

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

In the Matter of)
)
VOICESTREAM WIRELESS)
CORPORATION, and)
)
POWERTEL, INC.,)
)
Transferors,)
)
and)
)
DEUTSCHE TELEKOM AG,)
)
Transferee,)
)
Applications for Consent to Transfer of Control)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IB Docket No. 00-187

REPLY IN SUPPORT OF
APPLICATIONS FOR CONSENT TO TRANSFER OF CONTROL

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January 8, 2001

SUMMARY

The record in this proceeding establishes that the public interest will be overwhelmingly served by the prompt grant of the Applications. These transactions will increase competition and choice, benefit consumers, speed the deployment of innovative advanced wireless services, and create U.S. jobs. Not a single commenter contests these benefits, and no one has petitioned to deny the Applications. Moreover, there are simply no offsetting harms to competition, let alone any effects remotely approaching the “very high risk to competition” required to be shown under the Commission’s *Foreign Participation Order*. No commenter adduces any specific, credible evidence to the contrary. In fact, none of VoiceStream’s or Powertel’s U.S. wireless competitors — the only group potentially disadvantaged by VoiceStream’s enhanced competitiveness — has filed comments in this proceeding.

Nor is there any basis in the record for the Commission to repudiate the United States’ commitment to allow foreign entities unlimited indirect access to U.S. markets, as memorialized in the World Trade Organization Agreement on Basic Telecommunications (“WTO Basic Telecom Agreement”). Indeed, the Commission is bound by this commitment as a matter of law. Far from compelling the Commission to retreat from the United States’ commitment to free trade and open markets, section 310 of the Act, properly read, supports the position taken in the Basic Telecom Agreement. The Commission implemented the U.S. commitment to market access in its *Foreign Participation Order*, and it should grant the pending Applications under the framework articulated in that order. The Commission should not, as a few commenters suggest, refuse to apply its own decision in the *Foreign Participation Order* — and the policy of the United States — in this single instance.

Finally, no weight at all should be given to the requests by three competitors of DT in Germany that the Commission act as a worldwide super-regulator. When the Commission implemented the WTO Basic Telecom Agreement and jettisoned its previous Effective Competitive Opportunities test for WTO signatory countries, it did so with full recognition that it would rely instead on (1) foreign governments to implement their own commitments under the Basic Telecom Agreement, and (2) the United States' ability to pursue consultation with the foreign government involved and WTO dispute resolution where necessary. There is no reason for the Commission to shift course, effectively anointing itself arbiter of international, multijurisdictional concerns. To do so now would be arbitrary, in violation of the Commission's own decisions and the Administrative Procedure Act. Such a shift also would violate U.S. WTO commitments, likely resulting in the filing of complaints with the WTO and retaliation by other jurisdictions.

Accordingly, the Commission should grant these Applications as soon as Applicants have entered into an agreement with the Department of Justice and the Federal Bureau of Investigation regarding national security and law enforcement issues.

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**REPLY IN SUPPORT OF
APPLICATIONS FOR CONSENT TO TRANSFER OF CONTROL**

VoiceStream Wireless Corporation (“VoiceStream”), Powertel, Inc. (“Powertel”), and Deutsche Telekom AG (“DT”) respectfully submit this reply to the comments on their pending transfer-of-control Applications.

The record in this proceeding establishes that the public interest will be overwhelmingly served by the prompt grant of the Applications. These transactions will increase competition and choice, benefit consumers, speed the deployment of innovative advanced wireless services, and create U.S. jobs. Not a single commenter contests these benefits, and no one has petitioned to deny the Applications. Moreover, there are simply no offsetting harms to competition, let alone any effects remotely approaching the “very high risk to competition” required to be shown under

the Commission's *Foreign Participation Order*.^{1/} No commenter adduces any specific, credible evidence to the contrary. In fact, none of VoiceStream's or Powertel's U.S. wireless competitors — the only group potentially disadvantaged by VoiceStream's enhanced competitiveness — has filed comments in this proceeding.

Nor is there any basis in the record for the Commission to repudiate the United States' commitment to allow foreign entities unlimited indirect access to U.S. markets, as memorialized in the World Trade Organization Agreement on Basic Telecommunications ("WTO Basic Telecom Agreement"). Indeed, the Commission is bound by this commitment as a matter of law. Far from compelling the Commission to retreat from the United States' commitment to free trade and open markets, section 310, properly read, supports the position taken in the Basic Telecom Agreement.^{2/} The Commission implemented the U.S. commitment to market access in its *Foreign Participation Order*, and it should grant the pending Applications under the framework articulated in that order. The Commission should not, as a few commenters suggest, refuse to apply its decision in the *Foreign Participation Order* — and the policy of the United States — in this single instance.

Finally, no weight at all should be given to the requests by three competitors of DT in Germany that the Commission act as a worldwide super-regulator. When the Commission implemented the WTO Basic Telecom Agreement and jettisoned its previous Effective Competitive Opportunities ("ECO") test for WTO signatory countries, it did so with full

^{1/} See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23914 ¶ 51 (1997) ("*Foreign Participation Order*"); see also Order on Reconsideration, FCC 00-330, IB Docket No. 97-142 ¶¶ 2-4 (rel. Sep 19, 2000).

^{2/} See 47 U.S.C. § 310.

recognition that it would rely instead on (1) foreign governments to implement their own commitments under the Basic Telecom Agreement, and (2) the United States' ability to pursue consultation with the foreign government involved and WTO dispute resolution where necessary.^{3/} There is no reason for the Commission to shift course, effectively anointing itself arbiter of international, multijurisdictional concerns. To do so now would be arbitrary, in violation of the Commission's own decisions and the Administrative Procedure Act. Such a shift also would violate U.S. WTO commitments, likely resulting in the filing of complaints with the WTO and retaliation by other jurisdictions.

Accordingly, the Commission should grant these Applications as soon as Applicants have entered into an agreement with the Department of Justice ("DOJ") and the Federal Bureau of Investigation ("FBI") regarding national security and law enforcement issues.

