

plain language of section 310(b)(4), which expressly permits foreign governments to obtain *indirect* ownership of more than 25 percent of a common carrier radio license. *See* 47 U.S.C. § 310(b)(4) (a license can be held by any corporation that is more than 25 percent owned “by aliens, their representatives, or by a *foreign government or representative thereof*” if the Commission decides that allowing such a transaction would serve the public interest).^{87/} Because DT will not directly hold any of the licenses and will not directly own the licensees, section 310(a) is irrelevant and section 310(b)(4) authorizes the Commission to approve the pending Applications.^{88/}

^{87/} 47 U.S.C. § 310(b)(4) (emphasis added).

^{88/} We respond briefly here to Senator Hollings’s argument that DT’s \$5 billion investment in VoiceStream exceeds the 25 percent benchmark of section 310(b)(4). *See* Letter from Ernest F. Hollings, Ranking Democrat, Committee on Commerce, Science and Transportation, U.S. Senate, to William E. Kennard, Chairman, FCC, IB Docket No. 00-187 (filed Nov. 30, 2000). In approving the transfer of control of certain licensees (the “CIVS entities”) from Cook Inlet Region, Inc. (“CIRI”) to VoiceStream, the International and Wireless Telecommunications Bureaus stated the Commission would examine the Senator’s argument on this issue in the instant proceeding. *See Applications of Cook Inlet Region, Inc., Transferor, and VoiceStream Wireless Corporation, Transferee*, Order, DA 00-2397, WT Docket No. 00-207, n.33 (rel. December 13, 2000) (“*CIRI/VoiceStream Order*”). While this issue has no bearing on whether the proposed license transfers are in the public interest, DT’s \$5 billion investment in VoiceStream did not cause DT to acquire more than 25 percent of VoiceStream.

On September 6, 2000, DT purchased 3,906,250 shares of VoiceStream voting preferred stock, which is convertible at DT’s option to 31,250,000 shares of VoiceStream common stock in the event that DT’s merger with VoiceStream is terminated. As of September 6, 2000, DT’s stock constituted approximately a 1.79 percent voting interest and, on a fully diluted basis, an 11.49 percent equity interest in VoiceStream. *See CIRI/VoiceStream Order* at n.30. While it is well settled that options and other convertible instruments are not considered part of a company’s capital stock and, therefore, not relevant in a Section 310(b)(4) inquiry, *see, e.g., Application of Fox Television Stations, Inc., for Renewal of License of Station WNYW-TV, New York, New York*, Second Memorandum Opinion and Order, 11 FCC Rcd 5714, 5720 ¶ 16 (1995) (“*Fox II*”), VoiceStream has consistently reported DT’s beneficial ownership interest on the substantially higher “as-converted” basis. Since VoiceStream’s recent acquisition of the CIVS entities, CIRI has become a stockholder of VoiceStream and, along with other VoiceStream stock that has been issued, all stockholder interests in VoiceStream, including DT’s, have been slightly diluted. Accordingly, DT’s voting interest is now 1.53 percent and its equity interest, on a fully diluted basis, is only 11.08 percent.

Senator Hollings's interpretation of section 310 also is flatly inconsistent with the United States' commitments to the WTO in the Basic Telecom Agreement,^{89/} as the Chamber of Commerce, Securities Industry Association, and Organization for International Investment all point out.^{90/} In its WTO commitments, the United States expressly agreed that, while it would maintain limited restrictions on direct ownership of a common carrier radio license, it would maintain none at all on *indirect* ownership.^{91/} At the time the Agreement was negotiated, most

Senator Hollings argues that, in assessing whether DT's \$5 billion investment in VoiceStream put VoiceStream's foreign ownership over the 25 percent threshold in section 310(b)(4), the Commission must compare the amount of DT's investment with VoiceStream's paid-in capital. That argument misunderstands the law. The Commission looks to paid-in capital rather than reported share holdings only when the facts presented in a particular case suggest that reported shares do not correspond to actual beneficial ownership. *See Application of Fox Television Stations, Inc., for Renewal of License of Station WNYW-TV, New York, New York*, Memorandum Opinion and Order, 10 FCC Rcd 8452, 8468, 8473-74 ¶¶ 36, 48 (1995) ("*Fox I*") (considering paid-in capital where a single foreign investor in the licensee's parent paid in more than 99 percent of the capital for 24 percent of the common stock and voting power of the corporation). No such facts have been presented here. Because VoiceStream is not a start-up company and relative interests in the company's capital stock are not difficult to ascertain, examining investor paid-in capital is simply inappropriate. *Compare Applications of Nextwave Personal Communications, Inc., for Various C-Block Broadband PCS Licenses*, Memorandum Opinion and Order, 12 FCC Rcd 2030, 2675 ¶ 98 (1997) (rejecting an alleged foreign ownership violation as speculative, "because no market value of NTI's stock yet exists"). VoiceStream is a public company whose market value is easily ascertainable from the public market. DT bargained for its shares against the backdrop of the public market for VoiceStream stock and the Boards of both companies stand accountable to their shareholders to warrant that the transaction represented fair value. Given the efficiency of the stock market as an indicator of market value, it makes no sense at all to argue that DT owns a higher percentage of VoiceStream's capital stock than the shares that it actually owns (or could own on conversion).

^{89/} See Fourth Protocol to the General Agreement on Trade in Services, 36 I.L.M. 366 (1997) ("Basic Telecom Agreement").

^{90/} See Comments of Chamber of Commerce at 3; Comments of SIA at 1; Comments of OFII at 2-5.

^{91/} See United States of America, Schedule of Specific Commitments, Fourth Protocol to the General Agreement on Trade in Services, GATS/SC/90/Suppl.2, at 2 (Apr. 11, 1997) (Regarding limitations on market access for ownership of a common carrier radio license, the Schedule specifies: "Indirect: None." It then lists several restrictions on "[d]irect" ownership that track section 310.). See also Laura B. Sherman, "*Wildly Enthusiastic*" About the First Multilateral

European and other foreign carriers were wholly or partly government owned. Excluding those companies from the U.S. market, as Senator Hollings advocates, would have scuttled the Agreement by depriving those trading partners of most of the benefits of that Agreement.

Ambassador Barshefsky put it bluntly: “There would be no agreement in Geneva if we were not in a position to let our trading partners know that they could invest, in an indirect manner, up to 100 percent in a common carrier license, provided, however, that the public interest test was met.”^{92/}

During the negotiations of the Basic Telecom Agreement, U.S. trading partners had specifically asked the U.S. Trade Representative (“USTR”) to clarify the meaning of the U.S. offer on foreign ownership. USTR provided written assurances that the offer to permit indirect ownership extended even to government-owned corporations:

The United States offers up to 100% foreign indirect ownership of common carrier radio licenses — there will be *no limits on indirect ownership of such licenses by foreign governments (including government-owned corporations)* There is a limit on direct ownership, but it is *one of form not substance*. A foreign government (including a government-owned corporation) . . . can

Agreement on Trade in Telecommunications Services, 51 Fed. Comm. L.J. 61, 97 (1998) (“Sherman”) (“The U.S. offer limited *direct* ownership of a common carrier radio license [, but] . . . [o]ne hundred percent *indirect* ownership through U.S. holding companies is allowed.”) (emphasis added).

