

have extraordinary access to financial resources; will be more likely to engage in anti-competitive behavior because of favorable regulatory treatment of DT in Germany; and will possess additional advantages not enjoyed by competitors in the U.S. marketplace because of the Applicants' special relationship with the German Government.<sup>162</sup>

55. We address each of these concerns below and conclude that DT's German government ownership does not confer any unique advantages that are likely to pose a risk to competition in the U.S. telecommunications market.<sup>163</sup> We note further that after careful review and analysis of the proposed transaction (including the recognition that foreign government ownership of a party to a specific merger may be relevant to the analysis of the merger's competitive effect in some circumstances), the Antitrust Division of the Department of Justice concluded that the limited vertical integration resulting from the proposed transaction would not be likely to substantially lessen competition in violation of the antitrust laws.<sup>164</sup>

#### A. Foreign Government Control of DT

56. As a threshold matter, several commenters contend that the proposed transaction violates section 310(a) because it would result in the German government having *de facto* control over the corporations that hold the licenses. As explained above, the existence of such *de facto* control would not result in an absolute prohibition under section 310(a). Nevertheless, the existence and degree of control by the German government is relevant along with other factors in determining the public interest under section 310(b)(4). We therefore begin with an examination of the degree of control the German government will have over DT.

57. DT's German competitors and other commenters specifically allege that the German government will control DT because the government could exercise its shareholder rights to elect members of the Supervisory Board of Directors, which ultimately affects the appointment of the company's top managers and determines its strategy.<sup>165</sup> DT's Supervisory Board, which is the upper tier of a German corporation's two-tier board structure, consists of twenty individuals, ten of whom are elected by shareholder vote and ten by representatives of the employees' unions.<sup>166</sup> The commenters note that after the

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<sup>162</sup> See, e.g., CCIA Comments at 2; Novaxess Comments at 12, Senator Hollings Comments at 10-11.

<sup>163</sup> See *supra* Part V for an analysis of DT's entry into the domestic mobile telephony markets, U.S. international services market, and the market for the provision of global wireless services.

<sup>164</sup> See Department of Justice Sept. 14 Letter at 1-2 (noting that foreign government ownership may be relevant if such government ownership is likely to increase the existence or durability of market power in a foreign market and if the facts indicate that the merger would subsequently enable and increase the likelihood that the party would leverage that market power to injure U.S. competitors and consumers).

<sup>165</sup> Senator Hollings Comments at 5; Novaxess Comments at 5-7; GTS Comments at 8-9.

<sup>166</sup> VoiceStream Powertel DT Reply at 38-39; Applicants Feb. 9 Response to Supplemental Information Request at 8-9.

merger, the German government will retain a voting interest in DT of approximately 45 percent, while no other shareholder will own more than five percent of DT.<sup>167</sup> Therefore, commenters allege, as DT's largest shareholder, the German government will effectively retain the ability to name as many of the ten shareholder-appointed members of the Supervisory Board as it chooses, and thereby dominate the management of DT.<sup>168</sup> Commenters also allege that the German government meets regularly with DT officials to direct its activities.<sup>169</sup> Finally, comments state that the government loan guarantees and the fact that most of DT's workforce is former civil service employees are important indicia of control.<sup>170</sup>

58. The Applicants respond that after the merger, the German government will not control DT's management or operations and that DT does not act on behalf of the German government.<sup>171</sup> Although the government has the right to appoint ten members of DT's Supervisory Board, the Applicants argue that

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<sup>167</sup> GTS Comments at 8-9; *see also* Applicants Feb. 9 Response to Supplemental Information Request at 13.

<sup>168</sup> GTS Comments at 8-9. Under these circumstances, nearly all of DT's other shareholders would have to vote collectively to block the German government from pursuing any particular strategy. We note in this regard that the Applicants have not committed to limit the number of Supervisory Board members that the German government would appoint after the merger. If the German government could control the composition of the Supervisory Board, it would be able to control the Managing Board and thus arguably dominate the management of DT. Finally, we note that the German government will also have the ability to exercise negative control in limited circumstances by using its votes potentially to block certain transactions that require a supermajority of shareholder votes. *See generally* German Stock Corporation Act (Aktiengesetz) §§ 52, 103, 129(1), 141, 179, 179a, 182, 186, 193, 212, and 262 (requiring an affirmative shareholder vote of 75 percent for, *inter alia*, approval of mergers, sale of substantially all the corporation's assets and dissolution).

<sup>169</sup> Senator Hollings Comments at 5-6; Novaxess Comments at 4-7; GTS Comments at 8-9.

<sup>170</sup> Novaxess Comments at 5-6; Senator Hollings Comments at 6-7. These comments also emphasize the fact that the German Finance Ministry determined that DT's contributions to the German Slave Labor Fund, a foundation established to compensate the victims of Nazi-era forced and slave laborers, would be classified as state or government contributions rather than as private corporate contributions. Senator Hollings Comments at 8.

<sup>171</sup> VoiceStream Powertel DT Reply at 37-41. The Applicants also contend, on the basis of the six *Intermountain* factors, that after the merger has been consummated the German government will not have the ability to exercise *de facto* control. VoiceStream Powertel DT Reply at 39-41. Admittedly, the Commission has sometimes examined the six factors identified in the 1963 *Intermountain Microwave* decision to determine whether a party has *de facto* control. *Applications for Microwave Transfers (from Intermountain Microwave) to Teleprompter Approved with Warning*, Public Notice, 12 F.C.C. 2d 559-60 (1963) (*Intermountain*) (noting that "[t]he normal minimum incidents of such interest include the unfettered use of all facilities and equipment used in connection therewith; day to day operation and control; determination of and the carrying out of policy decisions,...; employment, supervision, and dismissal of personnel; payment of financial obligations,...; and the receipt of moneys and profits derived from the operation of the ... facilities"). *Intermountain* involved an unauthorized transfer of control and thus the *Intermountain* factors focus on control of day-to-day operations and other matters directly affecting control of the licensee. The circumstances of this case are somewhat different; we are concerned with whether the German government has *de facto* control of the licensees' ultimate holding corporation—DT. Therefore, we believe that the instant transaction is factually distinct from *Intermountain* and that a totality of the circumstances test would be the more appropriate standard.

to date the Government and its nominee have only appointed two members. In addition, the Applicants state that the German government historically has always voted in line with the majority of the other shareholders.<sup>172</sup> The Applicants further contend that the Government's guarantee of DT's pre-privatization loans and the civil service-like benefits that some of DT's employees receive are simply by-products of DT's former status as a government entity.<sup>173</sup>

59. As the Commission has previously stressed, "there is no exact formula for determining control and ... questions of control turn on the specific circumstances of the case...[t]hus...we examine the totality of the circumstances."<sup>174</sup> In this case, however, we need not decide this contentious issue. Assuming *arguendo* that post-merger the German government would control DT, we find, as explained below, that the German government's ownership of DT does not confer unique financial advantages or otherwise create a high risk to competition or consumers in the United States that warrants special conditions.

## **B. Foreign Government Ownership and Possible Financial Advantages**

### **1. Preferential Access to Capital and Government Subsidies**

60. First, we disagree with arguments that DT enjoys special financial advantages because its government ownership could be used to anti-competitively cross-subsidize operations in U.S. and global markets. Specifically, commenters argue that the proposed transaction will give the Applicants a "virtually unlimited supply of capital" through favorable interest rate terms reflecting a lower risk of defaulting, or through loan guarantees or special subsidies.<sup>175</sup> For example, Novaxess contends that because the German

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<sup>172</sup> VoiceStream Powertel DT Reply at 38.

<sup>173</sup> *Id.* at 41-43; Applicants Feb. 9 Response to Supplemental Information Request at 7 (noting that 97 percent of DT's guaranteed debt will be paid off by 2004). The Applicants also note that DT's contribution to the German Slave Labor Fund was categorized as a government contribution simply to reflect the German government's status as a majority shareholder. VoiceStream Powertel DT Reply at 43-44.

<sup>174</sup> *In re Application of Ellis Thompson Corporation*, Memorandum Opinion and Order and Hearing Designation Order, 9 FCC Rcd 7138, 7139, para. 10 (1994); see also *In re Application of Baker Creek Communications, L.P.*, Memorandum Opinion and Order, 13 FCC Rcd 18709, 18715 para. 9 (Wir. Tel. Bur. 1998) ("...the power to control is a fact-based inquiry with no precise formula for evaluating all factors.").

<sup>175</sup> Senator Hollings Comments at 6 (German government ownership allows DT to attract capital easily because lenders are aware that the government as DT's principle shareholder will back its debts); QSC Comments at 15-16 (advantageous access to capital has allowed DT to increase its accumulated debt more than a privatized firm would be able to, as well as bid for German UMTS licenses); see also UTStarcom Comments at 1; WITCO Petition to Deny at 5; Novaxess Comments at 7 and Annex A, Testimony of Andrew D. Lipman on behalf of VATM, the German Competitive Carrier Association, before the Subcommittee on Telecommunications, Trade, and Consumer Protection, Commerce Committee, U.S. House of Representatives, *Foreign Government Ownership of American Telecommunications Companies*, Sept. 7, 2000, at 13-14 (VATM Testimony).

government is DT's principal shareholder, it will ensure payment of DT's liabilities, allowing DT to increase its debt to a greater extent than a privatized firm would be able to do.<sup>176</sup>

61. The Applicants acknowledge that certain debt acquired by DT prior to its privatization in 1995 is guaranteed by the German government.<sup>177</sup> We are not persuaded, however, that this perceived benefit increases the likelihood that the Applicants will engage in anti-competitive behavior and harm competition in the United States. The record indicates that the German government does not guarantee debt incurred by DT subsequent to the company's privatization in 1995;<sup>178</sup> that DT has paid off approximately half of the guaranteed debt;<sup>179</sup> and that, pursuant to a payment schedule, DT expects to pay most of the balance by 2004.<sup>180</sup> Therefore, to the extent that, in the case of default, past loan guarantees increase the likelihood of payment of unguaranteed debts, thereby lowering DT's cost of capital, any benefit from the government guarantee of prior debts is limited, both in amount and duration.<sup>181</sup>

62. The record also indicates that partial government ownership in DT does not otherwise lower DT's cost of capital or create other advantages in financial markets. Indeed, commenters note that DT and other foreign companies with government ownership may be at a competitive disadvantage: government-owned firms typically are less efficient and less profitable and may have obligations such as high labor costs and extensive universal service requirements.<sup>182</sup> These factors may especially disadvantage DT and other foreign companies when they seek to expand abroad into competitive markets like the United States, where efficiency is such a key determinant of success.<sup>183</sup> Equity investors may judge that these

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<sup>176</sup> Novaxess Comments at 7.

<sup>177</sup> VoiceStream DT Application at 39 n.118.

<sup>178</sup> VoiceStream Powertel DT Reply at 11 (asserting that the comments regarding DT's practices in Germany are exaggerated and misleading). See also Sidak Declaration at paras. 22-26. The Applicants also note that debts DT incurred after January 2, 1995 are not guaranteed by the German government. VoiceStream DT Application at 38-39; see Letter from Andreas Tegge, Managing Director, Deutsche Telecom Inc., to Ari Fitzgerald, Deputy Chief, International Bureau, Federal Communications Commission, IB Docket No. 00-187 at 2 (filed Nov. 17, 2000) (DT Nov. 17 *Ex Parte* Letter).

<sup>179</sup> VoiceStream DT Application at 39 n.118.

<sup>180</sup> See Applicants Feb. 9 Response to Supplemental Information Request at 7. In 2005, only 3.0 percent of the guaranteed debt will remain. *Id.*

<sup>181</sup> "Cost of capital" refers to the annual rate of return that a firm must pay for its combination of debt (e.g., funds raised through bonds) and equity (e.g., common stock). The MIT Dictionary of Modern Economics 85 (4<sup>th</sup> ed. 1997).

<sup>182</sup> Fisher Testimony at 8; see *infra* Part IV.C discussing strategic trade policy concerns.

<sup>183</sup> Fisher Testimony at 8. Compared to fully privatized firms, DT has expensive labor obligations. A few commenters note that DT employees tenured prior to DT's privatization receive special protections pursuant to Article 143b of the German Basic Law. QSC Comments at 12 n.24; Senator Hollings Comments at 7. We find that the civil servant status of these DT employees does not confer any financial advantages to the Applicants and may in (continued....)

negative factors counter-balance or completely outweigh the positive impact of loan guarantees on the risk-level of an investment. If so, partial government ownership may have a negligible, or possibly even negative, effect on the cost of capital.

63. Based on evidence regarding the cost of capital and credit ratings, as well as the labor and civil service obligations discussed above, we find that the German governments' partial ownership in DT does not provide DT with easier access to capital than the major incumbents in U.S. markets. For example, the evidence regarding DT's weighted average cost of capital (WACC)—the cost of debt and equity combined—reveals that DT's cost of capital is higher than that of its competitors. According to one of the commenters, DT's WACC is 11.7 percent, which is higher than the WACCs of SBC (10.8 percent), Sprint (10.1 percent), AT&T (9.8 percent), Verizon (8.7 percent), and BellSouth (8.6 percent), all of which are large, privately held carriers.<sup>184</sup>

64. Furthermore, DT does not enjoy a higher bond rating than other large, but fully-privatized telecommunications carriers.<sup>185</sup> Bond ratings affect cost of capital by influencing the interest rate at which a firm can obtain long-term debt, a key component of the cost of capital. High bond ratings mean that lenders face less risk of default by the borrower, thereby resulting in lower interest rates. Although the German government enjoys the highest bond rating of AAA (Standard & Poor's), DT is only rated at A-, which is a lower rating than SBC (AA-), Verizon (A+), British Telecom (A), and AT&T (A), all of which are large, privately-held carriers.<sup>186</sup> Both Standard & Poors and Moody's downgraded DT's credit rating subsequent to DT's most recent bond issue in June of 2000,<sup>187</sup> and Moody's has placed DT under review for a possible

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fact pose considerable costs because of the larger required contributions to these employees' pensions. See Applicants Feb. 9 Response to Supplemental Information Request at 4 (noting that DT is required by law to contribute an amount equal to 33 percent of the civil servants' total income toward pensions, compared to a contribution for all other employees equal to approximately 11 percent of their total income).

<sup>184</sup> Sidak Declaration at para. 32, Table 2, Weighted Average Cost of Capital (WACC) for Major Telecommunications Companies.

