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December 13, 2000

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VIA COURIER

Ms. Magalie Román Salas, Secretary
Federal Communications Commission
The Portals
445 121 H Street, S.W.
Washington, D.C. 20554

Re: **Comments of QS Communications AG** in the Matter of VoiceStream Wireless Corporation, Transferor, and Deutsche Telekom AG, Transferee, Application for Consent to Transfer of Control and Petition for Declaratory Ruling, **IB Docket No. 00-187**

Dear Ms. Román Salas:

QS Communications AG, by its undersigned counsel, respectfully submits comments in opposition to the above-cited application and petition consolidated in IB Docket 00-187. An original and four (4) copies of this filing are enclosed. Please date stamp the enclosed extra copy of this filing and return it in the self-addressed stamp envelope provided herein.

Please do not hesitate to contact Michael Schunck at (202) 295-8349 should you have any questions or concerns regarding this matter.

Respectfully submitted,

Andrew D. Lipman
Michael Schunck

Counsel for QS Communications AG.

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Enclosure

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Before the
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Transferor, and	)	IB Docket No. 00-187
	)	
Deutsche Telekom AG, Transferee,	)	
	)	
Application for Consent to Transfer of Control and Petition for Declaratory Ruling	)	

COMMENTS OF
QS COMMUNICATIONS AG

December 13, 2000

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EXECUTIVE SUMMARY

Deutsche Telekom's ("DTAG'S") Petition and Application paints a misleading picture of the applicant, its track record and the situation in its home market. The Petition and Application simply avoids a number of topics crucial to an appropriate assessment of the public interest relative to DTAG's entry into the U.S. wireless market through its proposed acquisition of VoiceStream. The present Comments seek to set the record straight in an effort to fill in some of the strategic gaps in DTAG's presentation. Particularly the most recent developments in Germany reinforce the long-standing impression that DTAG's strategy of price squeezes and delayed delivery of vital services to competitors continues to seriously undermine the entry of competitors into lucrative market segments.

While QS Communications AG ("QSC") does not believe that the Petition and Application of DTAG should be denied, it requests that any possible approval of DTAG's request be appropriately conditioned. QSC strongly believes that the Commission has the power to impose conditions because in the *Foreign Carrier Entry Order* it chose to adopt a broad and flexible approach to defining the relevant markets it would consider. Meanwhile, market developments and new technologies have created a situation in which the Commission must review DTAG's record in a variety of markets at home and abroad, in order to assess the import of its proposed merger with VoiceStream. In line with the Commission's recognition of its duty to consider the public interest, the rebuttable presumption of entry claimed by DTAG under the *Foreign Participation Order* is only "*a* [single] factor in [the] public interest analysis." Rather, the Commission must consider the unique and exceptional circumstances of DTAG's extensive operations in Germany as well as other markets in Europe and elsewhere. These exceptional

circumstances include: 1) DTAG's continuing government ownership which affords DTAG a unique freedom from investor oversight and the demands of the market; and gives it undue protection from regulatory intervention; 2) the breadth of DTAG's holdings in wireless and wireline telecommunications which present an unresolved challenge to regulatory accounting safeguards; and 3) DTAG's systematic and uncompromising opposition to every step towards establishing competition in the German market, including its non-compliance with orders of the independent regulator, which indicate its distaste for competition and regulatory supervision.

Should the Commission in the course of this review determine that a lesser remedy than complete rejection of DTAG's Petition and Application is warranted, the Commission should devise appropriate conditions to safeguard the public interest, incentivize DTAG to open its markets to competitors and abide by the rules of fair competition. There can be no doubt that the Commission is empowered to create appropriately tailored conditions. In addition to such measures as additional reporting requirements and prior approval for circuit additions, the Commission has affirmed that it has the authority to entertain "other measures." Given the "exceptional circumstance" posed by DTAG's application, the Commission should, using the flexibility it provided itself, tailor conditions which will benefit competition across markets, in the U.S. and abroad.

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Before the
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In the Matter of	)	
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	)	
Application for Consent to Transfer	)	
of Control and	)	
Petition for Declaratory Ruling	)	
	)	

COMMENTS OF
QS COMMUNICATIONS AG

I. Introduction

QS Communications AG ("QSC") welcomes the opportunity to submit comments to the Federal Communications Commission ("Commission") on the application filed by Deutsche Telekom AG ("DTAG") and VoiceStream Wireless ("VoiceStream") for the Transfer of Control of VoiceStream to DTAG, as well as the Petition of DTAG for a Section 310(b)(4) Declaratory Ruling that the present application to transfer control of VoiceStream is in the public interest (hereinafter the "Application and Petition"). QSC believes that the Commission must exercise its mandate to carefully scrutinize and appropriately condition this proposed transaction involving a dominant foreign carrier in order to safeguard the public interest.

QSC is a European operator headquartered in Cologne, Germany, with shareholders located in the United States. QSC holds a preeminent position as a competitor in the emerging German facilities-based local telecommunications market through the acquisition of unbundled local loops and collocation spaces from the incumbent Deutsche Telekom AG ("DTAG"). As elaborated in the following comments, QSC's operations place it in the forefront of efforts by competitive companies to develop a market for local telecommunications services in Germany. QSC was the first competitive broadband provider of SDSL (Symmetric Digital Subscriber Line) for Internet access and data services in Germany. QSC expects to be operating high-speed access networks in 40 German cities by the end of 2000 (networks in more than 35 cities are already active today).