^{92/} *The WTO Telecom Agreement: Results and Next Steps: Hearing on Serial No. 105-11 Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce*, 105th Cong. 32 (1997) (statement of Ambassador Charlene Barshefsky). As USTR recently observed in a letter to the Chairman Bliley, Congressman Tauzin and Congressman Oxley, in 1995 governments in 24 WTO member countries constituting 95 percent of world telecommunications revenues held majority stakes in their national telecommunications providers. Letter of Hon. Charlene Barshefsky, United States Trade Representative, to the Hon. Billy Tauzin, Chairman, House Committee on Commerce, Subcommittee on Telecommunications, Trade and Consumer Protection, dated September 21, 2000. As USTR anticipated, increasing privatization has since lowered the number of majority state-owned providers to 16, and the figure will drop further when the proposed transactions are approved. *Id.*

directly own or control a U.S. holding company, which directly owns or control[s] a U.S. corporation holding a common carrier radio license.^{93/}

After the Agreement was concluded, but before it took effect, USTR again confirmed — this time to Congress — that the final U.S. commitment allowed full indirect foreign ownership, including by government-owned companies:

The U.S. offer is to allow indirect foreign ownership, *up to 100%* under this provision [Section 310(b)(4)]. . . .

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.^{94/}

Far from violating the Communications Act, this commitment mirrors the structure and language of section 310. By its terms, section 310(a) prohibits a foreign government or its representative from being the holder or grantee of a Commission wireless license. In these applications, the holder or grantee — what the Commission has always referred to as the direct licensee — will not be the German government or DT, but will be U.S.-incorporated subsidiaries of VoiceStream (and, in turn, DT). The agreement in the Basic Telecom Agreement to maintain restrictions on direct ownership of licenses acknowledges the prohibition in section 310(a) on direct control by a foreign government or its representative and commits to extend that

^{93/} See Communication from the United States, World Trade Organization, S/NGBT/W/12/Add.3/Rev.1 (Feb. 26 1996) (emphasis added). See also Comments of OFII at 2-5.

^{94/} 143 Cong. Rec. S1962-63 (daily ed. Mar. 5, 1997) (Written Response to Questions from Senator Lott and Written Response to Questions from Senator Bob Kerrey) (emphasis added). Assistant U.S. Trade Representative Richard Fisher recently confirmed that USTR continues to view section 310(a) as prohibiting only “*direct* ownership of certain categories of telecom licenses by a foreign government or its representative,” because “section 310(b)(4) authorizes *indirect* ownership of certain telecom licenses by a . . . foreign government to exceed 25 percent unless the FCC finds that the public interest will be served by the refusal or revocation of such license.” *Fisher Testimony* at 6 (emphasis added).

prohibition no further than the statute mandates. Section 310(b)(4), in turn, establishes the conditions under which a foreign government or its representative may own a U.S.-incorporated holding company that owns the holder or grantee of a Commission license. Section 310(b)(4) permits the Commission to prohibit indirect ownership interests in excess of 25 percent “if the Commission finds that the public interest will be served by the refusal or revocation of such license.”^{95/} The commitment in the Basic Telecom Agreement to impose no restrictions on indirect foreign control of licenses (including by foreign governments or their representatives) recognizes the authority conferred on the Commission by section 310(b)(4) to permit such indirect control.

The United States’ interpretation of section 310 during the WTO negotiations thus considered both section 310(a) and section 310(b)(4), paying heed to “the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.”^{96/} By contrast, Senator Hollings’s proposed interpretation — that a representative of a foreign government is absolutely barred from holding a license, whether directly or indirectly — would render superfluous the explicit reference in section 310(b)(4) to foreign governments.^{97/} The

^{95/} 47 U.S.C. § 310(b)(4).

^{96/} *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

^{97/} The legislative history of section 310 confirms both the plain meaning of these provisions, and the error of reading section 310(a) in isolation from Section 310(b)(4). The Radio Act of 1927 limited direct foreign ownership of licensees, and did *not* limit indirect ownership of those licensees. *See* Pub. L. No. 69-632, § 12, 44 Stat. 1167. During consideration of the Communications Act of 1934, the Senate passed a bill that would have added a flat ban on indirect foreign ownership of more than 25 percent of a radio licensee. *See* S. 3285, 73d Cong. § 310 (1934). The House then struck this language and substituted an entirely new bill, which readopted without change the limitation on direct foreign ownership contained in the 1927 Act. S. 3285 (Reported in the House), 73d Cong. § 301 (1934). The conference report, whose version was enacted into law, adopted a middle ground. It added the Senate’s 25 percent limit on indirect ownership (which continued not to differentiate among aliens, foreign governments, and

Commission should not adopt an interpretation that violates a core canon of statutory construction. *See, e.g., Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n. 11 (1988) (courts should not interpret one provision of a statute in a manner that renders another provision superfluous); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) (same).^{98/}

Because the U.S. obligations under the WTO Basic Telecom Agreement are clearly consistent with the plain meaning of section 310, the Commission must give effect to those obligations, contrary to Senator Hollings's contention.^{99/} Indeed, even if there were any other

foreign corporations), but "with the addition" of placing that question in each case within the new Commission's public interest mandate. H.R. Rep. No. 1918, 73d Cong. 2d Sess. at 48-49 (1934). And in doing so it combined all of the restrictions now embodied in sections 310(a) and 310(b) into a single unified section. *See* Pub. L. No. 73-416, §§ 310(a)(1)-(5), 48 Stat. 1086. That unification was altered only in 1974, but for wholly unrelated reasons. *See* S. Rep. No. 93-795 at 1-3 (1974).

^{98/} Nor does Senator Hollings's reliance on pre-Basic Telecom Agreement statements regarding section 310 by Scott Blake Harris, former Chief of the International Bureau, advance the Senator's cause. *See* Comments of Senator Hollings at 2-3. As an initial matter, Harris made clear in the testimony and news commentary in question that he was stating his own views (rather than those of the Bureau or Commission), *Hearing on Telecommunications Policy Reform 104-216 Before the Senate Comm. on Commerce, Science, and Transportation*, S. Hrg. 104-216, 104th Cong. 223 (1995) (statement of Scott Blake Harris, Bureau Chief, International Bureau, FCC). In any event, his statements are consistent with the position ultimately adopted by USTR in the WTO process. Harris's statement that there is a "general ban on license ownership by foreign Governments," *id.* at 224, nowhere mentioned *indirect* control; Harris simply recognized the ban on *direct* ownership in section 310(a). Any suggestion in Harris's later *National Law Journal* article that section 310 bars indirect ownership of a radio license by a firm with majority foreign government ownership (as DT has now, but will not have following the mergers) does not reflect his considered judgment. *See Sen. Hollings Calls on Kennard To Address Foreign Ownership Issue*, TR Daily, July 13, 2000.