<sup>185</sup> In fact, the record does not establish a systematic relationship between bond ratings and the extent of government ownership in a firm. Some credit agencies, like equity investors, cite government ownership as a negative or minus factor. For example, according to material submitted by the Applicants, Moody's recent rating of Telstra, the Australian government-owned carrier, expressly attributed Telstra's inability to access equity markets to its 50.1 percent government ownership. Fisher Testimony at 7 n.4.

<sup>186</sup> Sidak Declaration at paras. 27-28 (citing Standard & Poor's ratings obtained from Standard & Poor's New York Ratings Desk at (212) 438-2400 on Jan. 2, 2001; Moody's ratings obtained from Moody's New York Rating Desk at (212) 553-0377 on Jan. 2, 2001) (Ratings obtained from the Standard & Poor's New York Ratings Desk and the Moody's New York Ratings Desk on April 24, 2001, remain consistent with the ratings cited herein.) We also find insufficient evidence in the record to conclude, as Novaxess urges, that DT's current rating reflects the financial backing of the German government. See Novaxess Comments at 7.

<sup>187</sup> Sidak Declaration at para. 28.

further downgrade to its credit rating, as a result of its \$7 billion pledge for third-generation wireless licenses in Germany and its \$50 billion offer for VoiceStream.<sup>188</sup>

65. DT's government ownership does not appear to confer any other financial advantages. Under German and European Union (E.U.) law, DT cannot receive discriminatory tax benefits, subsidies, or state aid. E.U. law prohibits "any aid granted by a member state or through state resources in any form whatsoever which distorts or threatens to distort competition" by favoring certain companies.<sup>189</sup> Moreover, the European Commission, in cooperation with the German government, is expressly required to keep any such system of state aid "under constant review" and may initiate enforcement proceedings if it finds a system of state aid to be incompatible with the common market.<sup>190</sup> We therefore conclude that there is no basis to find that DT has easier access to capital than the major incumbents in U.S. markets, much less an advantage that is so great that it would enable DT to act anti-competitively in U.S. markets.

## 2. Possible Favorable Regulatory Treatment

66. Contrary to arguments raised in the record, we also find remote the possibility of discriminatory regulatory treatment in the German market sufficient to enable DT to finance anti-competitive behavior in U.S. markets. To the extent such a possibility exists, it does not rebut the presumption favoring investment by WTO Member countries, articulated in the Commission's *Foreign Participation Order*.<sup>191</sup>

67. Several commenters contend that DT's German government ownership has created a "tangled" relationship between DT and the German regulator, Regulatory Authority for Telecommunications and Posts (RegTP), which was created pursuant to the German Telecommunications Act.<sup>192</sup> Specifically, DT's German competitors allege that (i) DT receives favorable and discriminatory treatment from RegTP in light of the government's financial interest in DT; (ii) RegTP does not enforce existing regulations;<sup>193</sup> (iii) RegTP does not act independently because other parts of the German Government are able to dictate RegTP's policies;<sup>194</sup> and (iv) current regulation is inadequate to foster

<sup>188</sup> Fisher Testimony at 7.

<sup>189</sup> Consolidated Version of the Treaty Establishing the European Community, Art. 87(1) (ex Art. 92(1)).

<sup>190</sup> *Id.*, Art. 88 (ex Art. 93).

<sup>191</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23913, para. 50; see also *supra* Part IV discussing the Commission's standard for entry by foreign carriers.

<sup>192</sup> QSC Comments at 4; VATM Testimony, *supra* note 175 at 12-13; GTS Comments at 9; KKF Comments at 2; Broadnet Comments at 2; NetCologne Comments at 2; Senator Hollings Comments at 11.

<sup>193</sup> QSC Comments at 20-22; VATM Testimony, *supra* note 175 at 6-7, 18-21, 24-25, 27; see also VATM Testimony, *supra* note 175, App. 2, Propositions Regarding the Competitive and Regulatory Situation in the German Telecommunications Market, at 8-9 (VATM Propositions); WITCO Petition to Deny at 6; GTS Comments at 13, 15;

<sup>194</sup> VATM Testimony, *supra* note 175 at 12-13, 26, 30; GTS Comments at 15, 22; Novaxess Reply at 3-5.

competitive markets.<sup>195</sup> According to these commenters these advantages could be exploited to improve the Applicants' market position and distort competition in the U.S. market.<sup>196</sup> A coalition of DT's German competitors, the German Competitive Carrier Association (VATM)<sup>197</sup> also has made numerous allegations that the German government is highly protectionist of DT and suppresses competition in the German marketplace through political influence, as evidenced by what these competitors perceive as RegTP's unwillingness to initiate enforcement or take aggressive policy stands.<sup>198</sup> Commenters also express concern about a guidance paper released by the Ministry of Economics and Technology that they fear may reduce the effectiveness of RegTP and the premature release of DT from its dominant carrier obligations in Germany which they believe would result in anti-competitive behavior.<sup>199</sup> Moreover, VATM argues that the U.S. Trade Representative (USTR) has been unsuccessfully seeking to address these concerns with the German government.<sup>200</sup> Therefore, they request that the Commission condition any grant of the DT Transfer Applications on competition commitments relating to the German market.<sup>201</sup>

68. We recognize the dispute in the record regarding the efficacy of RegTP in promoting competition in the German telecommunications market. For example, VATM claims that RegTP has "adopted an overly passive and accommodating stand on issues such as [DT]'s predatory pricing."<sup>202</sup> The

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<sup>195</sup> QSC Comments at 22, 24-25; VATM Testimony, *supra* note 175 at 17-18, 26-29; VATM Propositions, *supra* note 193 at 7-9; WITCO Petition to Deny at 6; GTS Comments at 14-15, 20-21.

<sup>196</sup> *See, e.g.*, QSC Comments at 4; WITCO Petition at 5.

<sup>197</sup> VATM, Verband der Anbieter von Telekommunikations- und Mehrwertdiensten e.V., represents more than 50 telecommunications and multimedia companies that have entered the German market in competition with DT. Many of VATM's members are financed, operated, or controlled by U.S. interests. VATM Testimony, *supra* note 175 at 5.

<sup>198</sup> Specifically, the VATM testimony cites concerns about the possible lack of transparency in RegTP's decision-making and persistent difficulties in obtaining interconnection and collocation from DT in Germany. VATM Testimony, *supra* note 175 at 24, 2, 11-12.

<sup>199</sup> *See, e.g.*, KKF Comments at 2; GTS Comments at 10 and Exh. C. Position Paper of the Federal Ministry of Economics and Technology (BMW) on *Competition on the Telecommunications and Post Markets*, at 4-6 (Position Paper of the Federal Ministry of Economics). We note that, in response, the Applicants state that the Position Paper is a "nonbinding" discussion paper that merely affirms that significant competitive growth in certain markets, particularly the international market, points in the direction of possible price deregulation in the future. VoiceStream Powertel DT Reply at App. A, 3.

<sup>200</sup> VATM Testimony, *supra* note 175 at 6.

<sup>201</sup> Novaxess Comments at 2 (requesting that the Commission impose conditions necessary to pry open the German market to further competition, including specific commitments by German regulators); VATM Testimony, *supra* note 175 at 6; QSC Comments at 2-3 (noting that "the gap between market opening commitments and marketplace realities yawns wide" and requesting appropriate conditions).

<sup>202</sup> VATM Testimony, *supra* note 175 at 6, 12-13 (questioning the independence of RegTP and its ability to effectively regulate DT).

Applicants counter that, as is occurring in many developed economies, the German telecommunications market is undergoing liberalization, in which DT is being challenged by new competitors. While we acknowledge that both the German Telecommunications Act and Germany's liberalization and privatization commitments under the WTO Agreement require the independence and transparency of RegTP's decisionmaking, under the *Foreign Participation Order* we focus our analysis on the competitive effects of DT's entry on U.S. markets.

69. As we discuss in greater detail below, the likelihood of the Applicants engaging in predatory behavior in U.S. markets because of DT's position in the German market is low.<sup>203</sup> Predatory tactics work only in markets in which incumbents and entrants are financially weak and/or have poor access to capital markets. Otherwise, a predator cannot succeed in driving out and keeping rivals out of the market. Because the U.S. wireless and U.S. international markets are characterized by strong incumbents and potential entrants with access to the world's deepest capital markets, predation is highly unlikely to be a sustainable strategy, even if DT did receive favorable regulatory treatment in Germany.<sup>204</sup>

70. Moreover, the Commission has recognized that USTR, as the Executive Branch agency that negotiates and enforces U.S. trade laws and rights under international agreements, is responsible for responding to complaints and bringing disputes regarding alleged violations of WTO commitments by trading partners that do not affect competition in domestic U.S. markets.<sup>205</sup> We recognize that USTR, in its most recent report regarding its annual Section 1377 review, has noted progress in Germany with respect to Germany's compliance with its trade obligations, but USTR also recognizes the need for additional progress and maintains a focus on the activities of the German regulator.<sup>206</sup>

### C. Strategic Trade Policy Concerns

71. We also find no reason to conclude, as certain commenters argue, that the German government, through its partial ownership of DT, will choose to promote or protect its ownership interest

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<sup>203</sup> See *infra* Part V.A (concluding that predation would likely fail in the U.S. domestic wireless markets). We note that the Department of Justice has previously reached the same conclusion in conducting its review pursuant to the Clayton Act. See Department of Justice Sept. 14 Letter at 2.

<sup>204</sup> See *supra* Part V.A discussing predation.

<sup>205</sup> *Foreign Participation Order*, 12 FCC Rcd at 23908, para. 39; Statement of the Honorable Michael Kantor at 7 (Kantor Statement); OII Comments at 2; Callahan Comments at 1. We note that under GATS Article XXII, any WTO Member may initiate a dispute settlement if it believes that another Member has failed to carry out its obligations and commitments. *Foreign Participation Order*, 12 FCC Rcd 23903, para. 28 n.33.

<sup>206</sup> See Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 3106 (2000); USTR Fact Sheet on the 2001 Section 1377 Review (Apr. 2, 2001) (describing allegations with respect to Germany and progress in addressing many issues); Annual Review of Telecommunications Trade Agreements Highlights Concerns in Colombia, Mexico, South Africa, and Taiwan, USTR Press Release (Apr. 2, 2001) (USTR to continue monitoring developments in Germany to ensure compliance with international telecommunications obligations).

regardless of market forces in a manner that would harm competition in the United States.<sup>207</sup> DT's German competitors argue that DT's majority government control places DT beyond the reach of market forces, and they therefore urge the Commission to review closely the potential competitive impact of the level of government ownership and control of DT.<sup>208</sup> We recognize that a government-controlled company in a private sector market may choose for reasons other than commercial profit-maximization, i.e., political, nationalistic, or other reasons, to engage in predatory or other anti-competitive behavior as a strategic trade initiative.<sup>209</sup> We find it highly unlikely, however, that the German government, through its control of DT, would direct the Applicants to engage in unprofitable predatory practices in the United States to pursue national goals unrelated to maximizing profits.

72. First, numerous laws, including both U.S. antitrust laws and Germany's WTO trade obligations, are available to deter such predatory behavior. Second, as we explain fully below, predation in the U.S. wireless and international markets would almost surely be an unprofitable strategy, and DT's non-government shareholders would lose value should the German government attempt to pressure DT into such a predatory strategy. Therefore, DT's fiduciary responsibility to its private shareholders would likely deter DT from pursuing anti-competitive cross-subsidy schemes, because such schemes would inevitably fail and result in legal liability to its private shareholders.<sup>210</sup> Because DT is listed on the New York stock exchange, is subject to registration by the U.S. Securities and Exchange Commission, and has a fiduciary responsibility to its private stockholders, we believe there are particularly strong incentives to avoid engaging in unprofitable strategies. For these reasons, we find it highly unlikely that the German government would engage in anti-competitive behavior unrelated to earning profits.

#### **D. National Security, Law Enforcement, and Public Safety Interests**

73. In acting on applications pursuant to sections 214 and 310(b)(4), we also consider any national security, law enforcement, foreign policy, and trade policy concerns raised by the Executive Branch.<sup>211</sup> In this case, the Department of Justice and Federal Bureau of Investigation have raised such concerns, noting in particular the foreign government ownership of DT. On December 15, 2000, the Department of Justice, the Federal Bureau of Investigation, and the Applicants filed a Joint Petition to Defer

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<sup>207</sup> These concerns have traditionally been addressed as part of the economic literature regarding industrial policies. See, e.g., Robert E. Kennedy, Harvard Business School Case 9-796-184, *Economic Gains from Trade: Theories of Strategic Trade* (1996).

<sup>208</sup> QSC Comments at 13 (arguing that DT enjoys an ownership structure that immunizes it from the demands of the marketplace); GTS Comments at 11 (urging the Commission to carefully review the potential competitive impact of DT's level of government ownership and control).

<sup>209</sup> See, e.g., QSC Comments at 15-17 (contending DT's bidding for German UMTS licenses demonstrated insensitivity to capital and market factors and stating "it is dubious that the management of a firm whose obligations are not government-backed like [DT] would have shown such disregard for the judgment of the markets").

<sup>210</sup> See German Stock Corporation Act §§ 76, 93; Applicants Reply at 17.

<sup>211</sup> *Foreign Participation Order*, 12 FCC Rcd at 23918, para. 59.

Action (Petition to Defer) that expressly raised concerns that approving the DT Transfer Applications as filed would present significant impediments to the ability of the U.S. government to preserve national security, enforce the laws, and protect the public safety.<sup>212</sup> The Petition to Defer requested that the Commission defer approval of the proposed transaction until such time as an agreement could be reached between the Applicants and the Executive Branch resolving all such concerns.<sup>213</sup>

74. On January 25, 2001, the Department of Justice and the Federal Bureau of Investigation filed a Petition to Adopt Conditions to Authorization and Licenses (Petition to Adopt Conditions).<sup>214</sup> The Petition to Adopt Conditions requests that the Commission: (i) approve an Agreement, effective on the date the DT mergers with VoiceStream and Powertel close, reached between the Applicants and the Department of Justice and Federal Bureau of Investigation (DT-VoiceStream/DOJ/FBI Agreement); and (ii) condition grant of the instant application on compliance with the terms of the DT-VoiceStream/DOJ/FBI Agreement.