The present Application and Petition requires unusual vigilance by the Commission because it is far from clear that permitting DTAG to leverage its vast market power[1] into the U.S. market, where it will become a major wireless player, is in fact in the public interest. While QSC does not believe that the Petition and Application of DTAG should be denied, any possible approval should be appropriately conditioned. Despite DTAG's protestations in its present Application and Petition, DTAG is and remains anything but just another carrier. A glance at the German telecommunications market reveals all too clearly that the gap between market opening commitments and marketplace realities yawns wide – largely as

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[1] DTAG is not only considered the dominant fixed-service carrier in Germany, but due to its holdings and participation in joint ventures in various other countries also is a major player in the United Kingdom (ownership of One2One – a wireless operator and MetroHoldings Ltd. – a fixed-line operator), Austria (ownership of max.mobil – a dominant wireless carrier), Hungary (ownership of MATAV – the incumbent fixed line operator), the Czech Republic (Radiomobil), Slovakia (Slovenske Tel – the incumbent), Poland (PTC/Era – a mobile operator), the Ukraine (UMC – a mobile operator and UTEL, a long-haul fixed-line operator), Russia (Mobile TeleSystems CJSC), and Switzerland (Multilink SA – a fixed operator) in addition to investments in mobile telephony in Malaysia, Indonesia and the Philippines.

a result of DTAG's intransigence to the demands of fair competition. Benefiting from the lack of serious inroads made by competitive carriers into the German local access market, DTAG has long sought to leverage its home market power for cross-border expansion.

While DTAG chooses to selectively highlight the alleged benefits of absorbing VoiceStream into its corporate family and thus provide the wireless carrier "with the resources to expand . . . to acquire additional licenses . . . and to invest in delivering next-generation wireless services to consumers . . .",[2] DTAG leaves out the anti-competitive ramifications of this merger and offers only a misleading picture of the context in which DTAG's proposed expansion is to occur. The ex-PTT has steadily expanded from its safe home base through heavy investment (paid for by its captive home base customers) in foreign ventures and next-generation, global wireless services. The price for this expansion is being born by consumers, competitors and the prospects for eventual competition in Germany.

QSC has, and continues to suffer from, DTAG's anti-competitive behavior in its home market which is hampering its ability to compete fairly. Issues of particular concern in this regard are DTAG's foot-dragging in implementing efficient local loop unbundling, including the lack of progress in providing collocation space for lease to competitors, the onerous local forecasting requirements demanded by DTAG, and the cavalier disregard of the incumbent for contractually agreed-upon deadlines and provisioning intervals against which competitors have no remedy. These pressing problems are in addition to the threat by DTAG to cease providing billing and collection services to competitors and the intense efforts to monopolize at all cost markets, such as Internet access, rather than allow competition. The most recent developments

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[2] In the Matter of VoiceStream Wireless Corporation, Transferor, and Deutsche Telekom AG, Transferee, Application for Transfer of Control and Petition for Declaratory Ruling, IB Docket 00-187 (Sept. 18, 2000) ("*DTAG Petition and Application*"), page 2.

in Germany reinforce the impression that DTAG's long-term strategy of price squeezes and delayed delivery of vital services to competitors continues to seriously undermine the entry of competitors into lucrative market segments (such as broadband access). These persistent issues (in which DTAG is sometimes acting in open defiance of the German regulator) have left DTAG with a 98.5% share of the local access market – a testament to the inordinately slow pace of developing competition in this market in Germany.[3]

DTAG has chosen to highlight the alleged global benefits of its proposed merger while ignoring all but the most narrowly circumscribed risks to competition inherent in this proposed transaction. Among the issues the Commission should consider are the continuing government ownership of DTAG, its tangled and overbearing relationship with both the regulator and competitive carriers in its home market, and the generally abusive and anti-competitive pattern of behavior DTAG has pursued to prevent the budding of competition in Germany and elsewhere. The range of concerns centered on DTAG's home market are not, as the following will show, remote or irrelevant to the present Application and Petition, but rather require the Commission's full attention so as to preserve the public interest it is charged with safeguarding. As demonstrated below, the Commission's public interest inquiry must, at a minimum, encompass a close look at the Applicant's home market and track record where such inquiry is capable of shedding light on the Application's impact on the public interest.

The issues squarely before the Commission are the statutory requirements of the Communications Act of 1934, as amended, ("the Act") regarding the public interest hurdle to be surmounted before a foreign or foreign-government-owned entity should be permitted to hold the

[3] See for example the testimony by the German Competitive Carrier's Association ("VATM") before the Subcommittee on Telecommunications, Trade and Consumer Protection of the Commerce Committee, United States House of Representatives, September 7, 2000. The text of this testimony is appended hereto as Annex 1.

appropriate FCC station licenses and authorizations to operate in the United States. In the present instance, DTAG's aggressive defense of its market-dominant position in Germany and elsewhere, combined with its exertions of influence on the regulator through political and governmental pressure and *de facto* reliance on its government ownership to bring about results detrimental to consumer interests do not paint a very promising picture of the Applicant. Thus QSC requests that the Commission carefully scrutinize and appropriately condition any possible approval of DTAG's acquisition of VoiceStream.