^{99/} *See* Comments of Senator Hollings at 9-10. In fact, Senator Hollings's contrary position is simply a recycling of one that he advanced on the Senate floor less than a month after the February 1997 execution of the Basic Telecom Agreement, and that was overwhelmingly rejected by the Senate itself at that time. During the debate on S.J. Res. 5, which waived certain provisions of the Trade Act relating to the nomination of Ambassador Barshefsky, Senator Hollings proposed an amendment to that joint resolution that would have required Congress to approve any international trade agreement which would "in effect amend or repeal statutory

plausible reading of section 310, the U.S. Supreme Court has often emphasized that “[a]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains”^{100/} Because section 310 and the Basic Telecom Agreement can be read as operating consistently rather than in conflict, the United States is obliged to honor that agreement.^{101/} Needless to say, the Commission is not free to take any action in contravention of the United States’ binding foreign policy commitments.^{102/}

The consistency between the WTO Basic Telecom Agreement and section 310 also made Senate ratification unnecessary for the agreement to bind the United States and its agencies. To the extent that Senator Hollings suggests that the Agreement is invalid in the absence of ratification even if it is consistent with section 310, he is clearly wrong about the legal force of

law.” In proposing this amendment, Senator Hollings advanced the argument that the Basic Telecom Agreement “just gave away 100 percent in violation of 310(a).” 143 Cong. Rec. S1945-49 (daily ed. Mar. 5, 1997) (statement of Sen. Hollings). In response, Senator McCain and others vigorously opposed this amendment. They not only disagreed with Senator Hollings’s view, but also endorsed USTR’s position that “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.” *Id.* at S1963. After extensive debate, Senator Hollings’s proposed amendment was tabled by the overwhelming vote of 84-16. *Id.* at S1970. Given the Senate’s rejection of Senator Hollings’s argument based on the plain language of section 310(b)(4), it would be clear error for the Commission to accept his resubmission of the argument here.

^{100/} *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); see also *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21 (1963) (construing the National Labor Relations Act in a manner consistent with State Department regulations to avoid foreign policy implications, where to do otherwise would have been contrary “to a well-established rule of international law”).

^{101/} See Vienna Convention on the Law of Treaties, rt. 26 (1969), entered into force Jan. 27, 1980, 1155 U.N.T.S. 1331 (embodying the principle, *pacta sunt servanda*: an international agreement is binding on the parties and must be performed by them in good faith); Restatement (Third) of the Law of Foreign Relations of the United States § 111(1) (“international law and international agreements of the United States are law of the United States”).

^{102/} See *Humane Soc. of the United States v. Glickman*, 217 F.3d 882 (D.C. Cir. 2000) (a federal agency is not free to violate the terms of a treaty or a law that has the force of a treaty).

such an agreement. The General Agreement on Trade in Services (“GATS”)^{103/} and the U.S. schedule of commitments for basic telecommunications thereunder constitute a congressional-executive agreement — the most frequently used form of international agreement.^{104/} The Supreme Court has recognized that Senate ratification of such agreements is unnecessary where, as here, “the enactment of legislation closely related to the question of the President’s authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to ‘invite’ ‘measures on independent presidential responsibility.’”^{105/} Congress provided the requisite executive authority by enacting the Uruguay Round Agreements Act (“URAA”), in which Congress both expressly approved of the GATS and authorized USTR to conduct further negotiations on liberalization of trade in basic telecommunications services.^{106/}

^{103/} See General Agreement on Trade in Services, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167 (1994).

^{104/} See Laurence H. Tribe, *American Constitutional Law* 652 (3d ed. 2000) (“[S]ince 1934, the treaty form has been largely abandoned for trade agreements, even for an agreement as far-reaching as the one establishing the World Trade Organization.”) (citations omitted).

^{105/} *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (citations omitted) (finding that Congress implicitly approved the practice of claims settlement by executive agreement, and that the President’s suspension of claims against Iran through the Algiers Accords was binding as a matter of U.S. law). See also *Weinberger v. Rossi*, 456 U.S. 25, 30 n.6 (1982) (recognizing that “the President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause of the Constitution”); Restatement (Third) of the Foreign Relations Law of the United States § 303(2) (1987) (“the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution”); Tribe at 652 (Congressional-executive agreements have “come to be treated as the equivalent of the treaty form with respect to supremacy over state or prior federal law.”); Louis Henkin, *Foreign Affairs and the United States Constitution* 217 (2d ed. 1996) (A congressional-executive agreement “[l]ike a treaty, . . . is the law of the land, superseding inconsistent state laws, as well as inconsistent provisions in earlier treaties, in other international agreements, or in acts of Congress.”).

^{106/} See Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4809 (1994) (“URAA”), codified at 19 U.S.C. §§ 3501-3624 (approving and implementing the Uruguay Round Agreements); *id.* § 3555(b) (outlining the U.S. objective in the negotiations: “to obtain the

Moreover, Congress adopted the URAA against the backdrop of the authoritative Statement of Administrative Action regarding the WTO negotiations, which correctly recognized that there would be no need for further implementation of the results of the negotiations, because the U.S. commitments were consistent with existing law.^{107/}

For all these reasons, Senator Hollings is wrong that the International Bureau's decision in *Telecom Finland* is not good law.^{108/} To the contrary, as shown above, the Bureau's conclusion that section 310(b)(4) allows a foreign-government-controlled carrier to hold indirectly up to 100 percent of a radio license not only is consistent with section 310, but is *required* under the WTO Basic Telecom Agreement.^{109/} The Commission should ratify that holding here.^{110/}

opening on nondiscriminatory terms and conditions of foreign markets for basic telecommunications services through facilities-based competition or through the resale of services on existing networks”).

^{107/} See *The Uruguay Round Agreements Act, Statement of Administration Action*, H. Doc. 103—316, Vol. 1, at 307-08 (1994) (describing the negotiations on basic telecommunications to implement the GATS, and the Administration's plan to “consult with Congress” but not to seek further legislation before deciding whether the results of the negotiations are satisfactory or whether to reject them by taking an MFN exemption to the GATS for the basic telecommunications sector). See also Sherman at 98 (“The United States considered the WTO Basic Telecom Agreement as an extension of the WTO Agreement, the conclusion of which was foreseen by Congress when it approved the WTO Agreement. The United States also did not need congressional action to implement its scheduled commitments, as these commitments were consistent with existing law.”) (citing *inter alia*, 19 U.S.C. § 3555(b) and the *Foreign Participation Order*).

^{108/} See Comments of Senator Hollings at 9 (citing *Telecom Finland, Ltd.*, Order, 12 FCC Rcd 17648, 17651 ¶ 7 (1997) (“*Telecom Finland*”).

^{109/} Whether the International Bureau exceeded its delegated authority in the *Telecom Finland* decision, as Senator Hollings asserts, *id.*, is beside the point. The Bureau's decision is persuasive precedent that the Commission may consider in reaching its decision.

