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

In the Matter of	)	
	)	
VoiceStream Wireless Corporation,	)	
Transferor,	)	
And	)	IB Docket No. 00-187
	)	
Deutsche Telekom AG	)	
Transferee,	)	
	)	
Application for Consent	)	
to Transfer of Control	)	

COMMENTS OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT

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SUMMARY

The Organization for International Investment ("OFII") submits these comments with respect to the Deutsche Telekom-VoiceStream merger because it is critically important that the Commission uphold the United States' commitments made in the WTO Basic Telecommunications Agreement. At stake is the United States' credibility as a good faith trade negotiator, and its ability to negotiate future agreements, including upcoming services agreements. Trade agreements like the Basic Telecom Agreement create a hospitable climate for foreign investment, which produces enormous benefits for U.S. consumers.

When the United States made its WTO offer, it expressly stated that there would be "no limits on indirect ownership of such licenses by foreign corporations (including government-owned corporations)." In particular, the United States did not in any way limit market access to U.S. markets based on competitive conditions in a carrier's home market. After the conclusion of the Basic Telecom Agreement, the Commission adopted rules to implement the U.S. WTO commitments in its *Foreign Participation Order*, which established a strong presumption of entry for carriers, such as Deutsche Telekom, that are from WTO-member countries.

The FCC has rightly held that Section 310 of the Communications Act permits up to 100 percent indirect foreign ownership by firms from WTO-member countries of companies that hold common carrier radio licenses. The Commission must now affirm that holding and fulfill U.S. trade commitments. Failure to maintain a hospitable climate for foreign investment in the U.S. telecom market will harm U.S. consumers and undermine U.S. leadership in trade liberalization. That climate, of course, is guaranteed

by the binding trade commitments that the United States – along with 68 other WTO Members – has undertaken. Moreover, failure to live up to U.S. trade commitments would most likely result in official or *de facto* retaliation against U.S. companies by our trading partners. The proposed merger between Deutsche Telekom and VoiceStream is precisely the kind of transaction the Basic Telecom Agreement was intended to permit as it promises significant benefits to U.S. consumers. The FCC should not now repudiate the U.S. Government's trade commitments and deny U.S. consumers the benefit of increased competition.

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COMMENTS OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT

The Organization for International Investment ("OFII") submits these comments with respect to the Deutsche Telekom-VoiceStream merger.

I. STATEMENT OF INTEREST

OFII is a membership association representing U.S. subsidiaries of foreign parent companies. OFII's constituents range from medium-sized enterprises to some of the largest firms in the United States, and they are involved in industry and services ranging from telecommunications, biotechnology, and financial services to a multitude of consumer products. OFII's members employ millions of Americans throughout the nation. OFII's mandate is to educate the public about its members' essential role in the U.S. economy and to ensure that U.S. subsidiaries receive nondiscriminatory treatment under U.S. law.

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

II. ANALYSIS

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

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

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

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

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

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

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

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

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

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

[4] *Id.*

> license by a foreign government, an alien or a foreign corporation. All these prohibitions on direct ownership are contained in the U.S. offer.
>
> Section 310(b)(4) explicitly allows indirect ownership by all three – a foreign government or its representative, an alien or its representative or a foreign corporation, unless the FCC determines that such ownership is not in the public interest. This is also reflected in the U.S. offer . . . .[5]

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

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

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

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5 105 *Cong. Rec.* S1963 (1997).

6 *Id.*

7 *Foreign Participation Order* 12 FCC Rcd at 23893-'94.

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

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

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

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

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

rebutted, and entry conditioned or denied, only in the "exceptional case" that an unrestricted grant of an application would pose "a very high risk" to competition in the U.S. market.[9] The Commission further observed that it is "highly unlikely that a carrier from a WTO Member country . . . could pose a very high risk to competition."[10] Thus, those wishing to challenge this transaction based upon market conditions outside the United States must, under the *Foreign Participation Order*, demonstrate that this transaction presents an extremely high danger to U.S. competition – not competition in a foreign market.