II. The Legal Standard for Approval

1. Sections 214 and 310(b)(4) Place Strict Limits on Foreign Ownership of Licenses to Safeguard the Public Interest

The Act maintains a number of limitations imposed upon foreign carrier entrants seeking to provide licensed communications services in the United States. The relevant statutory provisions and the implementing Commission regulatory framework are encompassed in Sections 214 and 310 of the Act. Section 214 requires the Commission to authorize the construction of new interstate lines, such as are employed in rendering international service. The present application seeks the Commission's consent to the transfer of control of such licenses currently held by VoiceStream to DTAG. Section 310 is implicated by DTAG's application because that section mandates that "(a) the station license required under this act shall not be granted to or held by any foreign government or representative thereof; [and] (b) No . . . common carrier license shall be granted to or held by . . . . (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned . . . by aliens or . . . or a foreign government . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license."[4] In view of the

[4] 47 U.S.C. § 310 (b) (4) (2000).

statute's approval of more extreme remedies like refusal and revocation, the conditioning of Section 310 license transfers, as are being requested in the instant comments, is clearly within the Commission's power.

The legislative history, particularly of Section 310, through the passage of the Telecommunications Act of 1996 ("1996 Act")[5] amendments to the Communications Act, indicate that Congress considered, but ultimately rejected, major changes to this foreign ownership restriction, opting merely to eliminate the prohibition against foreign officers and directors,[6] while retaining the core of this provision with the explicit aim of affecting foreign telecommunications markets.

It is evident that Congress deliberately, and in the awareness of the policy implications of this step chose to demand that the public interest mandate of the Commission in the context of Section 310 be sufficiently expansive as to not preclude inquiry into the contexts, markets, and regulations in which a foreign carrier like DTAG operates. Rather, as the Commission has recognized in a series of orders implementing this statutory mandate, the public interest inquiry to be undertaken in this context is thoroughgoing and undoubtedly includes a review of concerns implicating, directly or otherwise, the market and regulatory environment in which an applicant like DTAG operates and the manner in which it conducts itself in its home market.

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[5] Telecommunications Act of 1996, Public Law: 104-104, 110 Stat. 56, approved February 8, 1996.

[6] Section 403. Elimination of unnecessary Commission Regulations and Functions. Conference Report, 1-31-96, To Accompany S. 652. 104th Congress Report, House of Representatives, 1st Session 104-458 Jan. 31, 1996. P.L. 104-104, 110 Stat. 56, approved February 8, 1996 Conference Report on S. 652, Telecommunications Act of 1996.

2. The Foreign Carrier Entry Order Commits the Commission to examine Applicants in the Context of their Home Markets

Even prior to final passage of the Telecommunications Act, the Commission, in November of 1995, promulgated an order creating the framework for evaluating the entry of foreign carriers into the U.S. market. This so-called *Foreign Carrier Entry Order*[7] foreshadowed developments in the Congressional arena, making explicit the Commission's preference for competitive, open markets nationally *and* internationally: "(1) to promote effective competition in the global market . . . ; (2) to prevent anti-competitive conduct . . .; and (3) to encourage foreign governments to open their communications markets."[8] The core test of the *Foreign Carrier Entry Order* is "effective competitive opportunity" – referring to the measure of a foreign carrier's home market treatment of entrants from abroad. The Commission chose to adopt this measure as an "important element"[9] of its public interest analysis for both, Section 214 applications by foreign or foreign-affiliated carriers as well as to Section 310 applications. The Order proceeds from a discussion of the Commission's above-noted goals to the structure of international traffic terminating to or from the United States, concluding by the enunciation of the "effective competitive opportunity" ("ECO") test as the best method to prevent foreign carriers from "unfairly leveraging their market power in the U.S. market"[10] as well as to

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7 Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order, FCC 95-475, 11 FCC Rcd. 3873 (1995) (hereinafter *Foreign Carrier Entry Order*).

8 *Foreign Carrier Entry Order* at ¶ 6.

9 *Id.* at ¶ 19.

10 *Id.* at ¶ 29.

stimulate competitive entry and to dis-incentivize governments and "foreign carriers who benefit from such barriers [to competition in their respective home markets]."[11]

It is of particular importance that the Commission in the *Foreign Carrier Entry Order* chose to adopt a broad and flexible approach to defining the relevant markets it would consider in the context of Section 214. The Commission defined the "primary markets" as those in which the foreign carrier applicant has a substantial or dominant market share. This definition includes the home market of the foreign carrier as well as all other destination markets where the carrier has the ability to leverage market power.[12]

Having determined to look at these foreign markets at the other end of international traffic originating or terminating in the United States, the Commission took a further step in applying analogous standards to Section 310 applications. It is significant that the Commission's analysis used in the Section 214 context[13] also is applied to the wireless arena, considering the fact that Section 310 common carrier licenses would not necessarily, or even ordinarily, involve a discussion of a foreign origination or termination market. One must conclude that the sole rationale on which rests the Commission's decision to apply an ECO test to these types of licenses is its continuing policy of furthering, and incentivizing competition in telecommunications – where necessary through the carrot-and-stick approach of denying or conditioning access to the lucrative United States market to companies flaunting the rules of fair competition. In fact, the Commission stated: "We believe that, by adopting a clear and explicit effective competitive opportunity public interest criterion, this . . . will result in a more open and

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11 *Id.* at ¶ 30.

12 *Id.* at ¶¶ 110, 116.