^{110/} The Commission's decisions in *Orion* and *Intelsat* do not compel a contrary result. In *Orion*, the Commission stated in a footnote that section 310(a) prohibited *de facto* or *de jure* control of the license by a foreign government or its representative, a statement repeated in

As many commenters appropriately emphasize, the practical consequences of adopting Senator Hollings’s reading of section 310 would be profoundly negative.^{111/} Such an interpretation would categorically deny American consumers the undisputed procompetitive benefits associated with the transactions proposed in the Applications, including a greater choice of providers, better and more innovative wireless service offerings, and lower prices.^{112/} And the consequences would extend far beyond U.S. shores. The United States has been one of the leading proponents — and one of the leading beneficiaries — of the Basic Telecom Agreement.^{113/} Indeed, the Commission has recognized that, “[a]s a result of the WTO Basic Telecom Agreement, 44 WTO Members (representing 99 percent of WTO Members’ total basic telecommunications services revenues) will permit foreign [including U.S.] ownership or control of all telecommunications services and facilities”^{114/} Abandonment of the open-entry standard adopted in the *Foreign Participation Order* would risk irreparable harm to this important market-liberalizing process. In particular, as several commenters have observed,

Intelsat. See *Orion Satellite Corp.*, Memorandum Opinion, Order and Authorization, 5 FCC Rcd 4937, 4944 n.26 (1990) (“*Orion*”); *The Applications of Intelsat LLC*, Memorandum Opinion, Order and Authorization, FCC 00-287 ¶ 48 (rel. Aug. 8, 2000) (“*Intelsat*”). In both cases, the Commission found that there was no control by a foreign government, so its footnote reference to *de jure* and *de facto* control under section 310(a) was mere dicta. Moreover, the licenses at issue were not held indirectly, so the scope of section 310(b)(4) was not at issue. See *Orion*, 5 FCC Rcd at 4939 ¶¶ 18, 20; *Intelsat* at ¶ 50.

^{111/} See Comments of OFII at 5; Comments of CWA at 11-12; Comments of Chamber of Commerce at 3-6; Comments of IIE at 1; Comments of SIA at 1.

^{112/} See *supra* Part I.A.

^{113/} *Basic Telecom Agreement*, 36 I.L.M. 366. See Office of the United States Trade Representative, *2000 Trade Policy Agenda and 1999 Annual Report*, Annex 1, at 111 (“Through this agreement, the United States has successfully exported a model based on the U.S. experience of telecommunications liberalization, focused on unimpeded market access, fair rules, and effective enforcement of key regulatory principles.”).

^{114/} *Foreign Participation Order*, 12 FCC Rcd at 23891 ¶ 27.

closing the U.S. market to foreign corporations with partial governmental ownership in excess of 25 percent would violate the Basic Telecom Agreement, invite retaliation, and undermine the incentive for other WTO members to honor their own market-access and market-opening commitments.^{115/}

In addition to harming consumers and curtailing opportunities for foreign acquisitions by American businesses, the perception that the United States has abandoned its WTO commitments would undermine USTR's standing to insist that other countries lower trade barriers, such as the high interconnection fees charged in Japan to U.S. telecommunications carriers.^{116/} Reneging on the commitments of the United States to its closest trading partners also would destroy this country's credibility in future international negotiations. As one commenter explained,

[w]hen 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 commitments, it could in a single stroke cripple U.S. trade policy.^{117/}

^{115/} See Letter from Pascal Lamy, Member of the European Commission, to Ambassador Charlene Barshefsky, USTR, dated July 24, 2000 (referring to legislation sponsored by Senator Hollings, which would have eliminated open-entry standard, as "clearly violat[ing] US commitments in the WTO"); Comments of CWA at 11-12 (denying applications would invite retaliation against U.S. businesses); Comments of Chamber of Commerce at 3-6 (same); Comments of OFII at 5 (same); Comments of IIE at 1 (same).

^{116/} See Comments of Chamber of Commerce at 6.

^{117/} See Comments of OFII at 2; *see also* Comments of SIA at 1.

B. Section 310(a) Does Not Apply in Any Event Because DT Is Not a “Foreign Government or the Representative Thereof.”

Senator Hollings’s argument fails for a second key reason: DT is not a representative of the German government, and neither the German government nor any representative thereof will exercise *de jure* or *de facto* control over the licensee.^{118/} The Commission has defined *de jure* control as control of more than 50 percent of a corporation’s shares.^{119/} The German government currently owns 43.2 percent of DT’s shares and KfW, the German public bank, owns an additional 16.8 percent (for a total governmental stake of 60 percent).^{120/} As a result of DT’s mergers with VoiceStream and Powertel (taking into account France Telecom’s recent sale of its DT shares to KfW), the German government’s interest (held directly or through KfW) will be reduced to approximately 45 percent.^{121/} Therefore, the German government (either separately, or together with KfW) will lack *de jure* control over DT — and, in turn, over DT’s licensee subsidiaries — following the Commission’s approval of the proposed transactions.

Senator Hollings’s assertion that the Commission should consider the German government’s *premerger* interest, rather than its *postmerger* interest, is both logically unsound and at odds with the Commission’s precedents. Contrary to the Senator’s assertion that

^{118/} See *Intelsat* at ¶ 48 (applying control test); *Starsys Global Positioning Inc.*, Declaratory Ruling, 10 FCC Rcd 9392, 9393 ¶ 9 (1995) (“*Starsys*”) (same).

^{119/} *Starsys* at 9393 ¶ 9.

^{120/} DT reported in the Applications that KfW’s interest was 15 percent. As reported in DT’s SEC Form 20-F, in 1998 France Telecom purchased from KfW what amounts today to a 1.8 percent stake in DT. On December 15, 2000, France Telecom decided unilaterally to exercise its option to sell that stake in DT back to KfW. As a result of that transaction, KfW’s ownership interest will increase to 16.8 percent, and the overall *premerger* governmental interest in DT will increase to 60 percent.

^{121/} This is Applicants’ current estimate and is subject to certain adjustment mechanisms set out in the Agreement and Plan of Merger Between Deutsche Telekom AG and VoiceStream Wireless Corporation, dated July 23, 2000.

considering the postmerger figure would “undercut[] the plain meaning of section 310(a),”^{122/} it is irrelevant how much of DT the German government currently owns. Because the postmerger combination of DT-VoiceStream-Powertel is the entity that will control Commission licenses, the relevant question is how much of *that* entity will be owned by a foreign government. For that reason, the Commission always has examined postmerger ownership percentages in analyzing transactions under section 310.^{123/}

Nor will the German government have *de facto* control over the licenses indirectly held by DT. Far from “dominat[ing] the management” of DT,^{124/} the German government plays a minimal role in that process. The government possesses no rights superior to those of other shareholders, such as a “golden share” or a special veto right. In fact, the government even has refrained from exercising its full rights as a shareholder. Contrary to Senator Hollings’s suggestion that the government selects all (or a majority of) the members of DT’s Supervisory Board, the government and KfW each have named only one member to that board. And even if the German government and KfW were to select all 10 non-labor members of the Supervisory Board, the presence of 10 labor members on the board would deny the German government a

^{122/} Comments of Senator Hollings at 4.