75. The DT-VoiceStream/DOJ/FBI Agreement provides, *inter alia*, that VoiceStream and/or DT shall: (i) ensure that its network is configured so as to be capable of complying with lawful U.S. process;<sup>215</sup> (ii) make certain call and subscriber data available in the United States, if VoiceStream stores such data;<sup>216</sup> (iii) take reasonable measures to monitor the use of facilities used in domestic telecommunications (specifically, with respect to personnel holding sensitive positions), information storage, and access to foreign entities;<sup>217</sup> and (iv) not disclose domestic communications, transactional data, classified or sensitive information to any foreign government, agent, component or subdivision thereof without the express written consent of the Department of Justice or a court of competent jurisdiction.<sup>218</sup> The Department of Justice and the Federal Bureau of Investigation gave particular attention to negotiating provisions designed to limit the control or influence of foreign governments or their representatives on DT's ability to perform these duties and obligations.<sup>219</sup> Specifically, DT expressly and irrevocably waives immunity from any legal action that may attach based on sovereignty or status as an agency or

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<sup>212</sup> VoiceStream Wireless Corporation, Powertel, Inc. and Deutsche Telekom AG., IB Docket No. 00-187, Joint Petition to Defer (filed Dec. 15, 2000).

<sup>213</sup> *Id.* at 2.

<sup>214</sup> Department of Justice and Federal Bureau of Investigation, Petition to Adopt Conditions to Authorizations and Licenses in the Matter of VoiceStream Wireless Corporation, Powertel, Inc., and Deutsche Telekom AG to permit, pursuant to Section 310(b)(4), 100 percent Indirect Foreign Ownership by Deutsche Telekom of Licenses and Authorizations Held by VoiceStream and Powertel, IB Docket No. 00-187 (dated Jan. 24, 2001) (attaching the DT-VoiceStream/DOJ/FBI Agreement).

<sup>215</sup> Petition to Adopt Conditions, Exh. 1, DT-VoiceStream/DOJ/FBI Agreement, Article 4: Disputes.

<sup>216</sup> *Id.* at Article 2: Facilities, Information Storage and Access.

<sup>217</sup> *Id.* at Article 3: Security.

<sup>218</sup> *Id.*

<sup>219</sup> Petition to Adopt Conditions at 4.

instrumentality of a foreign government.<sup>220</sup> DT also agreed to provide written notice to the Department of Justice and Federal Bureau of Investigation if any foreign government or entity controlled by a foreign government obtains an ownership interest or increases its existing ownership interest in DT.<sup>221</sup>

76. In assessing the public interest, we take into account the record and afford the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.<sup>222</sup> We recognize that, separate from our licensing process, VoiceStream and DT have entered into the DT-VoiceStream/DOJ/FBI Agreement, and that the Agreement expressly states that these agencies will not object to grant of the pending DT Transfer Applications, provided that the Commission approves the agreement and conditions grant of the DT Transfer Applications on compliance with it.<sup>223</sup> This resolution of the Executive Branch's national security and law enforcement concerns addresses allegations that foreign government control of a U.S. carrier would pose a threat to our national security.<sup>224</sup>

77. We note that the DT-VoiceStream/DOJ/FBI Agreement contains certain provisions relevant to this transaction that, if broadly applied, would have significant consequences for the telecommunications industry. These provisions, if viewed as precedent for other service providers and potential investors, would warrant further inquiry on our part, and we will consider any subsequent agreements on a case-by-case basis. Notwithstanding these concerns about the broader implications of the DT-VoiceStream/DOJ/FBI Agreement, however, we see no reason to modify or disturb the agreement of the parties on this matter. Therefore, in accordance with the request of the Department of Justice and the Federal Bureau of Investigation, in the absence of any objection from the Applicants,<sup>225</sup> and given the discussion above, we condition our grant of the DT Transfer Applications on compliance with the DT-VoiceStream/DOJ/FBI Agreement.

## V. ALLEGED HARMS TO COMPETITION IN SPECIFIC U.S. MARKETS

78. Having concluded that DT's partial government ownership does not contravene the public interest in promoting competition, advancing consistent trade policy, and protecting national security and law enforcement interests, we now consider allegations that DT's entry into U.S. markets and DT's provision of global services raise significant anti-competitive issues in specific U.S. markets. For example, some commenters contend that DT earns monopoly rents in certain service markets in Germany, where it

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<sup>220</sup> DT-VoiceStream/DOJ/FBI Agreement, at Article 4: Disputes.

<sup>221</sup> *Id.* at Article 5: Auditing, Reporting, Notice and Limits, at para. 5.2.

<sup>222</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23919-21, paras. 61-66.

<sup>223</sup> DT-VoiceStream/DOJ/FBI Agreement at 18-19, Articles 7.1-7.3.

<sup>224</sup> Senator Hollings Comments at 10; Stankey Comments at 1. (arguing that permitting a foreign nation to influence the policy or operations of communications facilities could lead to sabotage and espionage).

<sup>225</sup> Petition to Adopt Conditions at 4 (noting "[t]he DOJ and FBI are authorized to state that Deutsche Telekom, VoiceStream, and Powertel do not object to the grant of this petition").

possesses market power, and will be able to use those rents to subsidize domestic, international, and global services provided by VoiceStream in the United States.<sup>226</sup> This section analyzes these allegations by considering the competitive effect of the proposed merger in each of these markets. We note that our analysis is confined to specific harms alleged in the U.S. telephony markets, and does not consider harms that may occur in German telephony markets and any resulting impact on German consumers.<sup>227</sup> Ultimately, we conclude that the transfer of VoiceStream's and Powertel's licenses and authorizations to DT is unlikely to cause the harm alleged by the commenters and that the public interest would not be served by denying or conditioning our approval as proposed by some commenters.

#### A. Domestic Mobile Telephony Markets

79. Where a transaction involves the acquisition and aggregation of spectrum in the domestic mobile telephony markets through assignment or transfer of control of licenses, our competitive analysis focuses on an assessment of whether the combination complies with our CMRS spectrum aggregation rule.<sup>228</sup> The Applicants have certified that, while the combination creates PCS license overlaps in nine geographic markets,<sup>229</sup> grant of the applications would not violate the CMRS spectrum aggregation rule,<sup>230</sup> and we agree with the Applicants' assessment. In this case, however, commenters have alleged that this transaction involves competitive harms not addressed by the application of the spectrum aggregation limit.<sup>231</sup>

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<sup>226</sup> See, e.g., Novaxess Comments at 10; GTS Comments at 11, 15, 17, 25. See also Senator Hollings Comments at 10, 12 (arguing that DT is currently engaged in anti-competitive acts in Germany, including predatory pricing, and that, therefore the Commission should expect the same type of behavior in the United States).

<sup>227</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23897-98, paras. 13-14.

<sup>228</sup> 47 C.F.R. § 20.6. As part of all applications for assignment or transfer of control of CMRS licenses, the assignee or transferee must certify that grant of the application would not cause the assignee or transferee to be in violation of the spectrum aggregation limit. See FCC Wireless Telecommunications Bureau Application for Assignments of Authorization and Transfers of Control (FCC Form 603).

<sup>229</sup> VoiceStream holds seven F block (10 MHz) BTA licenses that overlap with Powertel's 30 MHz licenses in Savannah, Georgia; Macon, Georgia; Albany, Georgia; Augusta, Georgia; Birmingham, Alabama; Huntsville, Alabama; Gadsden, Alabama; and Decatur, Alabama. See Powertel DT Application at 19. VoiceStream also holds two F block (10 MHz) BTA licenses that overlap with Powertel's two 10 MHz (D and E block) licenses in Nashville, Tennessee. *Id.*

<sup>230</sup> 47 C.F.R. § 20.6. The spectrum aggregation rule also requires us to consider the license holdings of other entities whose interests are attributable to VoiceStream, Powertel, and DT in our analysis. 47 C.F.R. § 20.6. The license holdings of these attributable interests, however, do not create overlaps in any licensed area of VoiceStream or Powertel. See VoiceStream DT Application at 4 n.5 and 29 n.87; Powertel DT Application at 4; DT Feb. 23 *Ex Parte* Letter at 2.

<sup>231</sup> See, e.g., Novaxess Comments at 10; GTS Comments at 4, 11, 15, 17, 25; WITCO Petition to Deny at 5. See also Senator Hollings Comments at 10, 12. We note that commenters have not alleged specific anti-competitive (continued....)

80. Some commenters specifically allege that DT earns monopoly rents in certain service markets in Germany, and will use these rents to subsidize VoiceStream's U.S. domestic mobile telephony services, harming U.S. consumers.<sup>232</sup> Other commenters allege that DT will use its monopoly rents to subsidize its expansion in U.S. mobile telephony markets, harming competition in the United States.<sup>233</sup> We interpret these comments as suggesting that DT will use its monopoly rents to practice price predation in the United States.<sup>234</sup> As a first step in analyzing these claims, we review the domestic mobile telephony market structure, which involves identifying the relevant product and geographic markets and other significant market participants. After establishing this predicate for our analysis, we discuss the potential for DT to earn monopoly rents and undertake a successful predatory pricing scheme. We also address DT's ability to predate were it to choose to forego profit maximization.

### 1. Relevant Markets and Significant Participants

81. *Relevant Product and Geographic Markets.* With respect to the domestic wireless markets, we conclude that the relevant product market is mobile telephony services and that the relevant geographic markets are the geographic areas in the United States where DT, VoiceStream and Powertel are readily capable of providing a facilities-based service.<sup>235</sup> According to the Applicants, VoiceStream and Powertel each hold licenses to provide PCS and supporting services.<sup>236</sup> VoiceStream controls licenses to provide PCS services to most of the country, but, according to the Applicants, still falls short of a fully nationwide licensed area, with gaps in California, Nevada, the Chicago metropolitan area, and the southeastern United

(Continued from previous page) \_\_\_\_\_

harm with respect to the proposed alternative transaction that would involve the transfer of Powertel's licenses and authorizations to VoiceStream.

<sup>232</sup> Senator Hollings Comments at 10; GTS Comments at 15.

<sup>233</sup> Novaxess Comments at 10; WITCO Petition to Deny at 5 (arguing that DT has special privileges in its home market that it can exploit to distort competition in the United States); GTS Comments at 17, 25.

<sup>234</sup> A firm price predates in a market by first lowering its price, usually below some measure of cost, in order to drive one or more competitors out of the market, as well as deter potential market entrants. Once this is accomplished, the firm raises its price high enough above cost to recoup its losses. See Dennis W. Carlton and Jefferey M. Perloff, *Modern Industrial Organization*, at 334-335.

<sup>235</sup> Domestic mobile telephony licenses, as a general matter, are awarded by geographic area. PCS licenses are awarded based on Major Trading Areas and Basic Trading Areas. See 47 C.F.R. § 24.202. Cellular licenses are awarded based on Metropolitan Statistical Areas and Rural Service Areas. See 47 C.F.R. § 22.909. SMR licenses are awarded on either a geographic area or site-specific basis. See 47 C.F.R. Part 90, Subparts S, T. Such licenses may be combined by a particular mobile service provider to enable the provider to offer a variety of products that meet consumer demand for regional, nationwide or global access. See *In re Applications of 360° Communications Company and ALLTEL Corporation*, Memorandum Opinion and Order, 14 FCC Rcd 2005, 2012, paras. 15-16 (Wir. Tel. Bur. 1998).

<sup>236</sup> VoiceStream subsidiaries are also licensed to operate LMDS, WCS, and SMR systems. No competitive issues are raised with respect to these licenses, however, because neither Powertel nor DT hold licenses in these services nor do they provide any other services that compete with the services VoiceStream provides with these licenses.

States, among other places.<sup>237</sup> Powertel operates PCS systems in twelve states, primarily in the southeast, using GSM technology.<sup>238</sup>

82. *Significant Market Participants.* U.S. mobile telephony service providers offer local, regional, and nationwide service plans and are differentiated in their ability to compete in their product markets based on, among other things, the size and locations of their licensed areas and the extent to which they have built out their network. U.S. mobile telephony markets are characterized by as many as six mobile telephony carriers with nationwide or near nationwide licensed areas: Verizon Wireless, Cingular Wireless, AT&T Wireless, Sprint PCS, Nextel Communications, and VoiceStream. There are also a number of large regional carriers, including ALLTEL (midwest, southwest, southeast) and U.S. Cellular (primarily in the midwest with a presence on parts of the eastern and western seaboard) and medium-sized or smaller regional carriers, such as Southern LINC and Powertel (both southeast).

## 2. Competitive Analysis

83. Some commenters assert that DT earns monopoly rents (or profits) in certain service markets in Germany, where it possesses market power, and will be able to use those rents to subsidize domestic services provided by VoiceStream in the United States.<sup>239</sup> Commenters also suggest that DT could shift certain costs of operating VoiceStream in the United States to DT in Germany, so that German rate payers would pay for those costs through increased prices of non-competitive services in Germany.<sup>240</sup> Commenters further argue that, because of the monopoly rents and cost shifting, the merged entity would have the incentive and ability to engage in predatory pricing in the U.S. domestic mobile telephony market.<sup>241</sup>

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<sup>237</sup> We note that VoiceStream is continuing to diminish these gaps through other proposed acquisitions and through participation in Auction 35. See ULS File Nos. 0000287262, 0000287259, 0000288898, 0000303703, and 0000365311.

<sup>238</sup> These 12 states are Georgia, Tennessee, Alabama, Mississippi, Kentucky, Florida, Arkansas, Louisiana, Indiana, Illinois, Missouri, and South Carolina. See [www.powertel.com/htm/lea/lea\\_cov.asp](http://www.powertel.com/htm/lea/lea_cov.asp) (visited Apr. 24, 2001).

<sup>239</sup> See e.g., Novaxess Comments at 10; GTS Comments at 11, 15, 17, 25; WITCO Petition to Deny at 5. See also Senator Hollings Comments at 10, 12. Specifically, several commenters allege that DT is able to earn monopoly rents in local exchange markets through anti-competitive behavior. WITCO Petition to Deny at 6; GTS Comments at 17-24; QSC Comments at 20-24; Novaxess Comments at 11; Novaxess Reply at 3; VATM Testimony, *supra* note 175 at 6, 10-11, 19-24; VATM Propositions, *supra* note 193 at 1-7.

<sup>240</sup> See Senator Hollings Comments at 10 (alleging that DT will compete anti-competitively in the United States); Novaxess Comments at 10 (noting the potential for DT to use proceeds from monopoly pricing to subsidize its expansion into the U.S. market).

<sup>241</sup> Novaxess Comments at 10.

