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	)	

REPLY COMMENTS OF THE

ORGANIZATION FOR INTERNATIONAL INVESTMENT

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REPLY COMMENTS OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT

The Organization for International Investment ("OFII") submits these reply comments with respect to the Deutsche Telekom-VoiceStream merger. As an organization whose members have a strong interest in U.S. trade policies, and in market access conditions in the United States, OFII strongly disagrees with comments by Senator Hollings and comments by Global TeleSystems, Novaxess and QS Communications, three competitors of Deutsche Telekom in Germany. All of these parties ask the Commission unilaterally to abrogate U.S. WTO commitments. To the contrary, the Commission should strongly reaffirm the legality of, and its commitment to, full implementation of the U.S. WTO commitments.

ANALYSIS

I. SECTION 310 OF THE COMMUNICATIONS ACT ALLOWS UNLIMITED INDIRECT FOREIGN INVESTMENT, REGARDLESS OF WHETHER A FOREIGN GOVERNMENT CONTROLS A WIRELESS LICENSEE.

As outlined in OFII's comments, the FCC and the United States have interpreted Section 310 of the Communications Act to allow unlimited indirect foreign ownership of companies that hold common carrier radio licenses.[1] Based on this settled understanding of the law, the United States made binding commitments in the WTO to allow foreign companies, including government-owned companies, to own indirectly up to 100 percent of a U.S. company that holds common carrier radio licenses.[2] As the Commission is well

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[1] Comments of the Organization for International Investment, IB Docket No. 00-187 (filed Dec. 13, 2000) (hereafter "OFII Comments"); *see also Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23891, 23940 (1997) ("*Foreign Participation Order*").

[2] OFII Comments at 2-4 (describing the history of the U.S. offer with respect to market access and foreign ownership).

aware, the United States did not schedule any limitations on this commitment of indirect market access.

Senator Hollings, however, argues that Section 310(a) requires the Commission to apply a "control" test to exclude from access to the U.S. market any company in which a foreign government owns a controlling interest. Such a sweeping bar is unnecessary and is neither required nor permitted by law. By its terms 310(a) applies only to the holder or grantee of a license and prohibits a foreign government or its representative from being the direct grantee. In the case of Deutsche Telekom A.G., neither the German government nor Deutsche Telekom A.G. will be the direct licensee; a U.S. incorporated subsidiary will be the direct licensee.

The proposed transaction is plainly permitted by the language of the Act, contrary to Senator Hollings's assertions. Section 310(a) does not contain any control test and the Commission should not insert one when Congress did not. In fact, in section 310(b)(4), Congress gave the Commission explicit authority to grant a license to "any corporation directly or indirectly controlled by . . . a foreign government or representative thereof." It is quite clear, then, that Congress understood the difference between holding a license and controlling a licensee. It forbade the former and permitted the latter. Moreover**,** although Deutsche Telekom A.G. is neither a foreign government nor a representative of a foreign government under the Commission's established standard, this transaction would be legally permissible under Section 310(b)(4) even if it were. The Act plainly permits a license to be held by a company (VoiceStream) that is directly or indirectly

controlled by a foreign government or representative thereof (allegedly Deutsche Telekom).[3]

The FCC must construe the Communications Act so as to avoid any conflicts with international law, as articulated in the United States obligation under the GATS and the Basic Telecom Agreement.[4] The previously expressed view of the United States and the FCC to permit unlimited indirect foreign ownership harmonizes section 310(a) and U.S. international obligations, while Senator Hollings' view of section 310(a) creates an irreconcilable and unnecessary conflict. Accordingly, the law precludes the FCC from now adopting Senator Hollings' interpretation of section 310(a).