^{123/} See, e.g., *Applications of VoiceStream Wireless Corp. or Omnipoint Corp., Transferors, and VoiceStream Wireless Holding Co., Cook Inlet/VS GSM II PCS, LLC, or Cook Inlet/VS GSM III PCS, LLC, Transferees*, Memorandum Opinion and Order, FCC 00-53, DA 99-1634 & 99-2737, ¶ 14 (rel. Feb. 15, 2000); *Nextwave*, 12 FCC Rcd 2030 (stating that the Bureau agrees to reassess section 310(b)(4) compliance *after* promised transactions diluting foreign interests have been taken).

^{124/} *Benjamin L. Dubb Decision*, 16 F.C.C. 274, 289 ¶ 3 (1951). See also *Nonbroadcast and General Action Report No. 1142*, Public Notice, 12 F.C.C.2d 559, 560 (1963) (“*Intermountain Microwave*”) (discussing other indicia of *de facto* control).

voting majority in any event.^{125/} Senator Hollings also overlooks the fact that the government has not appointed any member of DT's Management Board, which oversees the day-to-day operations of the company. Moreover, the government has always voted with the majority of other shareholders, and it has never opposed the actions of the Management Board or Supervisory Board.^{126/}

Nor is any of the other indicia of control identified in *Intermountain Microwave* present here.^{127/} In that order, the Commission identified six factors as relevant to whether an entity has *de facto* control over a licensee: (1) Does the licensee have unfettered use of all facilities and equipment? (2) Who controls daily operations? (3) Who determines and carries out policy decisions, including preparing and filing applications with the Commission? (4) Who is in charge of employment, supervision, and dismissal of personnel? (5) Who is in charge of payment of financial obligations, including expenses arising out of operation? And finally, (6)

^{125/} The suggestion by Novaxess that the labor-appointed members of DT's Supervisory Board are close to the German ruling party SPD, and therefore constitute some kind of proxy for the German government, *see* Comments of Novaxess at 5-6, proves too much. In fact, because the supervisory boards of *all* major German stock corporations (including those without any governmental ownership) have half their members appointed by labor interests, Novaxess's assumption would mean that every major German corporation is a vote away from being controlled by the German government.

^{126/} Senator Hollings is simply incorrect that "[t]he German government meets both formally and informally on a regular basis with the management of Deutsche Telekom *to direct its activities.*" Comments of Senator Hollings at 5 (emphasis added). The only entity that "direct[s] the activities" of DT is the Management Board, which operates entirely independently from the German government. The division of the German Ministry of Finance that supervises the government's stock holdings has been established not to manage specific companies but, quite the opposite, to privatize them.

^{127/} *See Intermountain Microwave*, 12 F.C.C.2d at 560; Public Notice, 1 FCC Rcd 3 (1986) (providing guidance regarding questions of control based on *Intermountain Microwave*).

who receives monies and profits from the operations of the facilities?^{128/} The Commission has made clear that it evaluates these factors “in terms of actual and not theoretical control.”^{129/} Nothing in the record remotely shows that the German government will exercise *actual* control over the licenses currently held by subsidiaries of VoiceStream and Powertel. As ordinary shareholders, the German government and KfW have no say over the use of facilities and equipment, daily operations, personnel matters, or financial matters; nor does the German government receive any profits beyond the dividends earned by shareholders generally.^{130/}

For essentially the same reasons, DT is not the “representative” of the German government, contrary to Senator Hollings’s contention. The Commission has ruled that, in order to qualify as the representative of a foreign government, a company must act “in behalf of” or “in

^{128/} *Id.* The Commission applies these factors in the context of mobile wireless services, in addition to fixed services. *See, e.g., Ellis Thompson Corp.*, Memorandum Opinion and Order and Hearing Designation Order, 9 FCC Rcd 7138, 7138-39 ¶¶ 9-11 (1994).

^{129/} *See Ellis Thompson Corp.*, 9 FCC Rcd at 7140 ¶ 16.

^{130/} Senator Hollings asserts incorrectly that “there is evidence that the German government, through Deutsche Telekom, is already exercising control over VoiceStream.” Comments of Senator Hollings at 5. The Senator argues that the agreement by VoiceStream’s management to work with DT in developing maximum bidding amounts for Spectrum Auction 35 demonstrates DT’s control over VoiceStream. As VoiceStream’s Chairman has explained, however, this kind of routine investor safeguard by no means gives DT (much less the German government) day-to-day control of VoiceStream, and the Commission has upheld such arrangements under its licensee control requirements. *See* Letter of John W. Stanton, Chairman and CEO, VoiceStream Wireless Corp., to William E. Kennard, FCC Chairman, at 2 (Dec. 5, 2000). *See also Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 447-49 ¶ 81 (1994) (“non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in *de facto* control”); *Request of MCI Communications Corporation British Telecommunications plc, Joint Petition For Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3962 ¶ 14 (1994) (“covenants that give a party the power to block certain major transactions of a company do not in and of themselves represent the type of transfer of corporate control envisioned by Section 310(d) [of the Act].”).

connection with” with the foreign government in its use of the station license.^{131/} The mere fact that a government has some kind of relationship with an applicant does not suffice to make the applicant a governmental representative.^{132/} Thus, the German government’s possession of a partial ownership interest in DT does not suffice to make DT a governmental representative. DT’s relationship to the German government is as it is to all other shareholders — as a fiduciary.

There is nothing in the record to suggest that DT acts on behalf of or in connection with the German government. To the contrary, as shown in the Applications and above, DT acts only on behalf of all its shareholders, including those minority shareholders to whom it has a fiduciary duty, and its operations are entirely independent from the government’s function as sovereign.^{133/} And no commenter has provided a single fact supporting any argument that the VoiceStream or Powertel licenses will be used on behalf of the German government, rather than for private, business-related purposes — as DT is required to do under corporate principles of fiduciary duty similar to those applicable to U.S. corporations.

Senator Hollings points to four factors in support of his claim that DT is a representative of the German government: (1) some of DT’s old debt is guaranteed by the German government; (2) some of DT’s employees are former civil-service workers; (3) the German

^{131/} *Russell G. Simpson, Esq.*, 2 F.C.C.2d 640, 640 (1966) (“*Simpson*”). See also *Applications of QVC Network, Inc. for Commission Consent to Interim Transfer of Control of Paramount Communications, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 8485, 8490-91 ¶ 21 (1993).

^{132/} In *Simpson*, for example, the Commission concluded that the applicant was not a representative of that government because he intended to use the license only for his own purposes, and not in connection with his role with the government. *Simpson*, 2 F.C.C.2d at 640.

^{133/} Of course, insofar as the German government is a shareholder in DT, the corporation acts in furtherance of the government’s interests, but the government’s role as shareholder is distinct from its role as sovereign, and both section 310(a) and the Commission’s orders are concerned only with the latter function. Cf. *United States Shipping Board Emergency Fleet Corp. v. Western Union Tel. Co.*, 275 U.S. 415, 426 (1928) (holding that private corporations in which a government has an interest are not departments of government).

government attempted to account for DT's contribution to the German forced-labor fund as a governmental, rather than corporate, contribution; and (4) DT purported to waive sovereign immunity in an SEC filing.^{134/} None of these elements, singly or together, remotely establish that DT will act on behalf of or in connection with the German government in using the FCC licenses over which it seeks to obtain indirect control. Indeed, these factors simply reflect (if anything) the historical fact that DT was *formerly* a state-owned business.