I. THE COMMENTS CONFIRM THAT THE PROPOSED TRANSACTIONS WILL DELIVER SUBSTANTIAL PROCOMPETITIVE BENEFITS WITHOUT POSING OFFSETTING RISKS TO COMPETITION.

The record makes clear that DT's transactions with VoiceStream and Powertel^{4/} will deliver substantial procompetitive, proconsumer benefits. Very few commenters assert that DT's partial government ownership or position in the German telecommunications market will have anticompetitive effects, and all of them fail utterly to demonstrate any harm to competition (or to consumers), much less a "very high risk" of such harm.^{5/} Moreover, the forthcoming agreement between Applicants and DOJ and the FBI will appropriately address any national security or law

^{3/} See *Foreign Participation Order*, 12 FCC Rcd at 23907-09 ¶¶ 38-40.

^{4/} For convenience of presentation, we generally use "VoiceStream" to refer collectively to VoiceStream and Powertel. We note that no commenter raises any independent issue with respect to the Powertel-DT transaction.

^{5/} See *Foreign Participation Order*, 12 FCC Rcd at 23913-14 ¶ 51.

enforcement needs. Thus, the transactions plainly will “serve[] the public interest, convenience, and necessity,”^{6/} and the Commission should promptly approve them.

A. The Comments Support Applicants’ Showing That the Transactions Are Strongly Procompetitive.

As Applicants demonstrated in the Applications, these mergers will yield substantial benefits for American consumers and workers. No commenter questions that the direct result of the mergers will be to enhance competition in wireless telecommunications. VoiceStream will bring new service plans to more American consumers and will speed the introduction of innovative features and functions. This will produce benefits for all wireless consumers — not just VoiceStream customers — by forcing VoiceStream’s competitors to ratchet up their own competitive efforts.^{7/} Indeed, several commenters cite these benefits as reasons that the Commission should grant the proposed transfers,^{8/} and no commenter denies those benefits.

No commenter disputes that the proposed transactions will have substantial procompetitive, proconsumer effects.^{9/} Through these unions, VoiceStream will gain access to essential resources and valuable expertise that will facilitate its emergence as a robust fifth

^{6/} 47 U.S.C. § 310(d).

^{7/} No commenter refutes the lengthy discussion of procompetitive benefits made in the Application by VoiceStream Wireless Corp. and Deutsche Telekom AG for Transfer of Control and Petition for Declaratory Ruling, filed Sept. 18, 2000 (“VoiceStream-DT App.”). *See* VoiceStream-DT App. at 18-29; Application by Powertel, Inc. and Deutsche Telekom AG for Transfer of Control and Petition for Declaratory Ruling, filed Sept. 18, 2000, at 8-19 (“Powertel-DT App.”).

^{8/} *See* Comments of Organization for International Investment (“OFII”) at 9; Comments of Institute for International Economics (“IIE”), Attachment at 4; Comments of National Consumers League (“NCL”) at 1; Comments of Communications Workers of America (“CWA”) at 3-6; Comments of Alliance for Public Technology (“APT”) at 3-4.

^{9/} *See* Comments of NCL at 1; Comments of CWA at 3-6; Comments of IIE, Attachment at 4; Comments of Kugell.

national wireless competitor. Commenters agree that the mergers will accelerate VoiceStream's build-out of its network, which at present reaches only 45 percent of its licensed service areas.^{10/} Unlike four of its major competitors (AT&T Wireless, Cingular, Verizon Wireless, and Sprint), VoiceStream is a new and independent company, without the ready availability of capital necessary to build out its network and expand its services. The proposed transactions will put VoiceStream and Powertel on a more even footing with their larger competitors, allowing more rapid progress toward a near-nationwide footprint.

No commenter disputes that, by increasing competition, the merger will benefit all consumers because it will force all wireless providers to offer better, more innovative services at lower prices. In its annual CMRS competition reports, the Commission has documented the significant increases in competition and innovation — and the sharp declines in price — that accompany the arrival of each new competitor in a wireless market.^{11/} Likewise, as the Institute for International Economics commented in this proceeding, “[t]he larger the number of telecom giants operating in the US market, the keener the competition, the lower the prices, the faster the innovation — all propelling the new economy.”^{12/} Commenters also agree that VoiceStream's growth into a full-fledged, nationwide carrier will stimulate competition and benefit consumers.^{13/} And it is uncontroverted that the merger offers the potential for further price

^{10/} See VoiceStream-DT App. at 24-25; Powertel-DT App. at 10, 15-17.

^{11/} See, e.g., *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Fifth Report, FCC 00-289 (rel. Aug. 18, 2000).

^{12/} Comments of IIE, Attachment at 4.

^{13/} Comments of OFII at 9-10; Comments of IIE, Attachment at 4; Comments of NCL at 1; Comments of CWA at 3-6; Comments of APT at 3-4.

reductions as a result of improved economies of scale and scope, particularly from more efficient procurement.^{14/}

Moreover, no commenter challenges Applicants' showing that DT's leadership in providing advanced wireless services in Europe will facilitate VoiceStream's introduction of these and other promising new services, including next-generation applications, into the U.S. market. Commenters APT, CWA, OFII, and Kugell all note that DT's leadership and experience in this area will facilitate the delivery of new services to American consumers.^{15/} For example, APT specifically comments that approval of the merger will "promote advanced services deployment."^{16/} CWA similarly observes that "DT's leadership in providing advanced wireless services in Europe will provide U.S. wireless consumers with new options, such as a service that allows wireless customers to dial short codes to access value-added services."^{17/}

Finally, commenters emphasize the benefits of investment and job creation in the national economy — precisely the benefits envisioned by the United States when it joined the WTO and negotiated the Basic Telecom Agreement. CWA notes that accelerated network build-out fuels job growth.^{18/} OFII observes that "[f]oreign companies, through their U.S. subsidiaries, play a tremendous role in the stability and growth in the U.S. economy. Last year investment by international companies in new and existing American companies reached a record-breaking

^{14/} See VoiceStream-DT App. at 27-28; Powertel-DT App. at 17-18.