Moreover, both the public interest standard in 310(b)(4) and the provisions of the Exon-Florio Amendment to the Trade Act of 1988 provide the FCC and the U.S. government with sufficient authority to address specific concerns of national security. As the Commission is well aware, the Federal Bureau of Investigation has carefully reviewed the proposed transaction and, along with Deutsche Telekom and VoiceStream, asked the Commission to delay acting on this transaction "pending a resolution by the parties of those aspects of the applications that give rise to national security, law enforcement, and public safety concerns."[5]

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[3] The term "representative" of a foreign government was most likely intended to refer to the foreign government's ambassador or some other entity acting on behalf of a foreign government, not a private corporation. *See* Sidak, J.G., *Foreign Investment in American Telecommunications,* Chicago: University of Chicago Press, 1997 37-40 (explaining that the prohibition on granting a license to a foreign government or its representative was first proposed in response to the German government's use of radio to facilitate submarine warfare in World War I.)

[4] *Weinberger v. Rossi*, 456 U.S. 25 (1982) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

[5] Letter from James G. Lovelace, FBI, to Magalie Roman Salas, Secretary, FCC, Dec. 15, 2000.

Further, the FCC public interest review and the U.S. antitrust laws give the FCC and the antitrust agencies sufficient authority to address any potential competitive concerns. There is no overriding public policy need for the categorical bar on foreign government controlled companies, such as Senator Hollings espouses. The relevant agencies of the Federal Government can fully protect both national security and competition in this case as in cases involving only U.S. companies.

II. U.S. WTO COMMITMENTS AND THE COMMISSION'S *FOREIGN PARTICIPATION ORDER* PROHIBIT LIMITATIONS ON MARKET ACCESS BASED ON FOREIGN MARKET CONDITIONS UNRELATED TO COMPETITION IN THE UNITED STATES.

The Commission's legal framework for reviewing foreign ownership and investment in U.S. telecommunications firms, which OFII fully supports, was enunciated in the Commission's *Foreign Participation Order* and the Basic Telecom Agreement, and neither the Order nor the Agreement conditions market access on the extent of another nation's implementation of its WTO commitments. Several commenters, including Global TeleSystems, Novaxess and QS Communications, nonetheless now ask the Commission unilaterally to abrogate U.S. WTO commitments and the *Foreign Participation Order* by, as a condition of granting Deutsche Telekom access to the U.S. market, imposing conditions related to access by these companies to the German market.

The FCC expressly settled this issue in the *Foreign Participation Order*, stating, "We do not find it necessary or appropriate to retain the [Effective Competitive Opportunities] test or examine the extent to which a WTO member has made a market opening commitment or the extent to which that commitment has been implemented in

determining whether a carrier from that country should enter the U.S. market."[6] Even if the comments of Global TeleSystems *et al.* were well-founded (and their comments contain no reliable evidence that they are), the Commission should not now stray from that path by adding market access conditions not present in the U.S. WTO commitments or in the *Foreign Participation Order*, and to do so would be wholly improper and would violate U.S. GATS obligations.

Instead, if the U.S. Government believes that Germany has failed to fulfill the terms of its market access or regulatory commitments, the appropriate remedy is to bring a dispute in the WTO. The United States has already demonstrated its commitment to enforcing the commitments made by other WTO Members in the Basic Telecom Agreement by initiating a dispute against Mexico.[7] Indeed, allegations made by the commenters concerning German interconnection policy and regulatory transparency in Germany are precisely the kind of issues that the United States is pursuing in its dispute against Mexico. There is thus no need for the Commission to resort to the extraordinary step of abrogating U.S. international trade commitments.

CONCLUSION

As OFII observed in its comments, when the United States makes commitments in international trade agreements, it puts its national credibility on the line. Breach of U.S. commitments therefore affects not just present agreements, but the potential for reaching favorable resolutions to future trade issues. Now, of all times, is not the

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[6] *Foreign Participation Order*, at 23907 (¶ 37).

[7] Mexico Measures Affecting Telecommunications Service – Request for Consultations by the United States, WT \DS204\1(August 29,2000).

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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