1. While a portion of DT's old debt is guaranteed by the German government, that is unremarkable in light of DT's former status as a government entity. When DT became a stock corporation (*i.e.*, was privatized) in 1995, the German government chose to transfer all outstanding debt to the new corporation (rather than retaining such debt as a governmental obligation, as has occurred in other instances). Because all pre-1995 debt instruments were issued by the German government, their repayment remains backed by the German government. To remove the governmental guarantee that attaches to this pre-1995 debt would require the consent of the holders of the debt instruments and indeed would constitute a default if undertaken unilaterally. By contrast, no debt instrument issued by DT since privatization in 1995 is subject to any guarantee by the German government; such debts are backed by DT alone. In any event, in the five years since privatization, DT has paid off about half of the debt that was outstanding in 1995, and by 2004 virtually all of the remaining debt will be paid off by DT under its scheduled payments.

2. The civil service-like benefits extended to some of DT's employees are another relic of DT's former status as being part of the German government. When DT became a private corporation more than five years ago, its civil service employees were granted the same

^{134/} Comments of Senator Hollings at 5-8.

employment rights vis-à-vis DT that they had with the Federal Republic of Germany. By law, Germany shifted all responsibility over the then-civil servants to DT. As a result, these individuals are not employees of the German government; they are employees of a private corporation. They report to, and are subject to promotion by, DT, not the government. Far from demonstrating any intention on the part of the corporation to act on behalf of (or in connection with) the German government, the requirement to maintain the former civil servants' old level of benefits is only a holdover from DT's former state ownership. Critically, even if the German government had already divested 100 percent of its shares in DT, that would not alter DT's obligations to its employees who were civil servants.

3. The German government's proposed accounting for DT's contribution to the German forced-labor foundation is another red herring. The foundation, which was established in August 2000 to compensate former victims of forced and slave labor during the Nazi regime, is to be financed with 10 billion DM: five billion contributed by the German government and five billion by German industry. Under the applicable German law, German business entities are invited to contribute to the foundation, while the German government is obligated to contribute its share. On June 13, 2000, before the foundation was formally established, DT voluntarily contributed approximately 100 million DM to the private-industry side of the foundation. Subsequently, the German government claimed that, because a majority of DT's shares were still state-owned, the foundation law required that DT's contribution count toward the government's obligation to the foundation. German industry claims that DT's contribution should be booked on the industry side. The government's attempt to count DT's contribution says nothing about whether DT will use its indirect control over Commission licenses on behalf of the German

government. Rather, the question of how to account for DT's contribution is simply a political and historical issue that has no bearing on DT's operation of its wireless business.

4. Finally, Senator Hollings relies on a boilerplate provision of the VoiceStream-DT merger agreement stating that DT waives any sovereign immunity rights it may have in any subsequent dispute with VoiceStream. This precautionary measure, designed to resolve any future uncertainty, does not establish that DT in fact possesses any sovereign immunity, much less that any such legal status would answer the question here — whether DT would use its U.S. wireless licenses on behalf of or in connection with the German government. Rather, DT merely agreed (at VoiceStream's request) that, “*to the extent that it . . . is or becomes entitled to any immunity on the grounds of sovereignty or otherwise based on its status as an agency or instrumentality of the government, it . . . expressly, irrevocably, and unconditionally waives . . . any such immunity.*”^{135/} This routine waiver provision is included in such documents any time there is *any* ownership interest — whether controlling or noncontrolling — by a governmental entity. DT is a private corporation that can be sued in Germany just like any other corporation, and a waiver provision in a merger document does not change this fact.

III. THE COMMISSION SHOULD SUMMARILY REJECT COMMENTERS' REQUESTS TO IMPOSE CONDITIONS RELATING TO DT'S INTERACTION WITH NEW ENTRANTS IN GERMANY AND OTHER MATTERS THAT HAVE NOTHING TO DO WITH THE PROPOSED TRANSACTIONS OR THE PUBLIC INTEREST ANALYSIS.

The German Competitors ask the Commission to reverse its decision in the *Foreign Participation Order* to forego the ECO test for entry from WTO signatory countries and to impose a wide-ranging set of conditions to remedy alleged anticompetitive practices by DT in

^{135/} Agreement and Plan of Merger Between Deutsche Telekom AG and VoiceStream Wireless Corp. at 61, July 23, 2000 (emphasis added).

the German market.^{136/} In essence, these commenters are seeking reconsideration of that order three years too late. The Commission should summarily reject this request and any others that seek conditions unrelated to the proposed transactions' effects on competition in the United States, national security, law enforcement, foreign policy, or trade. Such grab-bag requests seek what would amount to a limitless expansion of the Commission's authority in license-transfer proceedings to second-guess its German and E.U. counterparts, in direct violation of the WTO Basic Telecom Agreement, the Commission's *Foreign Participation Order*, and basic principles of comity.^{137/} The unsubstantiated allegations of the German Competitors also have no connection to the proposed transactions, and for this reason too provide no basis for the relief sought.^{138/} In any event, Appendix A makes clear that the German Competitors' assertions are an exaggerated and misleading account of the routine issues that arise in the course of progress toward full local wireline competition in many countries. In fact, Germany has one of the world's most open and competitive telecommunications markets.

^{136/} See Comments of GTS at 4-5; Comments of Novaxess at 2-9; Comments of QSC at 25-29.

^{137/} See *Foreign Participation Order*, 12 FCC Rcd at 23940-41 ¶ 112-13 (defining scope of public interest analysis as including only very high risks to competition and concerns regarding national security, law enforcement, foreign policy, and trade).

^{138/} See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3207 ¶ 96 (1999) ("*AT&T-TCP*") (holding that open access issues did not provide a basis for conditioning or denying the merger because such "issues would remain equally meritorious (or non-meritorious) if the merger were not to occur"); *Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 2624, 2626-27 ¶ 2 (1997) ("*PacTel-SBC*") (finding that competition issues that existed before the merger were irrelevant to the license-transfer proceeding).

A. The Commission Should Reject the German Competitors' Calls To Usurp the Authority of RegTP and the European Commission in Violation of the *Foreign Participation Order* and the GATS.

The German Competitors make a series of remarkable assertions in beseeching the Commission to join RegTP as a co-regulator of the German telecommunications market, in bold disregard of the United States' WTO commitments and the WTO dispute resolution procedures. They contend that the Commission (1) must undertake a "full inquiry" under the ECO test, even though that test was abandoned in 1997 for carriers based in WTO member countries;^{139/} (2) should pretend DT is from a non-WTO country, notwithstanding that Germany, a WTO member, is indisputably DT's "home market";^{140/} and (3) should impose affirmative obligations on DT's regulators — *i.e.*, RegTP and the European Commission.^{141/} Simply to recite these requests is to refute their validity, but, in any event, the German Competitors themselves readily concede that there is no lawful basis for the imposition of such conditions. Because they do "*not* submit that entry of DTAG poses a 'very high risk' to competition in the United States,"^{142/} they cannot justify any inquiry into market conditions in Germany, much less the imposition of onerous conditions that would usurp the regulatory prerogatives of RegTP, the European Commission, and the WTO dispute resolution process.

