

**STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH
CONCURRING IN PART, DISSENTING IN PART**

Re: In re Applications of Voicestream Wireless Corporation, Powertel Inc. Transferors and Deutsche Telekom AG, Transferee, et al, IB Docket No. 00-187 (rel. April 27, 2001).

I join today's decision to grant the requested license transfers from Voicestream and Powertel to Deutsche Telekom (DT). Although I regret that our decision has taken so long, at least in this case (unlike so many license transfers before it) the delay was not attributable to closed-door negotiations about so-called "merger conditions." Instead today the Commission squarely addresses a legal issue of first impression: the scope and meaning of Sections 310(a) and (b)(4) as applied to a proposed licensee controlled by a holding company in which a foreign government has a significant ownership interest. Unfortunately the Commission in prior decisions had sent unclear signals about the application of Section 310 to this situation. It is my hope that today's decision – built on the plain language of the statute – will clear up any lingering ambiguity about our interpretation. Moreover, I am pleased that today's decision properly places the burden on the Commission, not the applicants, to show that the "public interest will be served by the refusal or revocation of such license" transfer under Section 310(b)(4).¹ In my view, this is a heavy burden that has not been met in this case.

Let me also note my profound appreciation for the insights of Senator Hollings in this proceeding. Senator Hollings invested substantial effort in providing detailed comments to the Commission. His comments helped the Commission focus on the details of the Communications Act generally and Section 310 in particular. Thanks to Senator Hollings, the Commission avoided many mistakes in this proceeding, including an erroneous interpretation that the World Trade Organization agreements, rather than Section 310 of the Communications Act, governed the Commission's review of this license transfer. The Commission's final determinations--both those that are consistent with the insights of Senator Hollings and those that are not--have been substantially strengthened as a result of the reflection required to appreciate fully his comments. Senator Hollings has reminded us to remain faithful to the law, and that is what this Commission has attempted to do.

I also wish to applaud a subtle shift in the Commission's approach to license transfers that is reflected in today's item. In the past, the Commission has assumed the role of "competition police" in license transfers. In these cases, the Commission would wander off into various "market analyses" to re-plow ground already spade by the Justice Department. All of these contortions were rationalized based on a statutory interpretation that permitted the Commission to engage in any form of review on an ad hoc basis. I am heartened to see that today's item does not engage in market analysis for market analysis sake. Instead, the

¹ I also note that the proper placement of this burden on the Commission is only one of many possible reforms to our Section 310 process that will more faithfully fulfill our statutory obligations. I hope that future Commissions will re-examine our overall approach to these issues. See Sidak, Gregory J., *Foreign Investment in American Telecommunications* (University of Chicago Press 1997).

Order solely responds to concerns raised by the commenters. While I would have preferred an outright rejection of the relevance of these antitrust-like concerns to the narrow issue of these license transfers, I am nonetheless heartened by this change in direction.

Regardless of the positive aspects of today's Order, I must dissent from the Commission's decision to once again yield to the Justice Department and FBI by incorporating their side agreements with the parties into this Order. As I have stated on numerous prior occasions, the national security concerns raised by the Justice Department and FBI are serious and should be addressed; however, our license transfer process should not be hijacked for their cause.² A proper approach to our process creates an opportunity for Executive Branch agencies to be heard and their views considered in our license transfer proceedings.³ However, to the extent that the Executive Branch has significant concerns about the national security implications of a given transaction, Congress has created an Executive Branch review process with strict timeframes to assess all such transactions throughout the economy.⁴ There is no statutory basis for singling out telecommunications companies for special, and less favorable, treatment. Congress has explicitly set the respective roles of the Executive Branch and the Commission in these transactions, and we should abide by them.

Rather than adopting this approach, the Commission has unwisely allowed its license transfer authority to be used by the Executive Branch to negotiate "voluntary agreements" that respond to national security concerns. These agreements are not very voluntary; without such a deal, the FCC has refused to grant the license transfers.⁵ Applicants, now aware of how this process works, often go to the Executive Branch early in the license transfer process and surrender to their demands. However, that only eliminates the delay, it

² See Separate Statement of Commissioner Harold Furchtgott-Roth, In the Matter of Applications of SatCom Systems, Inc., TMI Communications and Company, L.P. and SatCom Systems Inc., 14 FCC Rcd 20798 (1999); see also AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, 14 FCC Rcd 19140 (1999).

³ See 47 U.S.C. §§ 214 and 310; see Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Service in the United States, Report and Order, 12 FCC Rcd 24094, ¶ 179 (1997) ("DISCO II"); Ironically, "we emphasize[d] . . . that we expect national security, law enforcement, foreign policy and trade policy concerns to be raised in very rare circumstances. Contrary to the fears of some commenters, the scope of the concerns that the Executive Branch will raise in the context [of transfers] . . . is narrow and well-defined." *Id.* at ¶ 180.

⁴ 50 U.S.C. § 2170(a)-(k). Pursuant to Section 2170(a), the President authorized the Committee on Foreign Investment in the United States ("CFIUS") to review foreign acquisitions of U.S. companies for national security purposes. If it is determined that an investigation is necessary, the investigation must commence no later than 30 days after the President's receipt of written notification of the transaction in question, and the investigation must be completed no later than 45 days after such a determination is made. The President must make an investigation in any case in which an entity controlled by a foreign government seeks to engage in a transaction that could affect national security, which is subject to the time limitations stated above. The President must announce a decision to take action to suspend or prohibit any transaction no later than 15 days after an investigation is completed.

⁵ These filings have often delayed transactions' closing by months.

does not address the ongoing problem of enforcement. Because the license transfers are conditioned on compliance with these side agreements, the Commission by definition becomes responsible for ensuring compliance.⁶ In the end, I do not believe the Commission's proper role is to promulgate or enforce Executive Branch side agreements with licensees. I hope future Commission's will re-examine this process with a critical eye as well.

⁶ By conditioning these transfers on compliance with the side agreements, it also seems to be the case that whenever the side agreement needs to be amended or altered, the Executive Branch and the parties are obligated to come to the FCC for approval. This prospect alone would seem to be a sufficient deterrent to the Executive Branch to use the licensing process to achieve their goals.