^{15/} See Comments of APT at 2-4; Comments of CWA at 3; Comments of OFII at 9-10; Comments of Kugell at 1.

^{16/} Comments of APT at 2.

^{17/} Comments of CWA at 3.

^{18/} See *id.*

\$282 billion.”^{19/} DT has already invested \$5 billion in VoiceStream — money that supports the creation of high-skill, high-paying jobs and the deployment of advanced mobile networks, all on American soil. The proposed mergers will only further these beneficial developments.

In sum, the record on the public interest benefits of the proposed merger is clear. Commenters supporting the merger speak with a single voice about increased competition and innovation, accelerated deployment, greater choice and lower prices, job creation, and capital investment. Even those commenters opposing the unconditional license transfer do not dispute these benefits, but rather object on erroneous or irrelevant grounds.

B. The Record Is Clear That the Proposed Transactions Pose No Risk to Competition in the United States, Let Alone a “Very High Risk.”

No commenter argues — and none could argue — that this merger will result in the disappearance of an actual competitor. As the Institute for International Economics notes in its comments,

[t]he Deutsche Tele[k]om acquisition of VoiceStream (and Powertel) exemplifies the sort of horizontal expansion that *adds* to competition in the U.S. market. Deutsche Tele[k]om . . . has no significant presence in the US market. If Deutsche Tele[k]om makes an entry, it will add to competition. . . . Unless [VoiceStream] combines with another player, it won’t have the capital and technology to expand and compete. And with Verizon, [Cingular], AT&T and Sprint already nationwide carriers, unless VoiceStream combines with a carrier not already in the US market, a VoiceStream merger is likely to *subtract* competition.^{20/}

Nor does any commenter allege — and none could — that DT is a significant potential competitor that would have been likely independently to enter the U.S. wireless market in the absence of a merger or acquisition. There is no doubt that the allocated, unassigned spectrum is

^{19/} See Comments of OFII at 9; *see also* Comments of Chamber of Commerce at 6-7.

^{20/} Comments of IIE, Attachment at 2-3.

insufficient to permit independent entry by DT.^{21/} And no commenter argues — and none could — that this merger would lead to undue concentration in the U.S.-Germany route; to the contrary, Applicants’ combined share of the international services market is de minimis with respect to any route.^{22/}

Nonetheless, a few commenters vaguely assert that the proposed transactions threaten competition in the U.S. markets for wireless and international services.^{23/} These assertions lack any sound analytical foundation, much less any factual basis. None of these naked assertions establishes any risk to competition, let alone the “very high risk to competition” required by the *Foreign Participation Order*.^{24/}

DOJ’s Antitrust Division already has concluded that the proposed transactions do not pose such a risk to competition. In a September 14, 2000 letter to Congressman Billy Tauzin, DOJ explained that it had “carefully reviewed both the potential horizontal and vertical effects of the proposed acquisition of VoiceStream Wireless Corp. (VoiceStream) by Deutsche Telekom AG (DT).”^{25/} With respect to wireless competition, DOJ concluded that, because DT has no operations in the United States, “the proposed acquisition would not eliminate any competition

^{21/} VoiceStream-DT App. at 29-30, n.88 (citing *AirTouch-Vodafone*, which stated “any other avenue for Vodafone to enter the U.S. market [other than proposed merger] would generally have required it to acquire licensed spectrum from an existing licensee”).

^{22/} See VoiceStream-DT App. at 24; see also Powertel-DT App. at 21-22.

^{23/} See Comments of Senator Hollings; Comments of Global TeleSystems (“GTS”); Comments of Novaxess; Comments of QS Communications (“QSC”).

^{24/} *Foreign Participation Order*, 12 FCC Rcd at 23913-14, 23922 ¶¶ 51, 69. See also *id.* ¶¶ 111-12.

^{25/} Letter of Robert Raben, Asst. Attorney General, to Billy Tauzin, Chairman, Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, at 2 (Sept. 14, 2000) (attached as Appendix C).

between DT and VoiceStream in any U.S. wireless market.”^{26/} Likewise, with respect to international services, DOJ “concluded that the limited vertical integration resulting from the proposed acquisition would not be likely to substantially lessen competition in violation of the antitrust laws.”^{27/} While the public interest analysis includes factors in addition to those relating to competition, the Commission traditionally has taken the views of the relevant antitrust authorities into account in its license-transfer decisions.^{28/}

DOJ’s conclusions are confirmed by the absence of opposition to the transactions by consumers or competitors of VoiceStream or Powertel. If DT’s acquisition of VoiceStream and Powertel threatened the U.S. markets for wireless or international services, as alleged by Senator Hollings and a few of DT’s German competitors,^{29/} surely at least one of the participants in the markets for those services would have come forward to make that case. In fact, the users of

^{26/} *Id.*

^{27/} *Id.*

^{28/} See *Applications of Shareholders of Jacor Communications, Inc., Transferor, and Clear Channel Communications, Inc., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 6867, 6886-87 ¶ 17 (1999) (finding “the Department of Justice’s antitrust determination to be relevant and probative evidence regarding the competitive effect of the proposed transactions”). See also *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18170 (1998) (Separate Statement of Commissioner Michael Powell) (the Commission should consider the findings of DOJ in order “to minimize duplications of effort in the area of competitive analysis”); *Amendment of the Commission’s Ex Parte Rules*, Order, 9 FCC Rcd 6108, 6108 ¶ 2 (1994) (Ex parte presentations from DOJ or the Federal Trade Commission “promote the public interest through the exchange of information and ideas between the Commission and the other principal agencies responsible for promoting or ensuring competition in the telecommunications industry.”); Letter from Christopher J. Wright, General Counsel, FCC, to Arthur H. Harding, Esq., Peter D. Ross, Esq., George Vradenburg, III, Esq., Steven N. Teplitz, Esq., and Catherine R. Nolan, Esq., CS Docket No. 00-30, (Oct. 11, 2000) (Commission ordinarily waits for action by DOJ or the Federal Trade Commission because the Commission’s public interest review may be affected by the findings of those agencies).