The German Competitors ask the Commission to travel a road it has already left far behind. When the Commission adopted the *Foreign Participation Order*, it expressly rejected pleas to maintain the ECO test, or to examine "the extent to which a WTO Member has made a

^{139/} See Comments of QSC at 10.

^{140/} *Id.* at 25.

^{141/} See Comments of Novaxess at 12.

^{142/} *Id.* at 3. See also Comments of QSC at 2 (conceding that the standard for denying the applications has not been met); Comments of GTS at 3 (same).

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.”^{143/} The Commission stated: “[W]e find that the potential for harm from carriers from countries that have not implemented their market-opening commitments to allow competition in their telecommunications markets does not justify imposing . . . strict limitations on entry. . . .”^{144/} The Commission further recognized that “discriminating among foreign applicants based on the quality of their WTO commitment or the extent of the implementation of their commitment could raise serious GATS concerns. Adopting such a policy could damage relations with our trading partners and serve as a poor example to other countries also implementing their market opening commitments.”^{145/}

Because neither the German Competitors nor any other commenter claims that the proposed transactions would pose a very high risk to U.S. competition, there is no warrant for examining competitive practices in Germany. Indeed, as the Commission itself has recognized, to do so could be treated as a violation of Article II of the GATS.^{146/} Nor have any commenters alleged threats to national security, law enforcement, or foreign policy. And, while one commenter makes vague allusions to trade policy,^{147/} it is clear that supplanting the WTO

^{143/} *Foreign Participation Order*, 12 FCC Rcd 23907-08, ¶¶ 37-39.

^{144/} *Id.* at ¶ 39.

^{145/} *Id.* at ¶ 40.

^{146/} *See id.* (“In contrast to our policy that considers the competitive impact of a firm’s entry into the U.S. market, a policy of discrimination among carriers based on their WTO commitment alone could be interpreted by other WTO Members as discriminating among ‘like’ service suppliers based solely on foreign market conditions. This could be perceived as a violation of Article II of the GATS.”) (emphasis added).

^{147/} *See* Comments of QSC at 28.

process with a heavy-handed effort by the Commission to regulate the German market would severely hamper, rather than promote, U.S. interests on the trade front.^{148/} The German Competitors put forth no sound reason to justify departing from the *Foreign Participation Order*.

Attempting to evade the plain language of the *Foreign Participation Order*, the German Competitors argue that the open-entry standard adopted there should not apply because DT is a “global” telecommunications provider, and the Commission could not have considered such a development in 1997.^{149/} There is no basis whatever for that assertion. Because the Commission *did* anticipate the increasing importance of global markets, it made clear that it would determine the applicability of the open-entry presumption based on a foreign carrier’s “principal place of business” or “home market.”^{150/} The German Competitors have not asserted, nor could they, that DT no longer maintains its principal place of business in Germany (a WTO member country), or that Germany is not DT’s home market.^{151/}

The German Competitors try to create another loophole by arguing that the *Foreign Participation Order* has no application to the Commission’s imposition of conditions on, as opposed to an outright denial of, the Applications.^{152/} This, too, is without merit. The Commission does not — and cannot — even consider imposing conditions in the absence of a

^{148/} See Comments of CWA at 11-12; Comments of Chamber of Commerce at 3-6; Comments of OFII at 5-9; Comments of IIE at 1.

^{149/} See, e.g., Comments of Novaxess at 3; Comments of QSC at 11.

^{150/} *Foreign Participation Order*, 12 FCC Rcd at 23941-42 ¶ 116.

^{151/} To the contrary, QSC expressly makes reference to “DTAG’s German home market.” Comments of QSC at 27.

^{152/} See Comments of GTS at 6.

demonstrated harm to the public interest.^{153/} There is no demonstrated harm of that kind here, if for no other reason than that the German Competitors' proposals are not merger-specific: They have nothing whatever to do with DT's transactions with VoiceStream and Powertel, but would remain the same irrespective of whether DT were proposing to merge with a U.S. wireless carrier. The Commission has often stated that it does not use license-transfer proceedings to address such non-merger-specific issues.^{154/} In any event, because VoiceStream, Powertel, and DT have overwhelmingly demonstrated that this merger is in the public interest, there is no basis for imposing conditions.^{155/}

Moreover, in seeking to have the Commission impose conditions, the German Competitors invite it to evaluate other countries' implementation of WTO commitments — the very role that the Commission rejected in the *Foreign Participation Order*. The German Competitors are not without recourse if they believe their claims are meritorious. They can seek redress directly from RegTP and from the European Commission. In addition, as the Commission recognized in the *Foreign Participation Order*, USTR continuously monitors WTO members' "compliance with their WTO obligations and [can] pursue consultation and dispute settlement where noncompliance is found. Where a WTO Member fails to implement its

^{153/} See *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control*, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14854 ¶ 348 (“[I]f our analysis ended at this point [without consideration of proposed conditions], we would have to conclude that the Applicants have not demonstrated that the proposed transaction, on balance, will serve the public interest, convenience and necessity.”)

^{154/} See *AT&T-TCI*, 14 FCC Rcd at 3207 ¶ 96; *PacTel-SBC*, 12 FCC Rcd at 2626-27 ¶ 2.

^{155/} While the German Competitors conclusorily assert that DT's supposedly anticompetitive conduct could harm U.S. consumers, they supply no facts in support of that assertion, as required by section 309(d)(1), see *supra* Part I.B; and the assertion of a threat to competition in the United States in any event is demonstrably false, *id.*

commitment, the United States has the ability to enforce a Member's commitment."^{156/} Thus, if Germany lagged in complying with the Basic Telecom Agreement — which it does not — the appropriate remedy would be for the United States to raise the issue bilaterally with the German government or to bring a WTO complaint, not for the Commission unilaterally to resurrect the ECO test.

QSC therefore has it backwards when it alludes to USTR's review of Germany's WTO compliance as a supposed basis for the Commission's imposition of conditions.^{157/} That review — in which USTR has not found any basis for a WTO complaint against Germany^{158/} — provides the appropriate mechanism for addressing the German Competitors' complaints.

In any event, all of the competitive issues these commenters raise, far from identifying a need for unilateral intervention by the Commission in violation of its orders and international law, are commonplace byproducts of the transition from a local wireline monopoly to full and unfettered competition. Even if the German Competitors' allegations were valid — and they are not — the issues raised are general competitive matters that have nothing to do with the effects of the specific proposed transactions. Indeed, several issues raised by the commenters are identical to competitive disputes between incumbent LECs and new entrants in the U.S.

^{156/} *Foreign Participation Order*, 12 FCC Rcd at 23903, 23908 ¶¶ 28, 39. The Commission further recognized that other countries have a similar incentive to hold WTO members' to their commitments. *See id.*

^{157/} *See* Comments of QSC at 27-28.