13 *Id.* at ¶ 179.

competitive U.S. telecommunications market by informing foreign investors how to maximize their investment opportunities in this country."[14]

3. The 1997 Foreign Participation Order Responding to the Promises of the WTO Agreements Does Not Represent a Withdrawal from the Contextual Review of Foreign Applicants

In November 1997, the Commission, in response to adoption of the World Trade Organization ("WTO") Basic Telecommunications Agreement, issued another set of rules for reviewing the entry of certain foreign carriers into the U.S. market,[15] of which DTAG now seeks to take advantage. Based upon uncertain assumptions about the market opening effects the WTO Basic Telecoms Agreement would achieve throughout the world, the *Foreign Participation Order* established an additional standard of review for WTO member applicants. This new standard would in routine cases replace the ECO test with a rebuttable presumption in favor of the entry of a foreign carrier from a WTO member country,[16] without abolishing the ECO test or its underlying policy goals where that presumption in favor of entry may not apply. Because the Commission believed the WTO Basic Telecom Agreement would render foreign markets open to U.S. telecommunications companies, the Commission determined that WTO applicants would not have to individually demonstrate that their home markets offered effective competitive opportunities.[17] The Commission therefore determined that in these routine cases it would no

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[14] *Id.* ¶ 183.

[15] Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891 (1997) (hereinafter *Foreign Participation Order*).

[16] *Id.* at ¶ 13.

[17] *Id.* at ¶ 33.

longer be necessary to include the ECO analysis as part of its public interest finding for Sections 214 and 310(b)(4) purposes.[18] As demonstrated below, however, the Commission's assumptions do not hold true in the case of Germany and DTAG. Therefore the present Application and Petition cannot be addressed under the *Foreign Participation Order's* limited fast-track process. Instead, the Commission must undertake a full inquiry under the broad terms of the 1995 *Foreign Carrier Entry Order.*

III. DTAG's Application and Petition Can Not be Approved in the Shelter of the Presumption Without Further Examination.

While unquestionably there are foreign carrier entrants that should qualify for a presumption that their entry into the U.S. market serves the public interest, it is more than dubious whether this *rebuttable* presumption was ever intended to apply to entities like DTAG which have prolonged the metamorphosis from protected PTTs to market actors. Unthinking application of the presumption to the German local access market in which a dominant, government-controlled ex-monopolist maintains its stranglehold on competition and is keeping U.S. and other telecommunications carriers from being effectively able to make competitive entry, would make a mockery of Commission policies and the public interest.

In line with the Commission's recognition of its duty to consider the public interest, it adopted the rebuttable presumption of entry only as "*a* [single] factor in our public interest analysis."[19] Most importantly, the Commission wisely determined that, "in exceptional circumstances, entry into the U.S. market by an applicant affiliated with a foreign

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18 *Id.* at ¶ 43.

19 *Id.* at ¶ 50 *(emphasis added).*

telecommunications carrier from a WTO Member may pose competitive risks by virtue of the applicant's ability to exercise market power in a relevant foreign market."[20] Given the unique circumstances of this Application and Petition, including (1) DTAG's anti-competitive behavior in Germany and elsewhere, (2) DTAG's position as a *de facto* government controlled entity, as well as (3) the increasingly global market for roaming wireless services unforeseen at the time of the *Foreign Participation Order,* DTAG's application rises to the level of an exceptional circumstance (*see infra*) that precludes application of the routine-case presumption. The Commission must therefore consider evidence of these unique circumstances when assessing the public interest relative to this Applicant's Application and Petition.

The Commission predicates its rebuttable presumption on its finding that "it [is] highly unlikely that a carrier from a WTO Member country that has *open, competitive markets and a procompetitive regulatory regime in place* could pose a very high risk to competition."[21] As is demonstrated at more length below, DTAG fails to live up to that standard of allowing fair local competition, aided by a regulatory regime which is sometimes skewed by conflicts of interest between DTAG and its German government owners. Thus it is evident that the underlying assumptions and predicates of the Commission's *Foreign Participation Order* presumption standard, as applied to the unique circumstances of DTAG, require a more flexible and comprehensive ECO analysis and appropriate conditions upon DTAG's Application and Petition.

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20 *Id.* at ¶ 51.

21 *Id.* at ¶ 52 *(emphasis added).*

1. The Particular Circumstances and Scope of DTAG's Activities May Not be Adequately Captured by Existing Commission Safeguards.

The Commission maintains intact certain safeguards under Section 214 of the Act[22] in the attempt to ensure that foreign entrants will not abuse their foreign market power. These safeguards, however, are only applicable to dominant carriers who control international fixed-line routes, while the ongoing globalization of other forms of telecommunications, particularly of wireless markets has created other avenues of exercising market power. The Commission, recognizing the potential for applicants of DTAG's character, has acknowledged that imposition of these standard safeguards, "cannot rule out the possibility ... that these measures would be ineffective at preventing anti-competitive conduct in a particular context ..."[23]

The "particular context" that the Commission must consider is the unique and exceptional circumstances of DTAG's extensive operations in Germany as well as other markets in Europe and elsewhere. These exceptional circumstances include: 1) DTAG's continuing government ownership[24] which affords DTAG a unique freedom from investor oversight, the demands of the market and some protection from regulatory intervention; 2) the breadth of DTAG's holdings in wireless and wireline telecommunications which present an unresolved challenge to regulatory accounting safeguards; and last but not least, 3) DTAG's systematic and uncompromising

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22 *See* 47 C.F.R. § 63.10(c).

23 *Foreign Participation Order* at ¶ 51.