^{29/} For ease of reference, Applicants refer below to GTS, Novaxess, and QSC — three actual or potential competitors of DT in Germany — as the “German Competitors.”

wireless telecommunications services, represented by the National Consumers League and the Alliance for Public Technology, strongly *support* granting the transfer Applications.^{30/} The absence of any complaint by consumers or U.S. competitors places this case in stark contrast to other proceedings in which the merging parties' competitors have alleged grave threats to their competitive prospects.^{31/}

In addition, the few comments asserting that the transactions threaten competition are entirely conclusory and wholly unsubstantiated.^{32/} These comments therefore fail to meet the standard of section 309(d). Under that section, a petition to deny an application must “contain specific allegations of fact” establishing both that the petitioner is a “party in interest” and that “a grant of the application would be *prima facie* inconsistent with” the public interest.^{33/} The

^{30/} See Comments of NCL at 1 (NCL “supports the applicants . . . because we believe that both consumers and workers will benefit without any detriment to our national security.”); Comments of APT at 3.

^{31/} See, e.g., *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee*, Memorandum Opinion and Order, FCC 00-221, CC Docket No. 98-184, at Appendix A (rel. June 16, 2000); *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer of Control*, Memorandum Opinion and Order, 14 FCC Rcd 14712, at Appendix A (1999); *Application of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee*, Memorandum Opinion and Order, 12 FCC Rcd 19985, at Appendix A (1997); *Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee*, Memorandum Opinion and Order, 12 FCC Rcd 2624, at Appendix A (1997).

^{32/} For example, after cataloguing DT's supposed anticompetitive practices in Germany, GTS asserts without elaboration — let alone factual support — that such “serious competition issues in Germany . . . will have an adverse effect on competition in the U.S. market.” Comments of GTS at 25. See also Comments of Novaxess at 10 (asserting without factual support that the global nature of the wireless market means that DT's conduct in Germany threatens competition in the United States).

^{33/} 47 U.S.C. § 309(d)(1). Allegations that are conclusory, lack specificity, or are merely speculative cannot meet these threshold requirements. See *Application of MCI Communications Corp., Transferor, and Southern Pacific Telecommunications Corp., Transferee*, Memorandum Opinion and Order, 10 FCC Rcd 1072, 1074 ¶ 11 (1994); *Application of Pinelands, Inc., Transferor, and BHC Communications, Inc., Transferee*, Memorandum Opinion and Order, 7 FCC Rcd 6058, 6063 ¶ 18 (1992) (“*Pinelands*”) (finding petitioner did not have standing because

Commission's decisions applying section 309(d)(1) make clear that a party's failure to comply with these standards will result in dismissal of the petition.^{34/} Parties cannot sidestep these statutory obligations simply by styling their pleadings as comments rather than petitions to deny this application for transfer of control.

For all these reasons, the Commission should give no weight at all to the few comments in this proceeding claiming that the proposed mergers will have anticompetitive effects. Those comments offer mere naked assertions that (1) DT will be able to leverage its alleged market power in Germany to engage in improper cross-subsidization of VoiceStream's U.S. wireless operations;^{35/} (2) DT's alleged market power will enable it to engage in a price squeeze or other discriminatory conduct;^{36/} and (3) DT has preferential access to capital as a result of its partial governmental ownership, which in turn would give VoiceStream a competitive advantage vis-à-vis other U.S. wireless carriers.^{37/} As shown immediately below, these conclusory assertions do not even begin to overcome the strong presumption in favor of approving the transactions under section 310(b)(4). Indeed, one commenter making such assertions expressly concedes that the

claimed injuries were merely speculative). Moreover, all factual allegations must be supported by affidavits from persons "with personal knowledge" of those facts, unless the Commission can take "official notice" of such facts. 47 U.S.C. § 309(d)(1).

^{34/} See, e.g., *Pinelands* at ¶ 18 (competitor alleging injury that was "merely speculative" and "unlikely" lacked standing in license-transfer proceeding); *Application of Los Angeles Cellular Telephone Company for Renewal of Domestic Public Cellular Radio Telecommunications Service Station*, 13 FCC Rcd 4601, 4603-06 ¶ 5-9 (1998) (finding that a competitor lacked standing in license-renewal proceeding).

^{35/} See Comments of Senator Hollings at 10-12; Comments of Novaxess at 10.

^{36/} See Comments of Senator Hollings at 10; Comments of Novaxess at 10-11.

^{37/} See Comments of Senator Hollings at 6; Comments of Novaxess at 7.

proposed transactions do *not* pose a “very high risk” to competition in this country,^{38/} and others implicitly make such a concession by openly asking the Commission to disregard that standard.^{39/} The Commission should reject this invitation to contravene its own orders.^{40/}

1. *DT Could Not Improperly Cross-Subsidize VoiceStream’s Wireless Operations in the United States.*

There is nothing at all to the notion that DT could improperly cross-subsidize VoiceStream’s wireless operations in the United States. As an initial matter, a postmerger VoiceStream plainly could not drive its much-larger rivals — including Verizon, AT&T, Cingular, and Sprint — out of the U.S. market and thereby attain a dominant position. Yet, without doing so, VoiceStream could not recoup the losses that necessarily attend predatory pricing and therefore could not profit from such a scheme. The competitiveness of the German market (*see* Appendix A) also would stand in the way of any attempt to increase DT’s rates in Germany; and absent a rate increase, there could be no improper cross-subsidy. Statutory and regulatory safeguards, as well as the geographic and operational separation between DT’s operations in Germany and VoiceStream’s U.S. wireless operations, further make clear that commenters alleging a threat of improper “cross-subsidization” cannot possibly demonstrate any credible risk to competition, much less the “very high risk” required under the Commission’s open-entry standard.^{41/}

^{38/} See Comments of Novaxess at 3.