^{158/} *See* Press Release, USTR, *USTR Notes Progress on Telecom Issues in the United Kingdom, Germany and South Africa, Cites Continued Need to Monitor Implementation* (June 16, 2000), available at www.ustr.gov/releases/2000/06/00-46.html (citing statement by Ambassador Barshefsky that results of ongoing review under section 1377 of the Omnibus Trade and Competitiveness Act of 1988 indicated that Germany has "shown progress in addressing the concerns [USTR] expressed in [its] annual review of telecommunications agreements").

telecommunications market.^{159/} In this context, principles of comity have compelling force. If the Commission were to intervene in the routine disputes between new entrants and DT in Germany, that would open the door to foreign regulators' conditioning the entry of U.S. carriers on their compliance with requirements that usurp this Commission's role as local regulator.

RegTP thus is grappling with the same issues as the Commission, and the commenters advance no basis for concluding that the German regulator, or the European Commission, will fail to implement policies that promote competition. Just as it would be unreasonable to suggest that the longstanding regulatory disputes and litigation concerning collocation and loop provisioning in this country cast doubt on this Commission's ability to adjudicate these disputes that are endemic to the transition to local wireline competition, so too would it be unfair to impugn RegTP's effectiveness or independence as a result of such disputes in Germany. That is particularly so because that transition began two years later in Germany than it did here. Indeed,

^{159/} For example, the German Competitors' complaints regarding DT's provisioning of interconnection, local loops, and collocation space are virtually identical to the kinds of objections raised by new entrants regarding the RBOCs' performance. In fact, a similar process of voluntary negotiations followed by regulatory decisionmaking applies in both countries. Just as the state commissions and the FCC resolve disputes between incumbents and new entrants in this country, RegTP "is empowered to order, at the request of an interconnecting party, public telecommunications network operators to interconnect and to define the conditions of interconnection, and sets the deadline for implementation of the decision." European Commission, *Fifth Report on the Implementation of the Telecommunications Regulatory Package*, Annex 3, at 6 (Nov. 11, 1999). The substance of disputes often is the same, as well: While the German Competitors argue that collocation provisioning takes too long, *see, e.g.*, QSC at 21-24, the Commission recently completed a proceeding on this very same issue, in which U.S. competitors made identical requests regarding incumbent LECs' practices. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability, and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297 (rel. Aug. 10, 2000) (imposing new provisioning requirements at the behest of new entrants); *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, DA 00-2528, CC Docket No. 98-147 (rel. Nov. 7, 2000) (conditionally waiving certain requirements in response to objections by incumbent LECs).

the United States surely would cry “foul” if a WTO-member government were to use concerns about provisioning intervals of an incumbent LEC in the United States (such as Verizon, SBC, BellSouth, or Qwest) to deny that company access.^{160/}

B. The Commission Also Should Reject Any Demands for Access to Spectrum for Designated Entities as Beyond the Scope of This Proceeding.

Finally, UTStarcom’s vague suggestions that VoiceStream should be required to make spectrum available in rural markets, and that designated entities should be the beneficiaries,^{161/} have nothing to do with the proposed merger and should therefore be rejected.^{162/} Whether the

^{160/} In addition to the proposed conditions regarding *DT’s* conduct in Germany, Novaxess asks the Commission to force the *German government* to “commit itself to sell its stake in DTAG within a reasonable time period.” Comments of Novaxess at 2. The Commission should reject this proposal for the same reasons stated above, chief among these being the Commission’s dual obligation to follow its own orders and to take no action that would contravene the lawful and binding foreign commitments of the United States, and the absence of any merger-related competitive effects of such governmental ownership. It would be particularly inappropriate for the Commission to impose conditions on the German government, which, unlike DT, is not even a party to this license-transfer proceeding. In any event, the German government has stated its intent to reduce its interest in DT to zero, as market conditions permit. See Letter from Michael Steiner, Foreign Policy and Security Adviser of the Federal Chancellor, to Samuel Berger, Assistant to the President for National Security Affairs, at 1 (Sept. 21, 2000) (“The German Government is fully committed to the full privatization of Deutsche Telekom and to the objective to reduce its direct stake not just to 25% but to zero.”). There has been no showing remotely approximating that necessary to justify the draconian step of forcing that process to go forward irrespective of market conditions.

^{161/} See UTStarcom at 1.

^{162/} See *CIRI/VoiceStream Order* at ¶ 19 (rejecting a similar request to deny a transfer of control of designated entity licenses to VoiceStream premised on alleged harm to rural consumers). As the Bureaus noted in that order, “[t]he Commission has found that existing build-out requirements meet Congress’ directive . . . in section 309(j)(4)(B) of the Act to adopt rules to ‘include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.’” *Id.* (citing 47 U.S.C § 309(j)(4)(B) and *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, Fifth Report and Order, 9 FCC Rcd 5532, 5570, ¶ 90 (1994)). These build-out requirements apply to all PCS licenses, regardless of the licensee.

Commission should make additional spectrum available to designated entities directly or by means of secondary markets are general policy questions that the Commission should address in industrywide rulemakings, rather than in its consideration of the pending license-transfer Applications.^{163/} Indeed, imposing such requirements on one company as a condition of market access to the United States would itself violate the guarantees of the WTO. In any event, the Commission already is addressing such issues, and need not consider them here.^{164/}

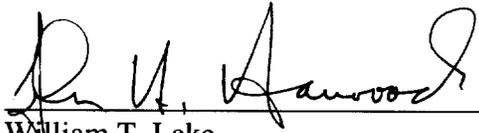
^{163/} See *Applications of Craig O. McCaw, Transferor, and AT&T Co., Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and Its Subsidiaries*, Memorandum Opinion and Order, 9 FCC Rcd 5836, 5877-78, 5889-90 ¶ 70, 90-91 (1994) (holding that broader policy concerns raised by commenters must be addressed in a rulemaking of general applicability). See also *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1983) (“rulemaking is generally a ‘better, fairer, and more effective’ method of implementing a new industry-wide policy than is the uneven application of conditions in isolated license renewal proceedings.”).

^{164/} See *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking, FCC 00-402, WT Docket No. 00-230 (rel. Nov. 27, 2000) (proposing creation of secondary markets for spectrum); *Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Sixth Report and Order and Order on Reconsideration, FCC 00-313, WT Docket No. 97-82, ¶ 23 (rel. Aug. 29, 2000) (deciding to apportion spectrum to promote interests of designated entities); *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; Implementation of Section 257 of the Communications Act – Elimination of Market Entry Barriers*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831, 21843-45 ¶¶ 13-17 (1996) (partitioning and disaggregation rules improve the ability of smaller entities to overcome entry barriers through the creation of smaller licenses that require less capital).

CONCLUSION

For the above reasons, and for the reasons set forth in the Applications filed in this proceeding, the proposed mergers are strongly in the public interest. VoiceStream and DT accordingly request that the Commission promptly grant these Applications and the requested declaratory rulings under section 310(b)(4).

Respectfully submitted,



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January 8, 2001

CERTIFICATE OF SERVICE

I, John Meehan, do hereby certify that on this 8th day of January, 2001, I caused true and correct copies of the foregoing Reply in Support of Applications for Consent to Transfer of Control to be served by hand (via courier), or by first-class mail, postage pre-paid (where indicated) upon the following parties:

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