By contrast, if the Commission were to review foreign market conditions as part of its review of these applications without any party showing a "very high risk" to competition in the United States, it would be *de facto* resurrecting an ECO-type test. In its WTO commitments, the United States, however, did not make competition in foreign markets a condition of market access. Imposing a new market access condition on entrants from a specific country would place the United States in violation of a number of WTO commitments, including the following:[11]

- ***Market Access.*** The United States must provide treatment no less favorable than that provided for in the terms, limitations, and conditions agreed and specified in the U.S. schedule of commitments.[12] In this case, the United States must permit foreign investment on the terms and conditions that it promised in its schedule of commitments, and no less.

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[9] *Foreign Participation Order*, 12 FCC Rcd. at 23913. The *Order* also allows the Commission to deny foreign entry based on national security concerns. *See id.* at 23918-19;

[10] *Foreign Participation Order*, 12 FCC Rcd. at 23914.

[11] The Commission has already found that elimination of the foreign-entry presumption "could undercut the commitments made under the GATS and WTO Basic Telecom Agreement." *Foreign Participation Order*, 12 FCC Rcd. at 23916.

[12] *See* General Agreement on Trade in Services ("GATS") art. XVI.

- ***Most Favored Nation ("MFN").*** The United States must offer the same treatment to like services and service suppliers from all other WTO Members.[13] For example, if the United States treats a Canadian supplier in one particularly favorable way, it must treat a German service supplier in at least as favorable a manner.[14]

- ***National Treatment.*** The United States must treat like services and service suppliers of other WTO Members no less favorably than it treats its own services and service suppliers.[15] In other words, national treatment means that the United States must treat German investors and services suppliers no less favorably than it treats U.S. investors and service suppliers.[16] Were the Commission to subject a foreign applicant to more stringent entry standards than it does U.S. applicants, the United States would be in violation of this commitment.

The United States could be brought before a WTO dispute settlement panel if the FCC violates any of these obligations. Abandonment of the *Foreign Participation Order* could be harmful to U.S. trade interests even in the absence of WTO action, however. As the Commission has recognized, the United States derives substantial benefits from being seen as an "example" with respect to trade matters in the telecom industry. Indeed, in implementing the foreign-entry presumption, the Commission noted:

> The success of the WTO Basic Telecom Agreement depends on implementation of the market-opening commitments of our trading partners. The United States must lead the way in prompt, effective implementation of our commitments. *If the United States is*

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13 *See* GATS art. II.

14 *See, e.g., Report of the Appellate Body, European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, ¶ 255 (Sept. 9, 1997) ("*Bananas Appellate Body Report*") (upholding panel findings that E.U. allocation of operator and ripener licenses pursuant to country-specific quotas violated E.U. MFN obligations under GATS article II); *Report of the Panel, Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, DS55/R, DS59/R, DS64/R (July 2, 1998) (finding that Indonesia's national car program afforded special treatment to car parts and components imported from Korea (whose manufacturer, Kia, played a key role in the Indonesian scheme), thereby violating Indonesia's MFN obligation under GATT 1994 art. I:1).

15 *See* GATS art. XVII.

16 *See, e.g., Bananas Appellate Body Report*, ¶ 255 (upholding DSB findings that E.U. allocation of operator and ripener licenses pursuant to country-specific quotas violated E.U. national treatment obligations under GATS article XVII); *Report of the Panel, Chile – Taxes on Alcoholic Beverages*, WT/DS87/R and DS110/R, (June 15, 1999) (finding that Chile's imposition of higher tax on imported spirits than locally brewed *pisco* violated national treatment obligations under GATT 1994 art. III:2).

> *perceived as failing to implement its commitments, other countries would likely limit implementation of their own commitments. We find such a result would deny the benefits of open global markets and increased competition to U.S. carriers and consumers, and is not in the public interest.*[17]

Were the United States to be perceived as backing away from its trade commitments, its trade partners would feel enormous pressure to act accordingly, either in the form of WTO legal action or *de facto* retaliation. Such action or retaliation would not necessarily be confined to the telecommunications sector, but could affect trade in other industries.