^{39/} See Comments of QSC at 25 (arguing that DT should be treated as if it were based in a non-WTO country); Comments of GTS at 6 (arguing that Commission should ignore strong presumption favoring entry adopted in *Foreign Participation Order*).

^{40/} See *Reuters Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1996) (“It is elementary that an agency must adhere to its own rules and regulations.”).

^{41/} *Foreign Participation Order*, 12 FCC Rcd at 23913-14, 23922 ¶¶ 51, 69.

a. *The Competitiveness of the U.S. and German Markets Precludes Any Improper Cross-Subsidy Scheme, as Does Retail Rate Regulation in Germany.*

Senator Hollings and the German Competitors assert, without supporting facts or analysis, that a combined VoiceStream-DT would threaten domestic wireless competition through a predatory-pricing scheme financed by monopoly rents from DT's operations in Germany. These claims do not withstand minimal scrutiny. As economist Gregory Sidak states in the attached declaration, DT would have no incentive to engage in an improper cross-subsidy scheme, because the competitive U.S. wireless market simply is not vulnerable to a predatory-pricing threat.^{42/} Any of the well-heeled wireless incumbents in the U.S. market could incur losses in anticipation of future profits, just as DT theoretically could. These carriers had a combined market capitalization of nearly \$500 billion as of September 2000, which would enable them to withstand any one competitor's below-cost pricing.^{43/} VoiceStream's low market share of only three percent would make it all the more implausible that VoiceStream could "capture a commanding market share quickly enough to make a campaign of predatory losses remunerative."^{44/} Even if VoiceStream could somehow drive its much-larger competitors from the market, their spectrum and facilities would remain,^{45/} and new entrants would appear as soon as VoiceStream raised prices to recoup earlier losses.^{46/} VoiceStream, of course, could not

^{42/} See Declaration of J. Gregory Sidak ("*Sidak Decl.*") at 16-17 (attached as Appendix B).

^{43/} See *id.* at 17.

^{44/} *Id.*

^{45/} Indeed, the services of VoiceStream's competitors would remain on the market during their reorganization.

^{46/} See *Sidak Decl.* at 19.

obtain spectrum owned by any failed competitor without the Commission's consent, and, in the case of a merger or acquisition, antitrust review by DOJ or the Federal Trade Commission.^{47/}

Even if DT tried to raise its rates in Germany for the purpose of launching an ill-advised cross-subsidy scheme to fund below-cost prices in the United States, competition in Germany would prevent such an effort. As shown in the Applications and in Appendix A to this Reply, nearly all of the German telecommunications market now is subject to substantial price competition as a result of broad-based new entry by companies including U.S. providers.^{48/} For example, by November 1999 competitive long distance carriers already had captured 40 percent of the German domestic long distance market and approximately 48 percent of the market for international long distance,^{49/} leading to rate declines of as much as 85 percent (to as little as 2 cents per minute) in the domestic market, and 93 percent in the international market.^{50/} Indeed, the extent of competitive entry indicates that entrants do not fear cross-subsidization between services offered in the German telecommunications market, and it is even less probable that DT

^{47/} Unlike the German Competitors, which could not be harmed by any hypothesized predatory pricing scheme (in fact, they would *benefit* if DT's rates in Germany were inflated to enable below-cost pricing in the United States), VoiceStream's U.S. wireless competitors obviously do not take this cross-subsidy argument seriously, because none has filed comments in this proceeding.

^{48/} See, e.g., Federal Republic of Germany, Regulatory Authority for Telecommunications and Posts, *Mid-Year Report 2000*, available at www.regtp.de/en/market/start/fs_15.html (discussing competitiveness of wireless, long distance, and other markets); Federal Republic of Germany, Regulatory Authority for Telecommunications and Posts, *Annual Report 1999* (same); Klaus-Dieter Scheurle, Pres., Regulatory Authority for Telecomms. and Posts, *Competition, Regulation and the Future of Regulation in Germany*, Address at J.F. Kennedy School of Gov't, Harvard Univ., Boston, at 1 (April 10, 2000), available at www.regtp.de/en/aktuelles/reden/01774/index.html (discussing long distance competition) (all cited in VoiceStream-DT App. at 10-16). See also Appendix A, *infra*.

^{49/} See VoiceStream-DT App. at 14.

^{50/} See *id.*

could use services provided in Germany to cross-subsidize services outside its home market.^{51/}

If DT were to inflate its rates in Germany, it would lose market share to ever-stronger competitors, and the lost revenue would more than offset any gains in the U.S. wireless market.^{52/} Gregory Sidak explains:

The large number of companies (especially from the United States) that have entered, and continue to enter, nearly all segments of the German telecommunication market ensure that prices in Germany are driven towards competitive levels. That outcome in turn ensures that Deutsche Telekom cannot earn supracompetitive returns with which to fund a predatory strategy in another country.^{53/}

While the local service market in Germany is not yet as competitive as that country's markets for mobile telephony, long-distance, and other services, DT does not have the ability to raise prices for local telephony in Germany in order to cross-subsidize other services in any location. Accelerating competition, particularly in the business market, is putting pressure on DT's retail rates.^{54/} In any event, comprehensive rate regulation precludes DT from increasing its local rates to supracompetitive levels.^{55/} DT is subject to strict sector-specific regulation of

^{51/} See *Sidak Decl.* at 20.

^{52/} Cf. Teligen, *Study on Market Entry Issues in EU Telecommunications Markets After 1st January 1998: A Report for the European Commission*, at 2 (July 26, 2000) (“[When] DT left the prices of long distance and international calls high [that gave] new entrants the economic incentive to enter the market.”).

^{53/} See *Sidak Decl.* at 27.