24 DTAG and its tenured employees enjoy special protection under Article. 143b of the German Constitution ("Basic Law") as a former part of the German Post monopoly ("Deutsche Bundespost Telekom"). Although that provision's standstill period of 5 years for government divestiture of its majority interest in DTAG have expired the German government has not shown much interest or willingness to give up its majority interest. Therefore, it is not accurate to state that the German Government "has divested its stake as rapidly as possible taking into account the prevailing market conditions" as DTAG claims in its Application and Petition (at page 9).

opposition to every step towards establishing competition in the German market, including its non-compliance with orders of the independent regulator which indicate its distaste for competition and regulatory supervision.

a. Majority Government Control places DTAG beyond the Reach of Market Forces.

DTAG enjoys an ownership structure that immunizes it from the demands of the marketplace. Rather than DTAG reforming itself to the demands of emerging competition and privatization in telecommunications, the ex-PTT has managed to not only insulate itself from the markets but has repeatedly succeeded in shaping policy[25] to accommodate its interests rather than those of the market and competition.

DTAG's nationwide cable holdings provide an example of such an outcome. Despite the obvious potential for abuse in DTAG being both the incumbent telecommunications provider and the only top-level cable system operator in the country,[26] DTAG only began to address this situation after considerable pressure from the European Union (having forestalled domestic regulatory scrutiny of this issue), offering to divest itself of the majority ownership of its legacy cable systems. However, first, the ex-PTT divided its nationwide system into regional entities incapable of challenging its telephony network and began taking bids for these bit-parts in a

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[25] *See for example a recent* Position Paper of the Federal Government of the Federal Republic of Germany on "*Competition in the Telecommunications and Post Markets*" (in German), August 16, 2000, 4-6 (English language version available for download at http://www.bmwi.de. This document is also attached hereto as Annex 3) in which the Finance Ministry (not the section managing the DTAG stake) advocates sharp cutbacks in regulatory authority and a lessening of restraints on DTAG.

[26] Other private cable operators exist and operate two-thirds of the final "level four" cable infrastructure to the home. DTAG operates the central "hubs" and "trunks" (levels one to three) of the nationwide coaxial network. There are therefore no significant integrated cable distributors with the infrastructure to truly compete with DTAG.

process not expected to actually turn over control of the cable assets until 2001. Moreover, the purchasers selected by the ex-PTT are largely inoffensive, smaller players[27] who will have to contend with DTAG as a substantial minority shareholder, making them unlikely future competitors of DTAG in areas like interactive services and high-speed Internet access over what might have been another path to the consumer.

In telecommunications services too, the frequent primacy of DTAG's self-interest over policy mandates and the regulator has too often been apparent. Even if and when the government ownership stake in DTAG is diluted after acquiring VoiceStream, the tight nexus of public, governmental and private business interests will continue.[28] Despite DTAG's arguments that its public ownership status is merely an unwelcome relic of its former PTT status, it is in fact an arrangement with which DTAG has long been comfortable. In its actions DTAG shows no eagerness to change its ownership structure, but instead has learned to take advantage of its government owner to act contrary to the mandates of the market and sound competition. Thus, while there may be some justification to the claim that currently the government's holdings in the ex-PTT cannot be divested expeditiously, DTAG's business strategy has encouraged and

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[27] The cable system in North-Rhine Westfalia for example was ultimately sold to a U.S. firm named Callahan Associates International, a relatively new startup.

[28] While DTAG in its Application and Petition states that "the German government exercises no right beyond those of other shareholders," in reality, the influence of public stakeholders in and on behalf of the ex-PTT go far beyond the nominal ownership stake held by the German Government: not only does the DTAG management meet with Government officials formally and informally on a regular basis, but the German Ministry of Finance has a specific division (Abteilung VII) in charge of administering the shareholdings of the Federal Government in DTAG. It is at best unclear how neutral this ministry acts when DTAG's interests are likely to be effected by some executive branch policy. The Federal Government also exercises its rights to appoint representatives to DTAG's Supervisory Board under the German Stock Corporation Act. These representatives, if acting in conjunction with the representatives of DTAG's labor force, form a solid bloc of votes interested in DTAG's parochial interests and able to affect government policy towards this entity.

perhaps even counted on such a result.[29] It is unlikely that any telecommunications firm could find a private investor like the German government who would permit the numerous risky and often failed gambles DTAG has undertaken in its expansion beyond Germany and into new markets (third generation wireless, Internet access,). DTAG's attempts to buy into markets beyond its home territory while its German competitors were still in their infancy has resulted in a string of business and financial shipwrecks, from the collapse of the Global One venture with France Telecom and Sprint, to its more recent failed bid for Telecom Italia. DTAG's current Application and Petition to acquire VoiceStream shows that its acquisitive mentality has not changed. The ongoing profligacy of offering to purchase VoiceStream at $20,000 per customer gives little reason to expect DTAG's stock price to recover and thus to provide an incentive for the German government to sell its stake anytime soon.[30]

Another recent and unsurprisingly controversial example[31] of DTAG's insensitivity to capital and market factors is its aggressive and ultimately successful bidding war in the competition for German UMTS licenses. In a more than 45 billion dollar bonanza for the

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[29] Of course, purely business interests may be of secondary concern to DTAG's supervisory board: Of twenty-one members, 10 are unionized employee representatives (the union enjoys close ties to the current governing party), in addition to representatives of the government-owned bank, DTAG management and others. Overall, a majority of the board members may be characterized as close to the government, while only a small minority of members are representatives of actual private shareholders.

[30] A widespread perception in the industry and the market is that DTAG is paying too much for its stake, relative to the customer base and revenue streams of VoiceStream. *See e.g.* Deutsche Telekom Slides under the Weight of VoiceStream Price (Reuters, July 20, 2000).