Concerns about potential retaliation are not academic. Indeed, in response to this very transaction, the European Union has threatened to scrap the entire Basic Telecom Agreement.

> European Union officials have said that blocking the merger would violate international trade law, and that the EU could in turn pull out of some of the 1997 World Trade Organization agreements governing telecommunications. "If this is an agreement which one side says it won't honor, then the other side is not particularly obliged to follow" it, said Wilfried Schneider, a spokesman for the EU's delegation in Washington, D.C. "The European Union is concerned. We will have to think about what to do."[18]

The Commission should not unilaterally take actions that could precipitate a trade war, and in this case there is no need to do so. The Commission's *Foreign Participation Order* establishes a framework, consistent with U.S. WTO obligations, that examines the effect of the transaction on competition in the United States. The Commission should comply with its rules and honor U.S. international commitments by reviewing foreign

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[17] *Foreign Participation Order*, 12 FCC Rcd. at 23908.

[18] John Borland, *VoiceStream-DT Merger Creates Political Tussle* (July 24, 2000) (available at http://ciscomp.cnet.com/news/0-1004-200-2334714.html).

market conditions only to the extent that they would create a merger-specific, very high risk to competition in the United States.

C. The Proposed Merger Will Produce Strong Public Interest Benefits.

The proposed merger, rather than provoking actions that could harm U.S. trade interests, should serve as an example of the many benefits that foreign investment brings to the United States. Foreign companies, through their U.S. subsidiaries, play a tremendous role in the stability and growth of the U.S. economy. Last year investment by international companies in new and existing American companies reached a record-breaking $282 billion. Much of this investment comes from new global alliances – like the one proposed by Deutsche Telekom and VoiceStream – which have been made possible by the pro-competitive and market-opening commitments of trade agreements such as the Basic Telecom Agreement.

This huge influx in international investment is essential to our continued economic growth. It carries with it substantial benefits to American consumers and American companies. The U.S. subsidiaries of international companies support over 5 million American jobs – jobs that are high-skill and high-pay. These workers, in turn, produce goods accounting for more than 22% of U.S. exports. The investments of their parent corporations allow these U.S. subsidiaries access to new markets internationally, while providing additional sources of capital for expansion and innovation domestically.

These are precisely the public interest benefits to be gained by the Deutsche Telekom-VoiceStream merger.[19] An even stronger VoiceStream will be well-positioned

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[19] Interestingly, Germany is the largest source of U.S. foreign investment behind Great Britain.

to continue to build out its networks and deploy new services, adding thousands of new jobs. Of course these are jobs – from network engineer, to customer service representative, to management – that will remain on American soil.

As has happened in other industries when international companies enter and compete in the United States, this merger will also benefit American consumers. As VoiceStream/Deutsche Telekom grows and introduces new services, it will push all other U.S. wireless operators to compete. This merger, like other foreign investment in the United States, thus directly benefits American workers and American consumers.

III. CONCLUSION

The Commission's actions as it considers this merger will be a direct test of the United States' credibility in implementing trade agreements. The Commission must do everything it can to ensure that the United States honors its word and keeps its commitments. Now, of all times, is not the occasion for the Commission to consider actions that would risk placing the United States in violation of its trade commitments. The merger should be expeditiously approved without any conditions that would violate U.S. WTO commitments.

Respectfully submitted,

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December 13, 2000

CERTIFICATE OF SERVICE

I, Maria Cabico, do hereby certify that copies of the foregoing pleading was served via first class mail, postage prepaid on this 13th day of December, 2000, to the following:

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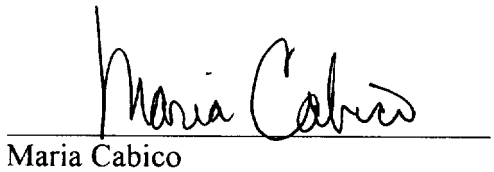

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