^{54/} For example, new entrants are beginning significant deployment of wireless local loop technology; in 1998 and 1999, RegTP allocated wireless local loop frequencies to 18 operators, many of which were U.S. companies. See *RegTP Mid-Year Report 2000* at 9-10. Many business customers now have a choice of two or more carriers, and consumers in more than half of the 83 largest German cities do as well. See *id.* at 12.

^{55/} See German Telecommunications Act §§ 24, 25, 27, 29.

retail tariffs.^{56/} Those tariffs must reflect the costs of efficient service provision based on the long-run incremental costs of providing a particular service, and the tariffs are subject to thorough scrutiny by RegTP.^{57/} In particular, RegTP prohibits these tariffs from containing any surcharges that result from the provider's market position, or discriminating among customers for the same or similar services in a market sector; rather, any surcharges, discounts, or discriminatory features must be objectively justified.^{58/} In short, there is simply no evidence — and certainly none adduced by commenters — that DT has any ability to increase retail local service prices to fund cross-subsidies.

b. Statutory and Regulatory Safeguards Further Ensure That the Proposed Transactions Will Not Adversely Affect Competition in the United States.

Other statutory and regulatory safeguards also would prevent DT from effecting improper cross-subsidies. First, even assuming for the sake of argument that cost-shifting were possible notwithstanding retail and wholesale rate regulation (which it is not), accounting and other safeguards would enable German, E.U., and U.S. regulators to detect and respond to any anticompetitive behavior. The German Telecommunications Act includes various measures that require transparency and prevent abuse of a dominant market position.^{59/} The also E.U. closely

^{56/} DT also is subject to strict cost-based regulation of the services offered to competitors on a wholesale basis (*e.g.*, interconnection, local loop unbundling).

^{57/} See German Telecommunications Act § 24; Telekommunikations-Entgeltregulierungsverordnung (Telecommunications Rates Regulation) § 3.

^{58/} See German Telecommunications Act § 24.

^{59/} See *id.* §14 (requiring transparent financial relations between and among services for dominant providers); §§ 29-30 (regulating rates); § 33 (preventing abuse of dominant position); § 35 (requiring dominant providers to grant competitive access to their networks). See also Christoph Engel, *The Path to Competition for Telecommunications in Germany*, in COMPETITION AND REGULATION IN TELECOMMUNICATIONS: EXAMINING GERMANY AND AMERICA (J. Gregory Sidak, ed., 2000) (describing German safeguards against cross-subsidization).

monitors competition and the performance of regulators in Germany and other member states. Pursuant to its Full Competition Directive of 1996, and other liberalization and harmonization directives in the telecommunications sector, the European Commission compiles exhaustive annual reports, and, where necessary, institutes proceedings to enforce its rules and ensure the continued development of competition and liberalized markets. As of the publication of the European Commission's *Sixth Implementation Report* in October 2000, there were 67 "infringement proceedings" underway against the various Member States.^{60/}

Second, DT's financial imperatives and fiduciary duties militate against any counterproductive cross-subsidy scheme, because, as shown above, such a scheme could not succeed in enhancing DT's profits. DT's partial government ownership does not relieve it of the objective of profit maximization. Because DT is a publicly traded firm that must compete with other firms for capital, it cannot engage in a futile effort to set predatory prices that do not maximize profits.^{61/} Any attempt to do so would be punished in the financial markets. Similarly, under German corporate law, DT's executives and board members are bound by a duty to preserve the long-term profitability of the company.^{62/} DT also owes a fiduciary duty of loyalty to its minority shareholders, who have purchased ADRs on the New York Stock Exchange or elsewhere.^{63/} Thus, if DT's management attempted to support below-cost prices in the U.S.

^{60/} European Commission, *Sixth Report on the Implementation of the Telecommunications Regulatory Package*, at 5 (Dec. 7, 2000) (noting 16 proceedings under the liberalization directives and 51 under the harmonization directives).

^{61/} See *Sidak Decl.* at 19.

^{62/} See German Stock Corporation Act §§ 76, 93.

^{63/} See, e.g., *Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464 (Cal. 1969).

market, thereby deviating from profit-maximizing behavior, DT might expose itself to liability under American corporate law, and possibly the laws of other nations.

c. *Separation of DT's Operations in Germany and VoiceStream's Wireless Operations Also Guards Against Improper Cross-Subsidization.*

The separation between DT and VoiceStream will serve as a further bulwark against any theoretical risk of improper cross-subsidization or other anticompetitive behavior. The fact that DT and VoiceStream operate in different geographic markets is pivotal. The Commission has recognized that geographic separation “mitigates the potential for undetected improper allocation of costs” between an ILEC and its wireless affiliate.^{64/} For that reason, the Commission does not impose separation requirements on an incumbent LEC’s “out-of-region” wireless operations; only a wireless service that substantially overlaps with a carrier’s local service area must be provided through a separate affiliate.^{65/} VoiceStream’s wireless operations in the United States are located on a different continent from DT’s local wireline facilities. Therefore, if DT were subject to the Commission’s rules regarding incumbent LECs’ CMRS affiliates, VoiceStream’s geographic separation from DT would be deemed sufficient to prevent improper cross-subsidization or other anticompetitive practices.

DT and VoiceStream nevertheless will have two degrees of separation that further safeguard against anticompetitive conduct. First, DT and T-Mobile International AG (“T-Mobile”), the holding company that will eventually control VoiceStream after the mergers, operate as separate entities. DT and T-Mobile have separate management boards and facilities.

^{64/} See *Amendment of the Commission’s Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, 12 FCC Rcd 15668, 15693 ¶ 39 (1997) (“*CMRS Safeguards Order*”).

^{65/} See 47 C.F.R. § 20.20(e); *CMRS Safeguards Order*, 12 FCC Rcd at 15673-74, 15694-96 ¶¶ 5, 42-43.