[31] MobilCom AG, participant in a winning consortium for a German UMTS license on September 21, 2000 announced it would seek judicial review of the licensing proceeding. According to news articles, at least one complaint voiced in this respect is the role of the German government as auctioneer, majority stockholder of DTAG and as beneficiary of the auction proceeds. *See* MobilCom seeks Review of German 3G Fees (Reuters Sept. 21. 2000).

German government, DTAG along with several other European incumbents,[32] won licenses for third-generation mobile services at prices which lead the market to sharply downgrade the valuation of the participants.[33] One reason for the exorbitant pricing of these licenses was DTAG's objective to exclude as many other companies as possible from entering the mobile market by bidding up the price of these licenses. Needless to say, while the skeptical response of the markets might have chastened private, investor-owned firms, the German government, as majority owner of DTAG as well as the recipients of the auction money raised, did not respond to DTAG's slumping stock prices with the concern a normal investor might have shown. Likewise, it is dubious that the management of a firm whose obligations are not government-backed like DTAG would have shown such disregard for the judgement of the markets.[34] By the same token, actions like these which seem designed to depress the stock price of DTAG render much less credible the claims of DTAG and the German government to be undertaking good faith efforts at divestment and majority privatization. Rather, DTAG's expansionist track record indicates a real disinterest in either full privatization or to playing by the rules of a competitive

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32 E-Plus (held by among others ex-PTT KPN Mobile, and Japanese incumbent NTT), Group 3G (two ex-PTTs – Sonera of Finland and Telefonica of Spain), MobilCom (part owned by France Telecom) and Viag Intercom (owned by BT, among others).

33 *See* Sonera Hits the Road but Fails to Woo Investors (Reuters, Sept. 9. 6. 2000), British Telecom's ratings have similarly suffered. A non-incumbent bidder, Hutchison Whampoa dropped out of the winning E-plus consortium entirely, citing the inflated price paid for the license.

34 According to DTAG's recently released 3rd Quarter financial report of October 31, 2000, the accumulated debts of DTAG have increased dramatically to a gigantic DM 121.5 billion. It is only possible for DTAG to bear this burden because its lenders are aware that the German Government, as DTAG's principal shareholder, will bail out the company in case it runs into serious financial difficulties; this is why international banking consortia were prepared to fund DTAG's recent bid in the German UMTS auction of DM 16.6 billion alone, never mind DTAG UMTS bids in other European countries. In view of the tremendous debts of DTAG, the company's current rating of single A reflects appropriately the backing of the German government. Without such backing, DTAG's rating would be lower yet.

market. The Commission therefore needs to carefully consider the need for safeguards against possible anti-competitive behavior of an entrant insensitive to market incentives and pressures.

b. Shifts in Market Developments and Technologies Have Created a Situation in Which the Proposed U.S. versus International Operation of DTAG Cannot Be Jurisdictionally Segregated

The need for the Commission to conduct a full and tailored *ad hoc* inquiry, and to condition appropriately any possible approval of DTAG's entry becomes yet more evident when considering the global scope of DTAG's operations across fixed and mobile telecommunications services. The Commission's current interpretation of Section 310(b)(4) does not explicitly provide for safeguards analogous to those found in the Section 214 context. Though the *Foreign Participation Order* reduced the frequency of the application of the ECO test under a Section 310(b)(4) public interest analysis, this change was not accompanied by the creation of safeguards specifically tailored to cross-market entries by dominant foreign wireline *and* mobile carriers.

The Commission's rationale in the *Foreign Participation Order* for not applying safeguards and conditions in the Section 310(b)(4) context was based upon then-existing assumptions which arguably have been superseded by developments in mobile technology applications and markets. While the observation that wireless markets "for the most part, consist of wholly domestic services"[35] may have been appropriate in 1997, four years later, the surging use of wireless services on a broad geographic scope (international roaming) and a whole host of new applications (advanced services, mobile Internet access and so forth) call into question the appropriateness of that assumption. Today, as DTAG's Application and Petition shows, the emerging strategy for large carriers is to take a *global,* trans-jurisdictional approach to mobile

[35] Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Order and Notice of Proposed Rulemaking, FCC 97-195, 12 FCC Rcd 7847, ¶ 73 (1997) (hereinafter *Notice*). *See also Foreign Participation Order*, ¶ 102.

services. This calls for the Commission to revisit its belief that anti-competitive dangers to the public interest of the sort considered in the Section 214 (fixed service) context were unlikely in the Section 310 (mobile) context.

DTAG claims that its proposed merger of VoiceStream into DTAG is pro-competitive insofar as the acquisition of VoiceStream by a behemoth like DTAG will create a stronger competitor to existing "domestic" wireless firms. DTAG simultaneously notes that VoiceStream GSM customers will enjoy foreign-market roaming advantages on DTAG's and affiliated carrier's networks in Europe. That argument of course illuminates the importance that DTAG apparently places on international roaming revenues and the marketing advantages it hopes to achieve from owning wireless systems on both sides of the Atlantic. Clearly not even DTAG believes that wireless markets are still local in nature. The GSM standard and its successors (UMTS/3rd generation wireless) are the de-facto global standard and DTAG is a very large player in these services. Seen from this perspective, the ability of a merged DTAG/VoiceStream to "provide more U.S. consumers with the opportunity to subscribe to a carrier that accommodates international roaming access where . . . GSM prevails"[36] becomes a dubious argument for competition in a global perspective. As DTAG correctly notes by its reference to foreign, GSM-standard markets, the proper scope of the wireless market inquiry is defined by the increasing international scope of roaming. There is no doubt that roaming corporate users have always been a very valuable revenue source for mobile operators and that increasingly the ability to gain from global roaming is becoming a concern for wireless carriers. What DTAG's Application and Petition leaves open is how the development of competitive markets for international roaming are improved by the tie-up just one operator with DTAG. VoiceStream subscribers might in the