84. The Applicants respond that DT's ability to earn monopoly rents in Germany is constrained, *inter alia*, by regulation in Germany.<sup>242</sup> For example, the Applicants argue that price cap regulation of DT in Germany would prevent DT from shifting costs of its U.S. mobile telephony operations to its regulated services in Germany and recovering the additional costs in Germany by raising prices for its regulated services.<sup>243</sup>

85. We believe that the ability of DT to obtain monopoly rents in German markets depends on the degree to which DT dominates these markets, and the nature and the effectiveness of German regulation. The record indicates that competitors have not made significant inroads into the local exchange market.<sup>244</sup> According to a recent study conducted by the German Competitive Carrier's Association (VATM), DT retains approximately 97 percent of the local exchange market.<sup>245</sup> According to the Applicants, DT's market share in the local exchange market has declined to 95 percent as competition in these markets has increased.<sup>246</sup> Based on DT's market share, it appears possible that DT may have some capability to earn monopoly rents in the provision of local exchange services.

86. In long-distance and international markets, however, there is conflicting evidence in the record regarding DT's ability to earn monopoly rents. The Applicants assert that DT's share in these markets has fallen to 60 percent of the long-distance market and 52 percent of the market for international long-distance service.<sup>247</sup> The Applicants also state that there have been substantial price decreases for long-

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<sup>242</sup> VoiceStream DT Application at 12-13, 40-41; VoiceStream Powertel DT Reply at 12, 15-16, App. A at 3-5; Sidak Declaration at 20-23.

<sup>243</sup> Applicants Response to Feb. 9 Supplemental Information Request at 1-3.

<sup>244</sup> GTS Comments at 14; Novaxess Reply at 3 and Annex; Position Paper of Klaus Earthel at 7; QSC Comments at 4, 19-20. *See also Sixth Report on the Implementation of the Telecommunications Regulatory Package*, Commission of the European Communities (Dec. 7, 2000) (<http://europa.eu.int/ISPO/infosoc/telecompolicy/6threport.html>) (*Sixth Report*) (visited Apr. 24, 2001). With respect to Germany, this report notes, *inter alia*, concerns regarding the empowerment of the regulator (p. 13); high license fees (p. 15); new entrants' allegations that they must resort to dispute resolution in order to obtain interconnection (p. 16) and that the time-limit for interconnection delivery in Germany is not observed, despite regulatory intervention (p. 17); and the possibility that the incumbent will have a first mover advantage with respect to ADSL offerings (p. 20). On the other hand, the report indicates that Germany is doing better than other E.U. Member States in many respects, such as initiation of local loop unbundling (p. 19); grant of broadband wireless local loop licenses (p. 21); licensing of mobile service providers that use a third party's mobile network (p. 24); grant of "third generation" wireless licenses (p. 25); implementation of requirement that incumbent update its cost accounting system (p. 30); and application of LRAIC model for pricing of interconnection (p. 30).

<sup>245</sup> VATM Testimony, *supra* note 175 at 10.

<sup>246</sup> VoiceStream Powertel DT Reply, Appendix A at 11-12. As of November 1999 there were 147 carriers authorized to provide local service in Germany. *See* VoiceStream Powertel DT Reply, App. A at 11.

<sup>247</sup> *Id.* at 10.

distance and international services.<sup>248</sup> However, some commenters allege that, although there has been an increase in competition in the long distance and international markets, DT continues to dominate these markets<sup>249</sup> and that these markets are not yet "contestable."<sup>250</sup> Commenters also provide some indication that only a few companies exert sustained competitive pressure on DT in these markets.<sup>251</sup> Though it appears that the long-distance and international markets are more competitive than the local exchange market, we do not have enough information in the record to conclude that DT is unable to dominate these markets.

87. With respect to the nature and effectiveness of German regulation, the record also presents conflicting evidence. The record indicates that Germany has enacted regulations to liberalize its telecommunications markets.<sup>252</sup> Also, DT is currently operating under a price cap regime for local exchange, long distance, and international services, although that regime expires at the end of 2001.<sup>253</sup> Several commenters, however, argue that, despite the liberalization and price cap regulation, there is a lack of regulatory oversight by the German regulator, RegTP, and DT is therefore able to behave in an anti-competitive manner.<sup>254</sup>

88. In Part IV.B above, we declined to reach a conclusion regarding the effectiveness of dominant carrier regulation or deregulation in Germany, because even if DT were able to earn monopoly rents and to shift costs from non-regulated to regulated services, the merged entity is unlikely to be able to engage in successful price predation in U.S. domestic mobile telephony services markets. The commenters here allege a standard price predation scheme that would require the merged entity to incur losses (that will increase as the predator's market share increases relative to those of its competitors) in order to drive out competitors and obtain the ability to price above competitive levels in the future. However, an investment

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<sup>248</sup> *Id.* at 11.

<sup>249</sup> Position Paper of the Federal Ministry of Economics, *supra* note 199 at 6 (summarizing findings of the Monopoly Commission).

<sup>250</sup> *Id.* at 7. A contestable market is a market that may be competitive if there is the threat of entry by other firms into the industry even if the industry presently has few firms. See Dennis W. Carlton and Jefferey M. Perloff, *Modern Industrial Organization* at 6, 76.

<sup>251</sup> Position Paper of the Federal Ministry of Economics, *supra* note 199 at 6.

<sup>252</sup> VoiceStream Powertel DT Reply, App. A at 6-8; Position Paper of the Federal Ministry of Economics, *supra* note 199 at 2-3.

<sup>253</sup> Applicants Feb. 9 Response to Supplemental Information Request at 2; see also *Sixth Report* at 28 (noting that Germany utilizes a price cap mechanism and approves the incumbent's end-user tariffs *ex ante*, and is considering the request of the incumbent that such regulations should be lifted). Our record does not reflect whether the price cap regulation is likely to be extended past 2001.

<sup>254</sup> QSC Comments at 21-22, 24-25; VATM Testimony, *supra* note 175 at 6-9, 12-13, 17-21, 24-30; WITCO Petition to Deny at 6; GTS Comments at 13-15, 20-22; Novaxess Reply at 4-5.

by DT in this predatory strategy is likely to prove unprofitable. As the Supreme Court explained in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*:

[T]he success of such [predatory] schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predators' losses and to harvest some additional gain. . . . For this reason, there is consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.<sup>255</sup>

89. Based on the record, and on a careful review of the conditions in U.S. mobile telephony markets, we find that the merged entity would likely be unable to engage in successful price predation. We note that currently there are at least six other mobile wireless companies that have more subscribers and more revenues in the United States than VoiceStream.<sup>256</sup> If the merged entity were to attempt to engage in predatory pricing, it is highly unlikely that it would be able to maintain such an artificially low price for a sufficiently long period of time to drive competitors out of business. Indeed, given that VoiceStream's licensed areas are less built out than many of its competitors, it is likely that many customers would choose to stay with their current provider, even if VoiceStream priced its services lower than its competitors.<sup>257</sup>

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<sup>255</sup> *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) (citing Robert Bork, *The Antitrust Paradox*, 149-155 (1978) (emphasis added)).

<sup>256</sup> Based on publicly available information, each of the other major wireless carriers had a significantly greater number of subscribers and substantially greater revenues than VoiceStream. At the end of 2000, Verizon Wireless had 27.5 million subscribers and revenues of \$14.2 billion. See Verizon 2000 Annual Report, *Verizon at a Glance*, at 1 (available at <http://investor.verizon.com/annual/2000/verizon2000ar06.html>) (visited Apr. 24, 2001) (Verizon 2000 Annual Report). Cingular Wireless had 19.7 million subscribers and *pro forma* revenues of \$12.6 billion. See SBC Investor Briefing, No. 223, Jan. 25, 2001 (available at [www.sbc.com/investor/Financial/Earning\\_info/docs/4Q00\\_IB.pdf](http://www.sbc.com/investor/Financial/Earning_info/docs/4Q00_IB.pdf)) (visited Apr. 24, 2001). AT&T Wireless had 15.2 million subscribers with revenues of \$10.448 billion. See *AT&T Wireless Fourth-Quarter Increases 39.1 Percent*, News Release, Jan. 29, 2001 (available at <http://www.att.com/press/item/0,1354,3628,00.html>) (visited Apr. 24, 2001). Sprint PCS had approximately 9.9 million subscribers with annual revenues of \$6.34 billion. See *Sprint Announces Record Fourth Quarter Yearly Results*, Press Release, Feb. 1, 2001 (available at [http://144.226.116.29/PR/CDA/PR\\_CDA\\_Press\\_Releases\\_Detail/1,1579,2206,00.html](http://144.226.116.29/PR/CDA/PR_CDA_Press_Releases_Detail/1,1579,2206,00.html)) (visited Apr. 24, 2001). Nextel Communications had approximately 6.7 million domestic subscribers with operating revenues of \$5.71 billion. See [www.nextel.com/about/information/corporate/profile.shtml](http://www.nextel.com/about/information/corporate/profile.shtml) (visited Apr. 24, 2001). ALLTEL had approximately 6.3 million subscribers with annual wireless revenues of \$5.5 billion. See [www.alltel.com/investors-index.html](http://www.alltel.com/investors-index.html). VoiceStream, on the other hand, had approximately 3.9 million subscribers with total revenues of \$1.9 billion. See *VoiceStream Wireless Announces 2000 Financial Results*, Press Release, Feb. 14, 2001 (available at [www.voicestream.com/about/press/press\\_20010214a.asp#](http://www.voicestream.com/about/press/press_20010214a.asp#)) (visited Apr. 24, 2001).

<sup>257</sup> VoiceStream DT Application at 23.

90. Further, even assuming that DT were successful at driving one of the six larger competitors (measured either by subscribership or revenue) out of the market, the licenses and sunk facilities of the bankrupt firm would be available for purchase by any existing or potential competitor, which, if not DT, would then resume competing against DT. While DT might seek to acquire the bankrupt firm's spectrum and facilities in order to prevent acquisition by another competitor, such a transaction would require the Commission's approval and be subject to review by U.S. antitrust authorities. For these reasons, even if DT rejected rational, profit maximizing behavior, it likely would be unable to drive any competitors out of the market, or even assuming it could do so, to keep competitors out. Therefore, we find no high competitive risk to markets or consumers in the United States such that additional reporting requirements or other safeguards would be required.

91. Moreover, the foregone profits associated with predatory pricing represent an investment that must be weighed against alternative investments.<sup>258</sup> We note that VoiceStream currently accounts for less than four percent of the U.S. domestic mobile telephony market, and currently has only built out its network to 45 percent of its licensed area.<sup>259</sup> Thus, while VoiceStream has aggressively pursued nationwide coverage, there remain significant gaps in its nationwide licensed area.<sup>260</sup> In light of this and the obligations under our rules requiring VoiceStream to meet certain build-out standards,<sup>261</sup> it is reasonable to assume that the merged entity would use its financial resources to complete its network build-out and fill in any remaining substantial gaps in its nationwide licensed area, rather than to engage in an extremely costly, and almost certainly unsuccessful, scheme of predation.

92. Therefore, it is unlikely that any attempt by the merged entity to engage in price predation in the United States would be successful. That the expected return on any investment in a predatory pricing strategy is almost surely negative suggests that the merged entity, if it were a rational, profit-maximizing firm, would have no incentive to engage in such a money-losing strategy. Finally, even if the merged entity rejected profit-maximizing behavior and attempted to predate, U.S. consumers would benefit from the lower prices during the period of predation. Moreover, because spectrum and facilities likely would not be lost to the national market in the long run, these customers would not suffer subsequent price increases as a result of particular firms being forced from the market.<sup>262</sup>

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<sup>258</sup> Cf. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. at 588 ("the foregone profits may be considered an investment in the future. For the investment to be rational, the [ . . . predator] must have a reasonable expectation of recovering in the form of later monopoly profits, more than the losses suffered.").

<sup>259</sup> See VoiceStream DT Application at 23-24; VoiceStream Powertel DT Reply at 5.

<sup>260</sup> See VoiceStream DT Application at 22; Powertel DT Application at 2, 10, 19.

<sup>261</sup> 47 C.F.R. §§ 24.203, 27.14.

<sup>262</sup> See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("Without [recoupment], predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. . . [U]nsuccessful predation is in general a boon to consumers.").

### 3. Rural Market Entry

93. Several commenters further argue that the VoiceStream DT Application should not be granted because VoiceStream has not shown sufficient commitment to build out its network in rural areas, and VoiceStream's acquisition by DT would exacerbate that situation, to the detriment of U.S. rural consumers. This issue was first raised in a petition to deny approval of VoiceStream's recent acquisition of control of approximately 144 PCS and nine WCS licenses from Cook Inlet Region, Inc. (CIRI).<sup>263</sup> We deferred consideration of the Jordan-Soldier Valley Telephone Co. (d/b/a WITCO), CIRI and VoiceStream arguments, regarding DT's acquisition of VoiceStream, to this proceeding and address them here.<sup>264</sup> WITCO argues that the pending merger of DT and VoiceStream militates against granting consent for VoiceStream to take control of licenses to serve rural markets.<sup>265</sup> WITCO argues that DT will be primarily interested in further establishing its global footprint and will not be likely to invest in rural portions of the VoiceStream territories, particularly in Iowa and Nebraska, to the detriment of rural customers.<sup>266</sup> Further, WITCO argues that the transfer of licenses from VoiceStream to DT would frustrate Congressional objectives in sections 254 and 706 of the Telecommunications Act of 1996<sup>267</sup> in that it will further widen the disparity between urban and rural consumers in the deployment of advanced telecommunications capability.<sup>268</sup>

94. UTStarcom and the Alliance for Public Technology have also raised issues about the effect of the proposed merger of DT and VoiceStream on rural markets. UTStarcom argues that, to establish its global footprint, DT will be interested in building out its GSM networks only in large, urban areas where DT can earn a greater return on its investment, and that this strategy would be evident in VoiceStream's decisions with respect to the acquisition of PCS licenses in the recent auction of PCS licenses.<sup>269</sup> UTStarcom argues further that DT could be expected to ignore the smaller towns and rural areas that will not generate large volumes of roaming, and that competition is likely to be harmed further because DT would acquire control of a larger number of entrepreneurs' block PCS licenses when it acquired VoiceStream.<sup>270</sup> UTStarcom proposes that, as a condition of granting the DT Transfer Applications, we require DT to make some amount of the entrepreneurs' block spectrum available for purchase or lease by

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<sup>263</sup> *VoiceStream/CIRI Order*, 15 FCC Rcd at 24699-700, paras. 17-19.