Moreover, DT and T-Mobile enter into written contracts to prescribe the terms of their relationship. For instance, DT and T-Mobile have entered into a licensing agreement under which T-Mobile must pay DT an annual license fee and must comply with fixed guidelines at the risk of financial penalties for noncompliance. T-Mobile contracts with a separate DT subsidiary, T-Nova Deutsche Telekom Innovationsgesellschaft mbH, for research and development work, but T-Mobile also is free to, and does, utilize other research and development.

Second, within T-Mobile, VoiceStream and T-Mobile's existing operating subsidiaries will be separate entities. Several other wireless subsidiaries that DT owns through T-Mobile, including One-2-One in the United Kingdom and max.mobil in Austria, maintain separate corporate identities, keep separate books of account, and have their own officers and employees. Apart from using DT's international network for inter-country traffic, those wireless subsidiaries have no substantial overlap with DT or with each other. Transactions between and among DT, its wireless subsidiaries, and its other subsidiaries (such as IT or systems solutions companies that may provide services to wireless subsidiaries) are negotiated and conducted on a separate contractual basis. VoiceStream's relationship with DT, T-Mobile, and other DT subsidiaries is expected to involve the same separation.

2. *DT Could Not Leverage Any "Bottleneck" Control of Local German Wireline Facilities To Undermine Competition in the U.S. Wireless Market.*

The German Competitors and Senator Hollings also assert — again without any factual or analytical support — that DT will be able to leverage its position in wireline local telecommunications markets in Germany to impede competition in the U.S. wireless

telecommunications market.^{66/} These assertions are at best fanciful and have already been considered and rejected by DOJ.

The Commission has long recognized that lack of overlap between a mobile operator's service territory and the service territory of an affiliated dominant wireline carrier eliminates the threat that a carrier will use its bottleneck control of local exchange facilities to favor its wireless affiliate.^{67/} In this case, the facts further underscore DT's inability to leverage any "bottleneck" control it allegedly has in its wireline network in Germany into the wireless market in the United States. As discussed above, DT's provision of local wireline services in Germany is subject to strict regulatory oversight by RegTP that forecloses any possibility of DT's discriminating in the termination of wireless calls originating in the United States (or elsewhere). Moreover, VoiceStream will be subject to the Commission's dominant carrier regulations with respect to the U.S.-Germany route and two other routes.^{68/} This regulatory oversight, together with the miniscule amount of U.S.-Germany traffic handled by VoiceStream and DT's existing U.S. affiliate,^{69/} remove any possible incentive for DT to attempt to favor VoiceStream with lower termination charges (or the like). Because DT would have to apply any reduced charges to *all* carriers terminating traffic, any savings associated with VoiceStream traffic would be far outweighed by foregone revenue associated with the vastly greater amount of traffic terminated by other carriers. Accordingly, leveraging of "bottleneck" control is simply not an issue here.

^{66/} See Comments of Senator Hollings at 10-12; Comments of GTS at 25; Comments of Novaxess at 10.

^{67/} See, e.g., *CMRS Safeguards Order*, 12 FCC Rcd at 15693 ¶ 39.

^{68/} See VoiceStream-DT App. at 31; Powertel-DT App. at 21-22.

^{69/} See VoiceStream-DT App. at 24, 32.

3. *DT Does Not Have Superior Access to Capital as a Result of Its Partial Government Ownership.*

Just as the conclusory allegations about predatory pricing are easily rebutted, so too are the claims that DT has an unfair advantage in capital markets stemming from the German Government's partial ownership. In fact, as described in the Applications and as supported by commenters Securities Industry Association and the Institute for International Economics,^{70/} there is simply no evidence linking a carrier's partial governmental ownership and its access to capital. If anything, DT's partial governmental ownership may have a *negative* impact on its credit rating.

While Senator Hollings asserts that "lenders are aware that the German government, as Deutsche Telekom's principle [sic] shareholder, will back the debts of Deutsche Telekom,"^{71/} DT's credit rating — the true mark of lenders' willingness to extend credit to the company — tells quite a different story.^{72/} Applicants have shown that DT's credit rating is comparable to that of fully privatized carriers, and far lower than that of the German government.^{73/} As Ambassador Richard W. Fisher, the Deputy United States Trade Representative, confirmed in his recent congressional testimony, British Telecom, a wholly privatized carrier, enjoys a higher bond rating from Standard and Poor's than DT, which in turn has a credit rating comparable to that of wholly private companies BellSouth and AT&T.^{74/} Based on this information,

^{70/} See Comments of Securities Industry Association ("SIA") at 2-3; Comments of IIE, Attachment at 1.

^{71/} Comments of Senator Hollings at 6.

^{72/} Notably, the German government has not backed any of DT's debt since the company was privatized in 1995. See *VoiceStream-DT App.* at 38-39.

^{73/} See *id.*

Ambassador Fisher concluded that the “[m]arket data do not demonstrate a conclusive link between government ownership and access to capital.”^{75/}

This conclusion is further borne out by the costs of capital reported by Bloomberg for these representative telecommunications carriers. With respect to equity-derived capital, Bloomberg reported in September 2000 that BellSouth, SBC, Verizon, and AT&T all had lower costs of capital than the partially government-owned carriers DT and France Telecom.^{76/} And when the costs of debt and equity are combined to produce a weighted average cost of capital, the figures again fail to show a clear advantage for government-owned firms.^{77/}

The recent downgrade of DT’s long-term credit rating further demonstrates that its partial governmental ownership does not insulate it from ordinary market forces. Acknowledging “an expected surge in the competitive environment in Germany,” Moody’s stated that the pressure on DT to rebalance quickly an “historically . . . inadequate tariff structure” — a legacy of DT’s former status as a government-owned monopoly — had resulted in increased operating risks.^{78/} Notably, DT’s credit downgrade paralleled that of similarly situated carriers, and the credit agencies’ analyses made no mention of government ownership at all — much less of that factor

^{74/} *Foreign Government Ownership of American Telecommunications Companies: Oversight Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Commerce Comm.*, 106th Cong. 6 (2000) (statement of Richard W. Fisher, Deputy U.S. Trade Representative) (attached as Appendix D) (“*Fisher Testimony*”).