[36] DTAG Application and Petition at 5.

future enjoy preferential rates for roaming on DTAG's networks in Europe and elsewhere, as DTAG mobile customers might be offered preferential terms on VoiceStream's service in the United States, whereas other U.S. wireless carriers which are increasingly migrating to GSM-compatible standards such as AT&T or Cingular (without operations in Germany) may face discrimination in roaming abroad.[37] The supposed benefit to competition in such a situation appears illusory.

c. DTAG Systematically Opposes Every Step Towards Competition in the German Local Telecommunications Market, Defies the Regulator at the Expense of the Market.

The German market for telecommunications continues to teeter on the brink of competition. In the German *local* market, competitors' market share remains insignificant. According to a recent VATM market study[38] no significant growth of the competitive market share is to be expected. In fact, competitors were only able to generate local traffic of 4 million minutes/day (equal to a market share of 1.1 %, nearly unchanged from the 0.6% market share recorded in 1999) by the middle of this year, whereas DTAG succeeded in generating 364 million minutes of local traffic per day. With control over 98.5% of the end users, DTAG remains the de-facto monopolist in the local market.

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[37] As GSM and the applications enabled by it (mobile web and text applications) are gaining in popularity, the formerly small group of U.S.-based GSM carriers stands to gain new members. Only recently, both AT&T Wireless and Cingular Wireless (a BellSouth/SBC joint venture) announced that they are adding GSM capabilities to their systems. *See* AT&T and Cingular commit to GSM (Total Telecom Nov. 30, 2000).

[38] *See* German Competitive Carrier's Association ("VATM") Market Study in Annex 2.

i. Local Competition to DTAG has barely begun

Yet DTAG continues to obstruct through every available means, any progress towards self-sustaining competition, particularly in local services. The unacceptable fact is that DTAG's continued dominance of the market (in minutes of use, DTAG carries 63 percent of long-distance and over 98 percent of local traffic)[39] is *not* the result of competent competition but of the imposition of discriminatory and unfair conditions upon its competitors and the exercise of its market power to destroy emerging competition through price squeezes wherever possible.

ii. DTAG hinders Access to the Local Loop

As in the United States, the key to local competition in the German market lies in access to the local loop of the incumbent network operator and to the collocation spaces necessary and sufficient to utilize interconnection with DTAG's local network. Here, the combination of DTAG's obstructionism and insufficiently assertive regulatory action have combined to burden competitive carriers with serious obstacles to fairly competing with the incumbent. Some current instances of self-serving discrimination at the hands of the incumbent which are of particular importance to DSL carriers like QSC, include failure to provide timely provisioning service for collocation and unbundled loops and totally inadequate OSS support including access to service coordination functions. The fundamental problem with DTAG's interconnection offering and performance is that it represents the incumbent's terms rather than ascertainable and enforceable regulatory standards.[40] Even where the regulator has acted to promulgate deadlines and standards, DTAG, in a none-too-unusual move, continues to avoid implementing them, such as a

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[39] For additional information regarding the most current statistics compiled by the VATM concerning the telecommunications market in Germany, see Annex 2.

[40] For a more detailed description of this complex problem, *see* the VATM testimony appended hereto as Annex 1.

June, 2000 RegTP decision on unbundling that specified binding provisioning intervals for unbundled loop access and collocation by DTAG. Here, as in other cases, the disjunction between commitments and reality yawns wide: since summer the actual provisioning times achieved by DTAG have deteriorated rather than improved, and have at all times greatly exceeded the deadlines supposedly mandated by RegTP. DTAG further exacerbates this situation through its obsessive culture of secrecy, refusing to publish or share on a confidential basis information on its network planning and interconnection availability. Thus, DTAG wants to fine competitive carriers for missing their forecast loop demand by 10% or for having an uneven order volume per quarter, while it itself provides practically no information on the status of available facilities, or order processing queues, of which would enable more efficient network and rollout planning by competitive carriers.

iii. DTAG Begrudges Adequate Collocation to Competitors

Likewise, with respect to collocation, DTAG has, in its most recent unbundling contract, imposed conditions which further burden competitive carriers in their attempts to gain collocation spaces. None of these conditions have any corresponding benefits, such as improved network planning information, provisioning times for collocation spaces or more flexibility such as permitting the sharing of collocation spaces. The combination of excessive provisioning times, disregard of contractual lead times and poor allocation of resources hamper the deployment of competitor's networks. Moreover, even as the shortage of space depends on, and is largely within the control of DTAG's real estate subsidiary, the ex-PTT wants to impose increasingly stringent forecasting requirements for spaces on competitors.[41]

[41] DTAG's terms require competitors to provide recurring 3-months forecasts with over 90% accuracy months in advance while crucial planning information is withheld from them.

The German Competitive Carriers' Association ("VATM") recently initiated a survey among its members that covers approximately 1,500 orders for collocation space under the current Local Unbundling contract, placed by 15 different carriers.[42] The results are as follows:

Collocation Application and Offer

In **86.3 %** of all cases DTAG exceeds the stipulated interval for Preparing an Offer for collocation space (the interval is supposed to be 20 days according to the agreement between the Competitors and DTAG, approved by the RegTP)

In **50.69 %** of the above cases DTAG further exceeds the interval for Preparing an Offer for collocation space by 250% (50 days or more).