<sup>264</sup> *See id.* at 24701 n.67.

<sup>265</sup> WITCO Petition to Deny at 4-6.

<sup>266</sup> *Id.* at 4.

<sup>267</sup> *Id.* 3-4 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified* at 47 U.S.C. §§ 151 *et seq.*).

<sup>268</sup> *Id.*

<sup>269</sup> UTStarcom Comments at 1.

<sup>270</sup> *Id.*

eligible entrepreneurs.<sup>271</sup> The Alliance for Public Technology urges the Commission, to fulfill its responsibilities under Section 706 of the Act and to impose reporting and review conditions on the merged company's deployment in rural areas.<sup>272</sup> The Alliance for Public Technology further requests that the Commission impose similar conditions in all mergers. In response to WITCO, VoiceStream asserts that approval of the VoiceStream DT Application would further the development of VoiceStream's advanced national GSM network in both urban and rural areas.<sup>273</sup> In response to UTStarcom's request to condition the grant of the DT VoiceStream Application on VoiceStream making spectrum available to eligible entrepreneurs in rural markets, the Applicants assert that this issue is a general policy question, which should be addressed in an industry-wide rulemaking, rather than in the instant license transfer proceeding.<sup>274</sup> Further, the Applicants argue that the concerns raised by UTStarcom are currently being addressed by the Commission in other proceedings.<sup>275</sup>

95. We deny the petition of WITCO and the requests of UTStarcom and the Alliance for Public Technology and decline to hold DT to a higher standard than that embodied in our rules. The Commission's rules establish minimum service requirements for wireless carriers, and WITCO's speculation as to DT's intent has not shown that these requirements will not be met. VoiceStream's licenses are subject to construction build-out requirements found in the Commission's rules.<sup>276</sup> For PCS licenses, these rules require licensees to construct their systems so that there is sufficient signal strength to provide adequate service to one-third of the population of the market within five years and two-thirds within ten years.<sup>277</sup> For WCS licenses, licensees must construct their systems so as to provide "substantial service" at the end of the ten-year license period.<sup>278</sup> The construction build-out requirements apply to individual licenses, regardless

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<sup>271</sup> *Id.*

<sup>272</sup> Alliance for Public Technology Comments at 4.

<sup>273</sup> *Id.*; Opposition to Petition to Deny of WITCO, VoiceStream Wireless Corporation, WT Docket No. 00-207, at 7 (filed Dec. 1, 2000).

<sup>274</sup> VoiceStream Powertel DT Reply at 53.

<sup>275</sup> *Id.* at 53 (citing *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, Notice of Proposed Rulemaking, 15 FCC Rcd 24203 (2000) (*Secondary Markets NPRM*); *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees: Implementation of Section 257 of the Communications Act—Elimination of Market Entry Barriers*, WT Docket No. 96-148, GN Docket No. 96-113, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831, 21843-45, paras. 13-17 (1996)).

<sup>276</sup> See 47 C.F.R. §§ 24.203, 27.14.

<sup>277</sup> 47 C.F.R. §§ 24.203(a) and (b).

<sup>278</sup> 47 C.F.R. §§ 27.14(a); see also *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10843-45, paras. 111-15 (1997).

of the licensee and are the standards by which all licensees' build-out performance is measured.<sup>279</sup> We therefore deny the petition of WITCO and the requests of UTStarcom and the Alliance for Public Technology for conditions.

## B. U.S. International Services Market

96. Commenters also argue that DT could use monopoly profits from German markets or other financial advantages to cross-subsidize U.S. international services offered by the merged entity.<sup>280</sup> Specifically, it is argued that approval will permit DT to harm U.S. competitors by offering end-to-end services to U.S. customers at rates subsidized by monopoly rents reaped in Germany.<sup>281</sup> As we explained in Part V.A above, we find that DT has neither the incentive nor the ability to engage in predatory pricing in U.S. domestic wireless markets through the use of cross-subsidies. For similar reasons, we conclude that DT would be unlikely to use successfully a predatory strategy to harm other incumbents in U.S. international services markets. Moreover, we will apply to VoiceStream and Powertel the dominant carrier safeguards described below, that will serve as an additional impediment to any cross-subsidy or other anti-competitive strategies.

### 1. Relevant Market and Significant Participants

97. We analyze the allegations of potential anti-competitive conduct by the merged entity in the provision of international services by reference to our precedents defining the U.S. international services market. This market consists of telecommunications services from the United States to foreign countries provided to U.S. end-users.<sup>282</sup> The geographic markets consist of each of the routes between the United States and other countries.<sup>283</sup> We also examine the allegations of potential anti-competitive conduct by determining the significant competitors in the U.S. international services market. These include the major

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<sup>279</sup> In addition, the Commission is currently exploring how to enhance the effectiveness of acquisition of spectrum in the secondary markets to ensure, among other things, that spectrum-based services are fully deployed in rural markets. See *Secondary Markets NPRM*, at paras. 7-8.

<sup>280</sup> See *GTS Comments* at 2-3; *Novaxess Comments* at 10; *QSC Comments* at 12-13.

<sup>281</sup> *Senator Hollings Comments* at 10.

<sup>282</sup> End-user services refer to the complete telecommunications service offered to business or residential customers, such as international services on the U.S.-Germany route. *MCI Communications Corporation, British Telecommunications plc, Declaratory Ruling and Order*, 9 FCC Rcd 3960, 3970-71, para. 50 (1994).

<sup>283</sup> "U.S. international services" comprise all U.S.-billed telecommunications services, including calls that originate in the United States and terminate at a foreign point and calls that originate at a foreign point but are billed by a U.S. carrier, such as international calling card calls. See *WorldCom/MCI Order*, 13 FCC Rcd at 18070-71, para. 78 n.240.

facilities-based providers of long-distance service in the United States, including AT&T, WorldCom, and Sprint, as well as other large carriers serving individual routes.<sup>284</sup>

## 2. Competitive Analysis

98. VoiceStream, Powertel, and DTI are each participants in the U.S. international services market, although they are not significant participants. VoiceStream and Powertel are exclusively providers of pure resale services and have only *de minimis* market shares of the end-user market.<sup>285</sup> DT currently provides service in the United States only through its affiliate DTI, which is a facilities-resale carrier and has only a *de minimis* share of the end-user market.<sup>286</sup> In addition, the merger will not significantly increase concentration on any U.S. international route because of the *de minimis* market shares of DTI, VoiceStream, and Powertel.<sup>287</sup> Therefore, the merger will not eliminate a significant competitor or raise significantly market concentration on any route.

99. We find that, for the same reasons discussed in Part V.A. above, the merger will not provide DT with the incentive or the ability to engage in a predatory pricing strategy through cross-subsidy and harm the U.S. international services market. VoiceStream, Powertel, and DTI are not significant participants in the U.S. end-user international services market. Thus, based on the existence of significantly stronger competitors in international services, we conclude that the merged entity would not be able to maintain an artificially low price for a sufficiently long period to drive competitors out of business.

## 3. Dominant Carrier Safeguards

100. In the *Foreign Participation Order*, we established rules to identify instances of potential competitive harm by U.S. market entry of a foreign carrier and to guard against them. Under these rules, we classify a U.S. carrier as dominant on a particular route if it is affiliated with a foreign carrier that controls essential facilities on that route.<sup>288</sup> A carrier classified as dominant is subject to dominant carrier

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<sup>284</sup> The carriers with the highest billed revenues for all U.S. facilities-based and facilities-resale services in 1999 were AT&T (\$7.34 billion), WorldCom Inc. (\$5.45 billion) and Sprint (\$1.51 billion). The total billed revenues for all U.S. facilities-based and facilities-resale services for all U.S. carriers combined were \$15.8 billion. FCC, Common Carrier Bureau, Industry Analysis Division, *1999 International Telecommunications Data* (Dec. 2000), at 27, Fig. 7 & at 2, Fig. 1.

<sup>285</sup> In 1999, VoiceStream reported revenue of \$58,787 from International Message Telephone Resale Service in its own company name, plus \$5,557,384 for Omnipoint Corporation and \$8,171 for Aerial Communications, Inc. but no revenues from U.S. facilities-based and facilities-resale services, and Powertel did not report any international billed revenue in 1999. FCC, Common Carrier Bureau, Industry Analysis Division, *1999 International Telecommunications Data* (Dec. 2000), at 27, Fig. 7, at 2, Fig. 1, and Resale Services Pages 1-9, Table D.

<sup>286</sup> DTI did not report any international billed revenue in 1999. FCC, Common Carrier Bureau, Industry Analysis Division, *1999 International Telecommunications Data* (Dec. 2000), at 27, Fig. 7, at 2, Fig. 1, and Resale Services Pages 1-9, Table D.

<sup>287</sup> See *supra* Part V.B.1 discussing relevant markets and significant participants.

<sup>288</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23991, para. 221.

safeguards.<sup>289</sup> These safeguards include various accounting, structural separation, and reporting requirements that are designed to address the possibility that a foreign carrier with control over facilities or services that are essential inputs for the provision of U.S. international services could discriminate against rivals of its U.S. affiliates (i.e., vertical harms). In the *Foreign Participation Order*, we concluded that these safeguards, along with our benchmark and no special concession rules, are sufficient to protect against vertical harms by carriers from WTO countries in virtually all circumstances.<sup>290</sup> In the exceptional case where an application poses a very high risk to competition in the U.S. market, and where our standard safeguards and additional conditions would be ineffective, we reserve the right to deny the application.<sup>291</sup>

101. We apply the requirements of the *Foreign Participation Order* to the merger application as follows. DT controls long-distance and local termination facilities within Germany, Slovakia, Hungary, and Croatia.<sup>292</sup> We currently regulate DT as dominant on the U.S.-Germany route, the U.S.-Slovakia route, the U.S.-Hungary route, and the U.S.-Croatia route as reflected in DTI's recent section 214 authorizations and foreign carrier notifications.<sup>293</sup>

102. Therefore, VoiceStream and Powertel, as affiliates of DT, are subject to dominant carrier safeguards under section 63.10 of our rules.<sup>294</sup> Under sections 63.09 and 63.10 of our rules, VoiceStream and Powertel, as entities controlled by DT, will also be classified as dominant international carriers on the

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<sup>289</sup> See 47 C.F.R. § 63.10.

<sup>290</sup> See 47 C.F.R. § 63.10; 47 C.F.R. § 63.14; see *Foreign Participation Order*, 12 FCC Rcd at 23913-14, paras. 51-52.

<sup>291</sup> *Foreign Participation Order*, 12 FCC Rcd at 23913-14, paras. 51-52.

<sup>292</sup> Upon consummation of the transaction, VoiceStream will become affiliated, within the meaning of section 63.09 of our rules, with DT's foreign carrier affiliates. These affiliated carriers include the following four carriers that are incumbents in their countries' long distance or local termination markets: Hrvatske Telekomunikacije d.d., (Croatia); Deutsche Telekom AG and operating subsidiaries (Germany); MATAV Magyar Tavkozlesi Rt., (Hungary); Slovak Telecom (Slovakia). See *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, DA 99-809, (rel. June 18, 1999); see also *Application to Transfer Control of International Section 214 Authorizations and Notification of Affiliations with Foreign Carriers*, App. B. We note that VoiceStream will also become affiliated with DT's affiliate in Uzbekistan—Chirkom. The Applicants state however that upon closing the merger, VoiceStream and its subsidiaries will surrender their authorizations to provide service on the U.S.-Uzbekistan route. *Id.* at 7.

<sup>293</sup> See *VoiceStream DT Application* at 9 n.19, 31; *Amendment to Applications to Transfer Control of International Section 214 authorizations and Notification of Affiliations with Foreign Carriers* (filed Feb. 16, 2001) at 3. See also *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, DA 99-809 (rel. June 18, 1999).

<sup>294</sup> We note that VoiceStream and Powertel are authorized to resell services of other carriers, including the services of DTI, which will become VoiceStream's and Powertel's affiliate upon consummation of the merger, and is a facilities-based carrier. See *VoiceStream DT Application* at 31; *Powertel DT Application* at 21-22. Therefore, VoiceStream and Powertel do not qualify for the exemption from dominant carrier safeguards under section 63.10(a)(4) of the rules.

U.S.–Germany, U.S.–Slovakia, U.S.–Hungary, and U.S.–Croatia routes. Accordingly, on each of these routes, VoiceStream and Powertel will be required, for the provision of international services, to maintain separate books of account from DT and the affiliated foreign carriers in these markets; not jointly own transmission or switching facilities with DT and these carriers; file quarterly reports of revenue and traffic; file quarterly reports summarizing the provisioning and maintenance of all basic network facilities and services procured from DT and these carriers; and file quarterly circuit status reports.<sup>295</sup> These requirements are designed to make a carrier's interaction with its affiliated foreign carrier transparent and thereby guard against discriminatory conduct.<sup>296</sup> We believe that the imposition of dominant carrier safeguards along with our benchmark and no special concession rules are sufficient to prevent vertical harms by the merging parties. In addition, some of the dominant carrier safeguards—such as the requirement to maintain separate books and the prohibition on joint ownership of facilities—provide additional confidence that DT will not have the ability to engage in cross-subsidization with respect to international services provided by its U.S. affiliates. We therefore find that merger will not create risks to competition in the U.S. international services market that would warrant the imposition of additional competitive safeguards.<sup>297</sup>

### C. Global Wireless Issues

103. Several commenters ask that we carefully evaluate whether the merger of DT and VoiceStream will allow DT to act anti-competitively in the provision of wireless services in the global market, thereby harming U.S. competitors in the provision of global wireless services. These commenters urge us to impose additional safeguards to promote competition in this market.<sup>298</sup> Specifically, they argue that, because DT and VoiceStream employ the same GSM technology, the merged company will have an unfair advantage in the global market.<sup>299</sup> They further contend that given DT's significant investment in

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<sup>295</sup> See 47 C.F.R. § 63.10(c).

<sup>296</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23991-24022, paras. 221-292.

<sup>297</sup> See *id.* at 23913, para. 51.