^{75/} VoiceStream-DT App. at 39.

^{76/} See *Fisher Testimony* at 7.

^{77/} See *Sidak Decl.* at 14.

^{78/} Rating Action: Deutsche Telekom AG, *Moody’s Downgrades the Long-Term Debt Ratings of Deutsche Telekom AG to A2*, Moody’s Investors Service (Oct. 5, 2000), available at www.moodys.com/moodys/cust/research/venus/Release/Rating%20Action/600020481/200040000296446.asp?namedEntity=Rating+Action.

as a counterweight — in justifying their actions.^{79/} All available evidence thus refutes the notion that DT’s partial government ownership gives it superior access to capital.^{80/}

Indeed, the remnants of governmental ownership may constitute a *minus*-factor in the ratings of the major credit agencies. One study has concluded that, for purposes of assessing a company’s financial soundness, “partial privatization may be worse . . . than complete privatization or continued state ownership.”^{81/} Additional evidence confirms that partial-governmental ownership may be an albatross, rather than a benefit, in terms of a carrier’s access to capital. For example, the partial government ownership of Telstra (Australia’s 50.1 percent government-owned telecommunications carrier) has been cited as a negative factor in Telstra’s credit-rating equation. “As a fully-owned government business enterprise Telstra enjoyed the same credit rating as the Australian Government. Partially privatised, it must fend for itself in proving the soundness of its future prospects.”^{82/} Because partial governmental ownership can result in greater public expectations and demands for service, increased liability, and less market

^{79/} See *id.* See also *The Wireless Gamble*, *The Economist*, Oct. 14, 2000; *Is the End in Sight?*, *The Economist*, Oct. 14, 2000.

^{80/} As discussed in Part II.B below, the fact that some of DT’s *old* debt was guaranteed by the German government does not affect DT’s *current* access to capital. Since January 2, 1995, the date of DT’s registration in the Commercial Register as a private corporation, the German government has not provided — and by law may not provide — any guarantee of the debts or liabilities of DT. See *VoiceStream-DT App.* at 39. DT could not unilaterally remove the guarantee attached to debt incurred before privatization in 1995; such action would require the consent of the holders of the debt instruments. See *id.* at 39 n.118.

^{81/} Anthony E. Boardman & Aidan R. Vining, *Ownership and Performance in Competitive Environments: A Comparison of the Performance of Private, Mixed, and State-Owned Enterprises*, 32 *J.L. & Econ.* 1, 26 (1989).

^{82/} Lyn Allison, *Is Reducing Public Debt So Great?*, *Australian Financial Review*, May 18, 2000.

flexibility, it “restricts financial and operating flexibility.”^{83/} Standard and Poor’s accordingly concluded that Telstra’s partial governmental ownership warranted a lower credit rating than would be appropriate if the carrier were able to dilute its majority state ownership.^{84/}

* * *

In sum, the few speculative allegations in the comments regarding anticompetitive effects are easily refuted. The combination of competition in the United States and in Germany, comprehensive rate regulation and a host of other statutory and regulatory safeguards in Germany, and the separation between VoiceStream, T-Mobile, and DT firmly establishes that VoiceStream-DT could not engage in improper cross-subsidization or other anticompetitive conduct.

C. Applicants’ Forthcoming Agreement with DOJ and FBI Will Resolve Any Potential National Security and Law Enforcement Issues.

In the *Foreign Participation Order*, the Commission recognized that its review under section 310(b)(4) “should include consultation with the appropriate Executive Branch agencies regarding” any national security, law enforcement, foreign policy, and trade matters. No commenter has raised any specific concerns in these areas, and Applicants have been working with DOJ and the FBI to address the needs of national security and law enforcement agencies. Applicants joined in a petition with the FBI to defer the grant of the Applications until an appropriate agreement has been completed and submitted to the Commission for review.

^{83/} See Craig Liddell, *Telstra’s Credit Downgrade*, CNET Australia, May 3, 2000, available at www.australia.cnet.com/Briefs/News/Australian/telstra20000503.asp (“Telstra’s 50.1 percent Government ownership places a significant restriction on Telstra’s financial and operating flexibility, a top international credit agency [Moody’s] has revealed.”)

^{84/} See Geoff Elliott, *Telstra Credit Rating Caned*, Australian Business Intelligence, September 29, 2000.

Applicants are confident that this forthcoming agreement will address all potential concerns regarding national security and law enforcement.

II. GRANT OF THE APPLICATIONS IS FULLY CONSISTENT WITH SECTION 310(a) OF THE ACT.

Senator Hollings argues that DT's acquisition of VoiceStream is barred by section 310(a) of the Act, which prohibits a "foreign government or the representative thereof" from holding a common carrier radio license.^{85/} His argument misconstrues section 310 and the relevant facts, and would reverse wholesale the United States' settled interpretation of section 310. Because DT is applying to obtain only *indirect* control over VoiceStream's and Powertel's licenses, section 310(a), which prohibits only *direct* control, does not apply. Senator Hollings's argument also is diametrically and avowedly contrary to the position of the U.S. government in its commitments to the WTO. If adopted, the Senator's argument would reverse the trend of market liberalization abroad, subject the United States to a complaint before the WTO, and gravely damage the United States' credibility in future trade negotiations. The Commission should construe section 310 in a manner that avoids such damaging results. Even if Senator Hollings's reading of the law were correct, DT is not a "representative" of the German government, making section 310(a) inapplicable in any event.

A. Section 310(b)(4), Rather Than Section 310(a), Applies to DT's Application To Assume *Indirect* Control of Commission Licenses.

Senator Hollings argues that section 310(a) "plainly prohibits" the proposed transactions, because, in his view, it is irrelevant whether a carrier more than 25-percent owned by a foreign government holds a license directly or indirectly.^{86/} But Senator Hollings's argument ignores the

^{85/} 47 U.S.C. § 310(a).

^{86/} Comments of Senator Hollings at 2-3.