Provisioning of collocation space

In **77.02%** of all cases, DTAG does not comply with the provisioning intervals (16 weeks from the receipt of the final order by DTAG).

In **32.77 %** of all cases DTAG exceeded the stipulated interval for providing collocation space by **12 weeks** or more (more than **75%** of the stipulated time). This number is expected to increase because DTAG has not even processed many orders.

In **171 cases**, expected to increase, DTAG did not provide the requested collocation space at all, particularly when DTAG's Central Office was located in an attractive commercial area.

VATM concludes that "[e]ven after the RegTP decision rendered on June 7, 2000, DTAG seriously obstructs competition in the local market as the survey clearly demonstrates, not only in individual cases, but systematically by artificially created bottlenecks. In particular, new market entrants in the local markets suffer from DTAG's obstruction policy." Since it quickly became clear that these conditions will continue with respect to access to DTAG facilities, QSC

[42] *See* VATM Testimony, Annex 1 at 34.

earlier in the fall lodged a formal complaint at RegTP against these practices which appear to be designed primarily to permit DTAG to roll out its broadband services ahead of its hamstrung competitors. As noted earlier, RegTP has not taken any decisive action on this complaint and similar complaints of other companies. Competitive providers currently have no meaningful alternatives to regulatory complaints, in the absence of other effective instruments like liquidated damages/penalties with which to compel DTAG to abide by rules of fair competition, or to comply with regulatory mandates.

While with respect to its discriminatory provisioning and collocation practices, DTAG was aided by the passivity of the regulator, in other instances DTAG has actively sabotaged RegTP rulings in a manner that shows its callous disregard for fair competition and the development of a functioning marketplace for telecommunications services. In but one instance of its strategy of selective price "dumping" designed to prevent competitive entry into promising market sectors such as Internet access services, DTAG had long offered flat-rate access through its wholly-owned ISP subsidiary T-Online, - forcing other ISPs to follow - while charging minute-of-use based wholesale rates. This created losses at ISPs and at T-Online but generated additional traffic and revenue for DTAG in an environment with strong economies of scale offsetting the losses at its affiliate T-Online. Once this effort to eradicate rival flat rates became too blatant to ignore in the face of voluminous complaints, the RegTP in November ordered DTAG to make flat rate access available to competing providers. DTAG initially responded by offering to withdraw its flat-rate products rather than to acquiesce.

Similarly, DTAG also labors to undermine competition by unfairly bundling its own DSL and ISDN services at prices below those of the individual network elements, as the following example demonstrates. As of 2001, DTAG will offer its own DSL services (DM 39.90 per

month) on a standard analogue line (DM 24.81 per month) for DM 64.71 per month. The charges for DTAG's DSL services combined with an ISDN line (DM 44.89) will be much lower, namely DM 19.90 (together DM 64.79). Consequently, the customer will get DTAG's IDSN services for free if he opts for combining ISDN with DTAG's DSL services. For an additional DM 15 the customer becomes eligible for DTAG's "AktivPlus" and "XXL Plan" and will receive rebates of approximately 50% on all calls and free calls on Sundays. Under those plans DTAG's DSL service will only cost an additional DM 9,90 (for a total of DM 69.79) – making the actual price of DSL only DM 5. The goal of these bundled offers is to undercut competitive IDSN and DSL offers and to prevent customers from pre-selecting alternative carriers for their long distance service. The moral of this story appears to be that not only is cross-subsidization among sub-markets practicable and common for DTAG, but where it is called upon by the regulator to compete fairly and in a manner which would further the development of Internet use in Germany, the ex-PTT would rather practice scorched earth tactics – risking the collapse of a promising market rather than to permit competition in it.

iv. DTAG is without Competition in Telecom Billing Services

For all intents and purposes, DTAG remains the only provider capable of rendering bills to the customers of competitive carriers using non-sign-on carrier selection to choose their long distance operator. While the RegTP last March upheld its requirement that DTAG continue to provide billing services to its competitors, this decision has not been fully implemented by DTAG. The new Standard Offer for billing that DTAG communicated to the competitors is not fully in compliance with the RegTP decision. Crucial issues, such as how to obtain online access to DTAG's customer billing and payment centers remain unresolved. Currently, DTAG is stalling the process by pursuing talks with competitors on a multilateral basis and is trying to

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

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

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

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

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

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43 *Foreign Participation Order* at ¶ 125 *(emphasis added)*.

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

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

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44 *Id.* at ¶ 51.

45 *Id.* at ¶ 54.

46 *Id.* at ¶ 113.

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

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

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

[48] *See supra* Note 45.

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

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

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

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49 *Foreign Participation Order* at ¶ 344.

50 *Id.* at ¶ 61.

51 *Id.* at ¶ 359.

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

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

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

self-executing commitments on the part of DTAG will assure that any such condition imposed by the Commission will indeed serve to pry open the German market to competition and force DTAG to compete fairly there as elsewhere. Finally, DTAG should commit to a specific timeline within which it would facilitate a substantial reduction in the German government's ownership stake in the firm.

WHEREFORE, for the foregoing reasons, QS Communications AG respectfully requests the Commission to condition any possible approval of DTAG's Petition and Application.

Respectfully submitted,

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