<sup>298</sup> GTS points to the increasing use of multi-national roaming agreements and the increasing capabilities of mobile technologies as evidence of the rapid globalization of the mobile market. GTS Comments at 2-3, 7 (noting that the Commission should assess the rapidly-developing global wireless market to determine what additional safeguards might be necessary to promote competition and protect the public interest); Senator Hollings Comments at 12 (urging the Commission to look globally at competition in the wireless sector); QSC Comments at 12, 17-19 (arguing that the ongoing globalization of wireless markets creates unique avenues for exercising market power); Novaxess Comments at 9-10 (asserting that given the globalization of wireless markets, the U.S. domestic wireless market is not the only relevant market, noting efforts by the European Commission to promote a transnational market approach, and arguing that DT will exploit its unfair market advantage in offering global wireless services).

<sup>299</sup> Senator Hollings Comments at 12; QSC Comments at 17-19; GTS Comments at 2-3. DT also employs GSM in its non-European mobile telephone subsidiaries. Mobile telephony carriers in the United States, however, are not constrained in the choice of technology, and currently VoiceStream is the only major U.S. mobile telephony carrier that uses the GSM standard as the primary technology in its network. Powertel, a regional carrier, also employs GSM, and this analysis applies equally to Powertel.

universal mobile telecommunications system (UMTS) licenses and its expanding global footprint into the United States, DT is positioning itself for global dominance.<sup>300</sup>

104. We decline to define a global wireless services market at this time because we do not have evidence that such a market yet exists. While there is some evidence that markets for U.S. international roaming services as well as international roaming services in foreign countries are developing,<sup>301</sup> we are not yet aware that customers are demanding a complete seamless wireless service. Nevertheless, because the global evolution of the wireless industry is likely to have an important effect on U.S. end-users, we will examine whether the proposed merger could have an anti-competitive impact on this evolution and harm competition for these services in the United States. Specifically, we address allegations regarding (i) the availability of international roaming services to U.S. end-users; (ii) the reliance on global standards for the development of "third generation" wireless technology;<sup>302</sup> and (iii) the development of multinational footprints by DT and other wireless carriers.

### 1. Background

105. With the explosive growth of the wireless industry throughout the world, we recognize that carriers are offering wireless service in an increasingly global context. For example, U.S. mobile telephony service providers have begun to offer international roaming services and are seeking the ability to allow customers to use their mobile telephones outside the United States.<sup>303</sup> New technology is bringing the World Wide Web to wireless phones. When evaluating potential competitive harms, however, our concern is not solely whether a particular service provider will possess competitive advantages in the provision of

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<sup>300</sup> GTS Comments at 2-3; Senator Hollings Comments at 12 (arguing that DT is positioning itself as the dominant provider of wireless services in the global market, given its significant investment in UMTS licenses in Europe and the ability of the merged entity to provide international roaming on a GSM-based network).

<sup>301</sup> We acknowledge, for example, that communications firms, driven by competitive pressures, will seek to extend access to the services they provide beyond the reach of their own facilities.

<sup>302</sup> Current wireless technology is considered "second generation." Second generation wireless systems are digital systems such as digital cellular and PCS. See *In the Matter of Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ET Docket No. 00-258, Notice of Proposed Rulemaking, FCC 00-455 (rel. Jan. 4, 2001)* at para. 3 n.8. Over the next few years, carriers plan to launch "third generation" wireless services that will support wireless Internet service at data speeds significantly above the current average of about 10 kilobits per second. See generally, e.g., *Newsbytes*, "Ericsson Unveils 3G Technology in India" (March 26, 2001) ([http://www.3gnewsroom.com/3g\\_news/news\\_0466.shtml](http://www.3gnewsroom.com/3g_news/news_0466.shtml)) (visited Apr. 24, 2001); Adam Creed, *ComputerUser.com*, "Australia 3G Telecom Auction raises \$577 Million" (March 22, 2001) (<http://www.computeruser.com/news/01/03/26/news12.html>) (visited Apr. 24, 2001); International Telecommunication Union, *3rd Generation Mobile Services And Applications* (March 26, 2001) ([http://www.itu.int/imt/what\\_is/3rdgen/](http://www.itu.int/imt/what_is/3rdgen/)) (visited Apr. 24, 2001).

<sup>303</sup> Roaming services are offered by mobile telephony providers seeking to extend their customers' access to services beyond the direct reach of their own facilities. International roaming occurs when mobile service is provided in a country in which the carrier does not have its own facilities.

global wireless services, as commenters contend DT will. Instead, we ultimately assess whether the competitive advantage confers the ability to exclude rivals from the market, thereby impeding competition and causing harm to end-users. A mere finding that a firm has certain advantages over its competitors, therefore, is not a basis for concluding that the firm has engaged in or will engage in anti-competitive behavior because the development of unique competitive advantages is the essence of the competitive process.

106. Based on our analysis of technological and economic factors, we find that any advantage that the merged entity may enjoy (because both VoiceStream and DT currently use GSM technology, or because DT has a wireless presence in many countries and has recently acquired "third generation" UMTS wireless licenses) is unlikely to produce anti-competitive effects in the provision of global services.

## 2. Competitive Analysis

### a. International roaming

107. We conclude that the merger of DT and VoiceStream is unlikely to permit them to act anti-competitively in providing international roaming services. First, we note that, regardless of the technology a mobile telephony provider chooses, roaming can only be accomplished with the use of compatible equipment. Thus, for any carrier to offer international roaming services in a country where carriers use only a GSM air interface, its customers must have compatible GSM equipment.<sup>304</sup> We also note that U.S. GSM equipment is not compatible with overseas GSM networks without further modification because different spectrum bands are employed.

108. While both DT and VoiceStream employ GSM, the current European allocation of spectrum for mobile telephony services differs from that in the United States. European providers of mobile telephony services generally operate either in the 900 MHz or 1700 and 1800 MHz bands, while U.S. mobile telephony service providers using PCS operate between 1850 and 2200 MHz,<sup>305</sup> those using cellular licenses operate in the 800 MHz band,<sup>306</sup> and those using SMR licenses operate at 220, 800 and 900 MHz.<sup>307</sup> Because different frequencies are used in Europe and the United States, no U.S. mobile telephony carrier currently can provide international roaming services on a single-band mobile telephone tuned for U.S. allocations for mobile telephony. Therefore, as a practical matter, all U.S. mobile telephony carriers, including VoiceStream, must provide different or upgraded equipment to offer these services via a single handset. In order to offer international roaming services, GSM U.S. mobile telephony carriers must provide "dual-band" equipment; non-GSM U.S. mobile telephony carriers must provide "dual-mode" equipment that is capable of operating with a GSM network (or any other technology employed in a network).

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<sup>304</sup> Similarly, in U.S. domestic mobile telephony markets, a customer of a CDMA carrier cannot obtain digital roaming service from a TDMA or GSM carrier without having a handset compatible with TDMA or GSM.

<sup>305</sup> See 47 C.F.R. § 24.5 (defining "Broadband PCS" spectrum).

<sup>306</sup> See 47 C.F.R. § 22.905.

<sup>307</sup> See 47 C.F.R. §§ 90.613, 90.715.

109. We also note that a number of U.S. mobile telephony service providers, including VoiceStream, currently provide international roaming services to Europe (and other countries where GSM is employed) through roaming agreements and offer the purchase or rental of special equipment for this purpose.<sup>308</sup> While the international roaming rates charged by all U.S. providers are comparable, VoiceStream charges less to consumers for the equipment needed for international roaming than other U.S. mobile telephony service providers.<sup>309</sup> Assuming that this price differential is related to VoiceStream's choice of the GSM standard, which eliminates the need for a dual-mode phone, it may be possible that VoiceStream's choice of GSM already provides it with some competitive advantage in international roaming. Both the Applicants and some commenters believe that VoiceStream's GSM network is a key asset for the provision of advanced global services, such as worldwide voicemail access and single source billing.<sup>310</sup> However, we do not find anything anti-competitive about this. Anti-competitive effects may occur when rivals are excluded from use of compatible standards. However, the various second and third generation wireless standards are open standards and are available for all carriers to use.

110. We further note that commenters do not clearly identify how the merger of DT and VoiceStream—as distinguished from their use of a common GSM air interface absent the merger—will reduce competition in the provision of international roaming services, nor do they suggest a specific condition that would address the issues. Even assuming the merger somehow may lower VoiceStream's cost of providing international roaming in those countries where DT holds a license and provides additional global services, producing additional competitive advantage for VoiceStream, we find no basis in the record to conclude that the merger of DT and VoiceStream would cause other U.S. mobile telephony service providers to be excluded from providing these services, or otherwise permit the merged entity to act anti-competitively.<sup>311</sup>

111. Finally, DT's ownership of VoiceStream does not leave other U.S. mobile telephony service providers without options for roaming partners in Germany and other countries where DT's T-Mobile has a subsidiary. Any foreign provider of mobile telephony services is a potential roaming partner for U.S. providers, regardless of network technology, and there appear to be a sufficient number of potential partners to support an open market for international roaming agreements. In this regard, we note that DT's U.K. wireless subsidiary, One2One, has international roaming agreements in Germany with three of DT's

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<sup>308</sup> See, e.g., [www.attws.com/personal/explore/intl\\_calling/world\\_connect](http://www.attws.com/personal/explore/intl_calling/world_connect) (visited Apr. 24, 2001); [www.nextel.com/phone\\_services/worldwide/coverage/country\\_list.shtml](http://www.nextel.com/phone_services/worldwide/coverage/country_list.shtml) (visited Apr. 24, 2001); [www.voicestream.com/products/coverage/global.asp](http://www.voicestream.com/products/coverage/global.asp) (visited Apr. 24, 2001).

<sup>309</sup> Compare [www.voicestream.com](http://www.voicestream.com) (advertising international mobile telephones at \$99.99 and \$199.99) (visited Apr. 24, 2001) with [www.nextel.com](http://www.nextel.com) (advertising an international mobile telephone for purchase at a special rate of \$199.00 or for rent at \$9.95 per day) (visited Apr. 24, 2001).

<sup>310</sup> See, e.g., DT VoiceStream Application at 27; Siemens Comments at 1.

<sup>311</sup> Further, we note that, of VoiceStream's annual 2000 revenue of \$1.923 million, only \$4 million, or 0.2 percent, is from roaming by German wireless customers. Of DT's German wireless operations year-2000 revenue of 6,483 million euros, only 0.7 million euros, or 0.01 percent is from roaming in Germany by VoiceStream customers. Applicants Mar. 2 Response to Supplemental Information Request at 2.

rivals.<sup>312</sup> We therefore have no specific reason to expect that the merger of DT and VoiceStream will result in the inability of other U.S. mobile telephony service providers to offer international roaming services in Germany. In summary, we find insufficient basis to conclude that the merger would lead to anti-competitive behavior by the merged entity in the provision of international roaming services to U.S. consumers.

**b. Third generation technology**

112. We also are not persuaded by commenters' claim that DT's acquisition of "third generation" UMTS wireless licenses will have an anti-competitive, exclusionary effect, either globally or in the United States.<sup>313</sup> DT's mobile subsidiary, T-Mobile, recently won two UMTS licenses in Germany and plans to offer third generation services by 2003.<sup>314</sup> However, other companies, e.g., E-Plus, Group 3G, MobilCom, and Viag Intercom, have also won UMTS licenses in Germany.<sup>315</sup> Moreover, it is unlikely that VoiceStream will be the sole U.S. carrier to adopt WCDMA, the technical standard European wireless carriers will use to provide UMTS services.<sup>316</sup> Both AT&T Wireless and Cingular Wireless plan to rely on WCDMA,<sup>317</sup> greatly reducing any VoiceStream competitive advantage based on its choice of technology. Further, even if VoiceStream has a competitive advantage as the only U.S. mobile telephony service provider to employ a technology similar to carriers in other countries, this fact alone would not suggest that it was engaging, or could engage, in anti-competitive behavior because U.S. carriers are free to choose among competing technical standards for the provision of third generation wireless services.<sup>318</sup>

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<sup>312</sup> See [www.one2one.com/framework/frameIE.htm](http://www.one2one.com/framework/frameIE.htm) (visited Apr. 24, 2001).

<sup>313</sup> QSC Comments at 15-17; VATM Testimony, *supra* note 175 at 13-15; Senator Hollings Comments at 12; Novaxess Comments at 10. UMTS uses the wideband code division multiple access (WCDMA) standard and, in Europe, operates in the 2 GHz band. See *European Radiocommunications Committee Decision of 30 June 1997, on the frequency bands for the introduction of the Universal Mobile Telecommunications Systems (UMTS)*, ERC/DEC/(97)07, European Conference of Postal and Telecommunications Administration.

<sup>314</sup> See [http://www.t-mobile.com/technews\\_q3\\_180800.html](http://www.t-mobile.com/technews_q3_180800.html) (visited Apr. 24, 2001).

<sup>315</sup> QSC Comments at 15-16. E-Plus is held partly by KPN Mobile and NTT; Group 3G is held by Sonera (Finland) and Telefónica of Spain; MobilCom is held partly by France Telecom; and Viag Intercom is held partly by British Telecom. DT VoiceStream Application at 13-14.

<sup>316</sup> Betsy Harter, "Putting the C in TDMA?," *Wireless Review* (Jan. 1, 2001).

<sup>317</sup> *Id.*; see also *AT&T and NTT DoCoMo Announce Strategic Wireless Alliance*, News Release, Nov., 30, 2000 (available at [www.att.com/press/item/0,1354,3502.00.html](http://www.att.com/press/item/0,1354,3502.00.html)) (visited Apr. 24, 2001).

<sup>318</sup> See generally *In the Matter of Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, ET Docket No. 00-258, Notice of Proposed Rulemaking, FCC 00-455 (rel. Jan. 4, 2001).

c. **Expansion of global footprint**

113. Several commenters further argue that by expanding its global footprint into the United States, DT is positioning itself for global dominance. Upon consummation of the merger, DT will own wireless carriers in Germany, the United Kingdom, Austria, Hungary, and the United States, as well as hold interests in wireless carriers in other countries.<sup>319</sup> DT's most important subscriber bases will be Germany (13 million subscribers), the United Kingdom (6 million subscribers) and the United States (3.9 million subscribers).<sup>320</sup> DT is not alone, however, in seeking an international footprint. Nor is it the first or the largest carrier to do so. Verizon Wireless, which is 45 percent owned by Vodafone Airtouch Plc, is already part of the Vodafone Group Worldwide,<sup>321</sup> which serves more subscribers in these key countries—Germany, the United Kingdom, and the United States—than DT.<sup>322</sup> In addition, AT&T Wireless and NTT DoCoMo, the largest wireless carrier in Japan, have formed an alliance.<sup>323</sup> That other large carriers are expanding their worldwide coverage suggests that this is a sensible competitive strategy rather than an independent attempt by DT unfairly to dominate global services. We would expect other U.S. carriers also to try to take advantage of the likely pro-competitive benefits of global expansion, such as economies of scale, seamless service through standardization, reduction of risk through geographic diversification, and speed in disseminating innovations. Because the global expansion of other U.S. mobile telephony service providers is underway, the merger of DT and VoiceStream is not likely to preclude other U.S. carriers from pursuing a global strategy. Moreover, as a signatory to the WTO accords, the United States has endorsed global competition in wireless services.<sup>324</sup> Permitting DT's effort to gain a competitive advantage by expanding into the U.S. mobile telephony service market is consistent with the U.S. WTO obligations.

