti-competitive behavior and permit the German market to become truly open to competition. Specifically, QSC suggests the following as a minimal catalogue of issues to be addressed in such conditions:

- To promote fair competition, DTAG should commit to – within 3 months - timely publish and monitor its provisioning intervals, status of orders and backlogs as appropriate on a monthly basis;
- to create within 6 months access to its ordering, and provisioning system permitting electronic bonding for competitors and offering sufficient access therein to network information which would permit rational planning by competitive providers, including but not limited to the availability of collocation spaces;
- to make available within 3 months sufficient internal planning data regarding central offices, network elements and personnel to permit more reliable projection by competitors of bottlenecks in interconnection (and local loop unbundling and collocation provisioning to competitors;
- to produce within 6 months and adhere to a comprehensive, state of the art, set of performance measures (benchmarks) including automatic, severe contractual penalties for missed or deficient performance.

Of course, DTAG's primary regulator (the RegTP) should ultimately enforce these commitments vigorously, promptly, and in a manner that displays no favoritism toward DTAG. Where, as currently, the effectiveness of the regulator is reduced however, the creation of firm,