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<sup>319</sup> See [www.telekom.de/dtag](http://www.telekom.de/dtag).

<sup>320</sup> See [www.telekom.de/dtag](http://www.telekom.de/dtag).

<sup>321</sup> See [www.vodafone.com](http://www.vodafone.com).

<sup>322</sup> Verizon Wireless, a joint venture of Verizon Communications, Inc. and Vodafone AirTouch Plc, is the largest wireless company in the United States by number of subscribers, with 27.5 million subscribers at year-end 2000. See Verizon 2000 Annual Report, *supra* note 256. Vodafone Group Plc, the largest wireless company in the United Kingdom, with 10.2 million subscribers, is the parent company of Vodafone AirTouch. It is also the parent company of Mannesmann AG, the largest wireless company in Germany, with 16.4 million subscribers. See [www.vodafone.com](http://www.vodafone.com) (data provided as of Sept. 30, 2000) (visited Apr. 24, 2001).

<sup>323</sup> NTT DoCoMo recently invested \$9.8 billion in AT&T Wireless and plans jointly to develop the U.S. mobile multimedia market, promote the proliferation of WCDMA third generation wireless technology in the U.S. market, and develop international roaming operations. See *NTT DoCoMo to Buy Stake in AT&T Wireless*, News Release, Nov. 30, 2000 (available at <http://www.nttdocomo.com/new/contents/00/whatnew1130b.html>) (visited Apr. 24, 2001).

<sup>324</sup> See U.S. commitments regarding mobile services in the WTO Basic Telecommunications Agreement, Schedule of Specific Commitments of the United States of America, incorporated into the General Agreement on Trade in Services by the Fourth Protocol to that agreement (WTO 1997), 36 I.L.M. 366 (1997).

114. Therefore, because we conclude that the transfer will result in no anti-competitive effects in the provision of global services in the United States, we find that this is not a basis for denying, or further conditioning, approval of the proposed transfers.

#### D. Conclusion

115. In summary, as discussed in Parts IV and V, the harms that could flow from the proposed VoiceStream Powertel DT merger, or the alternative VoiceStream Powertel merger, are remote. DT's partial government ownership does not appear to increase the likelihood of anti-competitive activity or present unique competitive harms. Contrary to commenters' assertions, we find no basis to conclude that DT has the incentive or ability to anti-competitively cross-subsidize its operations in any relevant market. We also note that the Applicants' agreement with the Department of Justice and Federal Bureau of Investigation substantially reduces the potential for harm to U.S. national security, law enforcement, and public safety interests.

### VI. ALLEGED PRO-COMPETITIVE BENEFITS

116. *DT-VoiceStream-Powertel Merger.* The Applicants contend that the proposed DT-VoiceStream-Powertel merger will generate significant public interest benefits and efficiencies.<sup>325</sup> They argue that consumers will benefit from the significant expansion of the nationwide footprint for GSM subscribers, which will result in additional competition in the mobile voice market nationwide, which is currently served, in addition to VoiceStream, by Verizon Wireless, Cingular Wireless, Sprint PCS, AT&T Wireless, and Nextel Communications.<sup>326</sup> Further, they claim that the proposed merger will produce benefits through economies of scale and scope, improved spectrum efficiency, and wider availability of advanced services.<sup>327</sup>

117. The Applicants further contend that the proposed merger will provide VoiceStream with the resources necessary to accelerate the build-out of VoiceStream's existing licenses and to acquire additional spectrum to fill out its near nationwide footprint.<sup>328</sup> The build-out and extension of

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<sup>325</sup> VoiceStream DT Application at 24-29; Powertel DT Application at 16-19; *see also* Letter from the Honorable Patty Murray, U.S. Senator, and the Honorable Maria Cantwell, U.S. Senator to Michael K. Powell, Chairman of the Federal Communications Commission, IB Docket No. 00-187 (filed March 15, 2001) (stating that the proposed merger will benefit consumers and in no way reduce competition and noting that denying approval would violate U.S. commitments under the WTO Basic Telecommunications Agreement, which could start a trade war damaging exports in every sector of the U.S. economy); Letter from the Honorable George R. Nethercutt, Jr., the Honorable Jennifer Dunn, the Honorable Norm Dicks, the Honorable Doc Hastings, the Honorable Adam Smith, the Honorable Jay Inslee, the Honorable Jim McDermott, the Honorable Rick Larson, and the Honorable Brian Baird, U.S. House of Representatives to Michael Powell, Chairman of the Federal Communications Commission, IB Docket No. 00-187 (filed Feb. 16, 2001) (citing the public interest benefits of the proposed merger, noting that denying approval would violate U.S. commitments under the WTO Basic Telecommunications Agreement).

<sup>326</sup> VoiceStream DT Application at 25-26; Powertel DT Application at 17.

<sup>327</sup> VoiceStream DT Application at 27-29; Powertel DT Application at 17-18.

<sup>328</sup> VoiceStream DT Application at 24-25.

VoiceStream's network will enable the merged company to deploy additional wireless services, including services that DT provides in Europe but are not yet available in the United States.<sup>329</sup> As VoiceStream's network is built out and new spectrum added, roaming charges incurred by VoiceStream's subscribers will be reduced.<sup>330</sup>

118. The Applicants also argue that the merger will present opportunities for a single-handset global service on DT's GSM network<sup>331</sup> with such features as worldwide voicemail access numbers and transferable prepaid calling plans.<sup>332</sup> In addition, the Applicants claim that the merger will produce benefits through economies of scale and scope by allowing VoiceStream to procure handsets and infrastructure equipment at attractive prices and drive down other costs, and these cost savings may be passed on to customers.<sup>333</sup> The Applicants argue that the merger with DT will provide VoiceStream with the needed financing in order to deploy next-generation wireless services, which will provide U.S. consumers with another choice in obtaining high-speed data services.<sup>334</sup>

119. According to the Applicants, DT's acquisition of Powertel will provide consumer benefits similar to those provided by its acquisition of VoiceStream, and some of these benefits will be greater for Powertel users than for VoiceStream users.<sup>335</sup> DT's acquisition of Powertel will provide the capital necessary to build out and upgrade Powertel's network and allow the deployment of advanced services over this network, that otherwise would not take place given the fact that Powertel is a regional and not a national operator.<sup>336</sup> Since Powertel is a regional provider, folding Powertel's network into VoiceStream's will decrease roaming charges to Powertel's customers and give them access to a provider with a near nationwide footprint.<sup>337</sup> Also, the acquisition of Powertel will fill in one of VoiceStream's remaining substantial gaps in its national footprint in the southeastern United States.<sup>338</sup>

120. Commenters in this proceeding discuss many of the same public benefits claimed by the Applicants. The Organization for International Investment, Communication Workers of America, Siemens

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<sup>329</sup> *Id.* at 27.

<sup>330</sup> *Id.* at 26.

<sup>331</sup> *Id.* at 27; Powertel DT Application at 18.

<sup>332</sup> VoiceStream DT Application at 27.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* at 28-29.

<sup>335</sup> Powertel DT Application at 16-19.

<sup>336</sup> *Id.* at 17.

<sup>337</sup> *Id.* at 17.

<sup>338</sup> *Id.* at 10.

and Stan Kugell each argue that the merger will provide VoiceStream with an infusion of capital that will permit it to build out its network and extend its national footprint.<sup>339</sup> These commenters each claim that the merger will enable VoiceStream to deploy new services including next generation wireless services.<sup>340</sup> Siemens and Stan Kugell point out the benefits of the merged entity being able to offer a global wireless network to VoiceStream's customers.<sup>341</sup> The Communications Workers of America argue that U.S. consumers and workers will benefit from a transfer of positive elements of DT's corporate culture, such as a strong labor/management partnership and corporate involvement in connecting schools to the Internet.<sup>342</sup> The National Consumers League similarly claims that consumers can be expected to benefit in view of DT's record as a good employer and corporate citizen.<sup>343</sup>

121. We agree with the Applicants that the build-out and extension of VoiceStream's network to expand VoiceStream's reach significantly, both nationwide and internationally, constitutes a clear, transaction-specific public interest benefit. A significant percentage of mobile phone users desire nationwide access, and those users will benefit from the continued expansion of the VoiceStream network and the resulting increase in competition in mobile services. We are persuaded that new services, new features, and potentially reduced roaming charges to consumers will result from the merger. We also believe that the combined DT/VoiceStream/Powertel company will become a stronger competitor among other large companies providing international roaming services and that U.S. consumers will gain benefits from increased choices and competition in such international roaming services.

122. We agree with the Applicants that GSM subscribers will benefit from the expanded licensed area to be created by combining VoiceStream and Powertel under ownership of DT, and that all mobile phone users needing nationwide access will benefit significantly from the expansion of VoiceStream's licensed area. Moreover, this expansion of VoiceStream's licensed area will provide more consumers in the southeast United States with an additional, and possibly less expensive, opportunity to subscribe to a carrier that enables both local and international access.

123. *VoiceStream-Powertel Merger.* The Applicants contend that the proposed VoiceStream-Powertel merger, which will occur only if the proposed merger between DT and VoiceStream is not

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<sup>339</sup> OII Comments at 3; CWA Comments at 3; Siemens Comments at 1; Kugell Comments at 1.

<sup>340</sup> OII Comments at 3; CWA Comments at 2-3; Siemens Comments at 1; APT Comments at 3.

<sup>341</sup> Siemens Comments at 1; Kugell Comments at 1; *but see* QSC Comments at 18-19. QS Communications AG disputes the claim that providing VoiceStream's subscribers enhanced global roaming services will be a public benefit. QSC contends that, if VoiceStream subscribers enjoy preferential rates for roaming on DT's networks, such rates may have been achieved through discrimination in roaming abroad against other U.S. carriers that are migrating to GSM compatible standards; such discrimination would render illusory any supposed benefit to competition. *Id.* As discussed in detail above, however, we find it unlikely that DT will be able to discriminate in this way given the competition and regulatory safeguard to which DT is already subject.

<sup>342</sup> CWA Comments at 3-6.

<sup>343</sup> National Consumer League Comments at 1.

consummated, will generate significant public interest benefits.<sup>344</sup> The Applicants argue that acquisition of control of Powertel will permit VoiceStream to fill a major gap in its national PCS footprint. They claim that consumers will benefit from this significant expansion of the nationwide footprint for GSM subscribers, which will result in additional competition in the mobile voice market.<sup>345</sup>

124. We agree with the Applicants that the expansion of VoiceStream's network to the portion of the southeastern United States that Powertel—but not VoiceStream—reaches at present constitutes a clear, transaction-specific public interest benefit. A significant percentage of mobile phone users desire nationwide access, and those users will benefit from the expanded licensed area to be created by combining VoiceStream and Powertel.

## VII. CONCLUSIONS

### A. Section 310(b)(4)

125. In response to the petition filed by the Applicants seeking a Commission determination that the levels of alien and foreign government ownership resulting from the proposed transactions would be consistent with the public interest, we have examined, as required by the *Foreign Participation Order*, whether the proposed foreign government ownership would pose a high risk of harm to competition in the U.S. market and have concluded that it would not. We therefore decline to impose conditions related to DT's conduct in the German market, as requested by some commenters. We also have accorded deference to the expertise of the Executive Branch regarding national security and law enforcement concerns and will condition grant of the DT Transfer Applications on compliance with the DT-VoiceStream/DOJ/FBI Agreement.

### B. Sections 214 and 310(d)

126. Based upon our section 310(b)(4) analysis and our reviews under sections 214(a) and 310(d) of the Act, we find that the Applicants are legally and otherwise qualified to hold the licenses at issue. We determine that the proposed merger will likely not result in harm to competition in any relevant market and will likely yield tangible public interest benefits to U.S. consumers. We conclude, therefore, that the transfers serve the public interest, convenience and necessity and decline to designate the DT Transfer Applications for hearing.

## VIII. RELATED PETITIONS

127. We also consider in this proceeding three petitions for declaratory ruling under section 310(b)(4) of the Act, and one petition for declaratory ruling under sections 310(b)(4) and 310(d) of the Act, from entities in which VoiceStream currently holds indirect, non-controlling interests (the Related

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<sup>344</sup> VoiceStream Powertel Application at 2-3.

<sup>345</sup> *Id.*

Petitions).<sup>346</sup> On February 1, 2001, the Bureaus issued a public notice to announce that the petitions were accepted for filing, and to establish a pleading cycle to permit interested parties an opportunity to comment on the petitions.<sup>347</sup> In response to the *Declaratory Ruling Public Notice* no comments were filed. As discussed above, under section 310(b)(4), we determine whether the public interest would be served by allowing these common carrier licensees to have indirect foreign ownership that exceeds 25 percent.<sup>348</sup>

128. We find no reason that the foreign ownership attributable to DT would raise concerns with respect to the Related Petitions different from those addressed in this order with respect to DT generally. Therefore, consistent with our findings with respect to the proposed acquisition by DT of VoiceStream Powertel in general, we conclude pursuant to section 310(b)(4) that the public interest is served by allowing the proposed levels of indirect foreign ownership requested in the Related Petitions. Each petition is discussed individually below.

#### A. CIVS IV and CIVS V

129. On October 13, 2000, Cook Inlet/VS GSM IV PCS, LLC (CIVS IV) and Cook Inlet/VS GSM V PCS, LLC (CIVS V) filed a Petition for Declaratory Ruling under Section 310(b)(4) of the Act stating that it is in the public interest to permit an indirect ownership interest of up to 49.9 percent in CIVS IV and CIVS V by DT. On April 4, 2001 CIVS IV and CIVS V filed an amendment to their Petition requesting that the Commission extend its section 310(b)(4) ruling in this proceeding to allow CIVS IV and CIVS V to exercise their right to call additional capital from VoiceStream up to the point where VoiceStream would have an 85 percent equity stake in CIVS IV and V.<sup>349</sup> CIVS IV and CIVS V each are

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<sup>346</sup> As discussed *infra* at para. 135, in addition to the petition under section 310(b)(4) of the Act filed by Iowa Wireless Services Holding Corporation (Iowa Wireless), VoiceStream and DT, with the licensee's consent, also have filed an application for the transfer of control of VoiceStream's limited partnership interest in Iowa Wireless to DT. See ULS File No. 0000315934.

<sup>347</sup> See *Declaratory Ruling Public Notice*, *supra* note 3. The petition filed on October 13, 2000 by the CIVS entities was withdrawn as moot on April 4, 2001 as a result of VoiceStream's acquisition of a controlling interest in these entities. See *Withdrawal Letter from Jonathan D. Blake, Christine E. Enemark, and Rachel C. Welch, Counsel for Cook Inlet Region, Inc., Transferor of the CIVS entities to Magalie Roman Salas, Secretary, Federal Communications Commission, IB Docket No. 00-187 (filed Apr. 4, 2001)*. On April 12, 2001, the Applicants amended their Petition for Declaratory Ruling under section 310(b)(4) to include the CIVS entities as newly-acquired wholly-owned subsidiaries of VoiceStream. See *VoiceStream DT Amendment to Petition for Declaratory Ruling (filed Apr. 12, 2001)*.

<sup>348</sup> 47 U.S.C. Section 310(b)(4); see also *Foreign Participation Order*, 12 FCC Rcd at 23935, para. 97.

<sup>349</sup> See *Amendment Letter from Jonathan D. Blake, Christine E. Enemark, and Rachel C. Welch, Counsel for CIVS IV, CIVS V, BCN Communications, L.L.C. and CIVS IV License Sub I, LLC to Magalie Roman Salas, Secretary, Federal Communications Commission, IB Docket No. 00-187 (filed Apr. 4, 2001)*. CIVS IV and CIVS V also amended their petition to cover a new wholly-owned subsidiary of CIVS IV, BCN Communications, L.L.C. *Id.* An earlier amendment to the petition added wholly-owned subsidiary CIVS IV License Sub I, LLC. See *Declaratory Ruling Public Notice*, *supra* note 3 at 2 n.5. As wholly-owned subsidiaries of CIVS IV, these entities would have the same attributable indirect foreign ownership as CIVS IV.

Delaware limited liability companies.<sup>350</sup> CIVS IV is a wholly-owned, direct subsidiary of Cook Inlet/VS GSM IV PCS Holdings, LLC; CIVS V is a wholly-owned, direct subsidiary of Cook Inlet/VS GSM V PCS Holdings, LLC. Each of the CIVS IV Holdings and CIVS V Holdings has two members. Cook Inlet Mobile Corporation (CIMC) holds a 50.1 percent membership interest in and is the sole manager of CIVS IV Holdings; Cook Inlet Wireless, Inc. (CIWC) holds a 50.1 percent membership interest in and is the sole manager of CIVS V Holdings. CIMC and CIWC each are wholly-owned, direct subsidiaries of Cook Inlet Region, Inc., an Alaska Native Regional Corporation organized pursuant to the Alaska Native Claims Settlement Act. Omnipoint Investment, LLC, a wholly-owned subsidiary of VoiceStream, holds a 49.9 percent membership interest in each of CIVS IV Holdings and CIVS V Holdings.

130. In the event that DT acquires VoiceStream as contemplated, CIVS IV and CIVS V require Commission approval for the resulting indirect foreign ownership of CIVS IV and CIVS V attributable to DT.<sup>351</sup> We received no comments in response to the Public Notice of CIVS IV and CIVS V petition for a declaratory ruling.

131. Our grant of this petition allows the following foreign ownership: CIVS IV and CIVS V are authorized to be indirectly owned up to 85 percent by DT and DT's German shareholders. CIVS IV and CIVS V would need additional Commission authority under section 310(b)(4) before DT or DT's German shareholders could increase investment above the authorized levels. Foreign entities other than DT or DT's German shareholders may acquire as much as 25 percent aggregated indirect ownership in each of CIVS IV and CIVS V. Any such ownership in excess of 25 percent will require additional Commission authority.

#### **B. Wireless Alliance, L.L.C.**

132. On October 16, 2000, Wireless Alliance, L.L.C. (Wireless Alliance) filed a Petition for Declaratory Ruling under Section 310(b)(4) of the Act (Wireless Alliance Petition) stating that it is in the public interest to permit an indirect ownership interest of up to 30 percent in Wireless Alliance by DT. Wireless Alliance is a Delaware corporation owned and controlled 70 percent by Rural Cellular Corporation, a Minnesota corporation, and 30 percent owned by APT Minneapolis, Inc., a wholly-owned subsidiary of VoiceStream.<sup>352</sup>

133. In the event that DT acquires VoiceStream as contemplated, Wireless Alliance requires Commission approval for the resulting indirect foreign ownership of Wireless Alliance attributable to DT. We received no comments in response to the Public Notice of Wireless Alliance's petition for a declaratory ruling.

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<sup>350</sup> Because CIVS IV and CIVS V hold, or are intended to hold, entrepreneurs' block PCS licenses, they are structured to comply with the Commission's entrepreneurial eligibility rules. See 47 C.F.R. §§ 1.2110, 24.709, 24.720.

<sup>351</sup> See *VoiceStream/Omnipoint Order*, 15 FCC Rcd at 3347-50, paras. 13-20; *VoiceStream/Aerial Order*, 15 FCC Rcd at 10094-96, paras. 10-16.

<sup>352</sup> Wireless Alliance Petition at 2.

134. Our grant of this petition allows the following foreign ownership: Wireless Alliance is authorized to be indirectly owned up to 30 percent by DT and DT's German shareholders. Wireless Alliance would need additional Commission authority under section 310(b)(4) before DT or DT's German shareholders could increase investment above this authorized level. Foreign entities other than DT or DT's German shareholders may acquire as much as 25 percent aggregated indirect ownership in Wireless Alliance. Any such ownership in excess of 25 percent will require additional Commission authority.

### C. Iowa Wireless

135. On January 5, 2001, Iowa Wireless filed a Petition for Declaratory Ruling under sections 310(b)(4) and 310(d) (Iowa Wireless Petition) of the Act stating that it (1) is in the public interest to permit an indirect ownership interest of up to 38 percent in Iowa Wireless by DT and (2) based on the particular provisions of the Iowa Wireless organizational documents, the transfer to DT of VoiceStream's 38 percent limited partnership interest in Iowa Wireless either does not constitute a transfer of control of Iowa Wireless, or in the alternative, constitutes only a *pro forma* transfer of control of Iowa Wireless. Subsequently, on March 9, 2001, VoiceStream and DT, with the consent of Iowa Wireless, submitted an application for the transfer of control of VoiceStream's limited partnership interest in Iowa Wireless from VoiceStream to DT and asked that the application be subject to the processing procedures for substantive transfers of control.<sup>353</sup> The Applicants state that they seek to resolve "any question regarding the appropriate manner in which this application should be processed under the Commission's rules."<sup>354</sup> Accordingly, we find that the Applicants have rendered moot the need for a declaratory ruling under section 310(d) of the Act, and do not address the issue further. Instead, we limit our analysis of the Iowa Wireless Petition to the ruling requested under section 310(b)(4) of the Act.

136. *Section 310(b)(4)*. Iowa Wireless is a Delaware corporation, wholly-owned by IWS-LP, which in turn is comprised of a general partner, INS Wireless, Inc., an Iowa corporation, which holds a 62 percent general partnership interest, and a limited partner, VoiceStream PCS I Iowa Corporation, an indirect wholly-owned subsidiary of VoiceStream, which holds a 38 percent limited partnership interest.<sup>355</sup>

137. In the event that DT acquires VoiceStream as contemplated, Iowa Wireless requires Commission approval for the resulting indirect foreign ownership of Iowa Wireless attributable to DT. We received no comments in response to the Public Notice of Iowa Wireless' petition for a declaratory ruling.

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<sup>353</sup> See ULS File No. 0000315934. This application appeared as accepted for filing on March 21, 2001. See *Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Accepted for Filing*, Public Notice, Report No. 810 (Mar. 21, 2001). Disposition of this application is not addressed in this order.

<sup>354</sup> See ULS File No. 0000315934, Amendment at 1. See also Public Notice Report No. 810 (Mar. 21, 2001). This application will be processed independently from this proceeding taking into consideration the determinations made herein.

<sup>355</sup> Iowa Wireless Petition at 2.

138. Our grant of this petition allows the following foreign ownership: Iowa Wireless is authorized to be indirectly owned up to 38 percent by DT and DT's German shareholders. Iowa Wireless would need additional Commission authority under section 310(b)(4) before DT or DT's German shareholders could increase investment above this authorized level. Foreign entities other than DT or DT's German shareholders may acquire as much as 25 percent aggregated indirect ownership in Iowa Wireless. Any such ownership in excess of 25 percent will require additional Commission authority.

**D. Eliska Wireless Ventures**

139. On January 24, 2001, Eliska Wireless Ventures License Subsidiary I, L.L.C. (Eliska License Sub) filed a Petition for Declaratory Ruling under Section 310(b)(4) (Eliska License Sub Petition) of the Act stating that it is in the public interest to permit an indirect ownership interest of 49.9 percent equity in Eliska License Sub by DT. Eliska License Sub is a limited liability corporation formed under the laws of the state of Delaware. It is a wholly-owned subsidiary of Eliska Wireless Ventures I, Inc., a Delaware corporation which in turn is wholly-owned by EWV Holding Company, Inc., a Delaware corporation.

140. Powertel owns 49.9 percent of the equity and holds 24.95 percent of the voting rights in Eliska. In the event that DT acquires Powertel as contemplated, Eliska requires Commission approval for the resulting indirect foreign ownership of Eliska attributable to DT. We received no comments in response to the Public Notice of Eliska's petition for a declaratory ruling.

141. The International Bureau previously authorized Eliska to be indirectly owned up to 35.99 percent by any one of the following foreign entities: Sonera Holding BV, Sonera Corporation, and Sonera Ltd.<sup>356</sup> We stated that Eliska would need additional Commission authority under section 310(b)(4) before any of these Sonera entities could increase investment above this authorized level. Additional authority also would be required before any other foreign entity or entities acquire, in the aggregate, a greater-than-twenty five-percent indirect interest in Eliska.<sup>357</sup>

142. Our grant of this petition allows the following foreign ownership in addition to that previously authorized with respect to the Sonera entities: Eliska is authorized to be indirectly owned up to 49.9 percent by DT and DT's German shareholders. Eliska would need additional Commission authority under section 310(b)(4) before DT or DT's German shareholders could increase investment above this authorized level. Foreign entities other than the Sonera entities, DT, and DT's German shareholders may

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<sup>356</sup> See *DiGiPH PCS, Inc. and Eliska Wireless Ventures License Subsidiary I, L.L.C.*, Memorandum Opinion and Order, 15 FCC Rcd 24501 (2000). The assignment of the DiGiPH licenses to Eliska License Sub was consummated on January 31, 2001. As a result, Eliska Wireless Investors I, L.P., an Alabama limited partnership, holds a 60 percent voting and 20 percent equity interest. Powertel, a Delaware corporation, holds a 24.95 percent voting and 49.9 percent equity interest. Sonera Holding B.V., a company organized under the laws of the Netherlands, hold a 15.05 percent voting and 30.1 percent equity interest. Petitioners anticipate that Sonera's ownership interest in Powertel will result in Sonera's direct and indirect equity interest in EWV Holding Company Inc. totaling 35.99 percent. See Eliska License Sub Petition at 2.

<sup>357</sup> *Foreign Participation Order* 12 FCC Rcd at 23941, para. 114.

acquire as much as 25 percent aggregated indirect ownership in Eliska. Any such ownership in excess of 25 percent will require additional Commission authority.

#### **IX. ORDERING CLAUSES**

143. Accordingly, having reviewed the applications, the petitions and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a) and (c), 309, and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and (j), 214(a) and (c), 309, and 310(b) and (d), that the applications filed by VoiceStream and Powertel for authority to transfer control of licenses and authorizations to DT, and the petitions for declaratory ruling filed by VoiceStream and Powertel in the above-captioned proceeding ARE GRANTED, to the extent specified in this order and subject to the conditions specified below.

144. IT IS FURTHER ORDERED that, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, this authorization to VoiceStream and Powertel to transfer control of their international section 214 authorizations to DT is subject to the condition that said section 214 authorizations shall be subject to rules governing dominant carriers set forth in section 63.10 of the Commission's rules, 47 C.F.R. §63.10, on the U.S.–Germany, U.S.–Hungary, U.S.–Slovakia, and U.S.–Croatia routes.

145. IT IS FURTHER ORDERED that the above grant shall include authority for DT to acquire control of: (a) any authorization issued to VoiceStream's and Powertel's subsidiaries during the Commission's consideration of the transfer of control applications or the period required for consummation of the transaction following approval; (b) construction permits held by such licensees that mature into licenses after closing; and (c) applications filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.

146. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 214(a) and (c), 309 and 310(b) and (d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and (j), 214(a) and (c), 309, 310(b) and (d), that the Petition to Adopt Conditions to Authorization and Licenses filed by the Department of Justice and the Federal Bureau of Investigation, on January 25, 2001, IS GRANTED, and that the authorizations and licenses related thereto which are to be assigned or transferred as a result of this Order are subject to compliance with provisions of the Agreement between VoiceStream and DT on the one hand, and the Department of Justice and the Federal Bureau of Investigation on the other, effective on the date when the DT mergers with VoiceStream and Powertel have closed, which Agreement is designed to address the national security, law enforcement, and public safety concerns of the Department of Justice and the Federal Bureau of Investigation regarding the authority granted herein, is fully binding upon VoiceStream and DT and those subsidiaries, successors and assigns of both companies that provide telecommunications services within the United States. Nothing in the Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. §§ 222(a) and (c)(1) and the Commission's implementing regulations.

147. IT IS FURTHER ORDERED that the petitions for declaratory ruling filed by CIVS IV and CIVS V; Wireless Alliance; Iowa Wireless; and Eliska Wireless Ventures ARE GRANTED to the extent specified in the order; accordingly these entities are authorized to accept indirect foreign ownership in excess of the 25-percent benchmark of section 310(b)(4) of the Communications Act of 1934, as amended, to the extent specified in this Order.