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Changing Freqyencies: The Federal Communications Commission Globalizes the Telecommunications Industry with the Adoption of the WTO Agreement

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The United States' statutory restrictions on foreign ownership of telecommunications companies[1] represent an anachronism in today's global market. The 1996 amendments to the Communications Act of 1934 (the Act) retained § 310(b) of the Act prohibiting ownership of a media entity by a corporation that is directly or indirectly controlled by a foreign corporation or government, or by a corporation that has more than twenty-five percent of its stock owned by such a corporation or government.[2] Originally proposed during a time of national insecurity,[3] this restriction is no longer justified in today's international climate. Indeed, it is now difficult to ignore the xenophobic fears[4] that prompted Congress to pass § 310.[5]

Also, the potential impact that § 310(b) could have on the global telecommunications market is troubling. Passed at a time when radio and telephone were the dominant methods of electronic mass communication, § 310(b) seems especially anomalous in an era of digital satellites, wireless cable, and the Internet. Rather than assisting in the liberalization of telecommunications regulations worldwide, this restriction makes it difficult for foreigners to invest in the United States market. As long as these regulations remain, foreign countries

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1. *See* 47 U.S.C. § 310 (1934).

2. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 403(k)(1), 110 Stat. 56, 131-32.

3. The 1934 Act was based on the Radio Act of 1912. *Compare* 47 U.S.C. § 310 (1934), *with* Radio Act of 1912, ch. 287, 37 Stat. 302 (repealed 1927).

4. *See* S. REP. NO. 73-781 (1934) (referring to the measure as a means of "insur[ing] the American character" of those holding radio licenses).

5. Senator Clarence Dill, in introducing the committee's report, noted that § 310(b)(4)&(5) were necessary to "guard against alien control" and "insure the American character" of licensees. *Id.* at 7. He later noted that in a time of war, the President would simply seize broadcast entities with partial foreign ownership. *Id.*

will have little incentive to allow the United States to compete in their markets.

This Note surveys the evolving interpretations of § 310, exploring the background of the Communications Act of 1934, early case law interpretations of it, the impact of multilateral treaties on telecommunications regulation, and the Effective Competitive Opportunity (ECO) test. It concludes that the Federal Communications Commission (FCC) logically chose the WTO Agreement on Basic Telecommunications Services as the most feasible and concrete standard by which to judge whether foreign countries should be permitted to invest in American telecommunications, as well as whether the investing country provides roughly equivalent opportunities for American investment. The FCC believes that the WTO agreement will minimize the uncertainty as to which countries have agreed to liberalize their telecommunications industries and have clearly defined available opportunities. While still granting discretion to the commissioners, the FCC's use of the WTO agreement constitutes a sound and objective method for evaluating the requirements of §310(b)(4).[6]

I. BACKGROUND

A. WHY REGULATE? LEGISLATIVE HISTORY OF FOREIGN OWNERSHIP REGULATIONS IN TELECOMMUNICATIONS

Since foreign ownership restrictions were first enacted in the Radio Act of 1912, the FCC has adopted a number of approaches to determine whether foreign ownership is in the public's interest. As telecommunications issues have changed and evolved, these approaches have also changed. First, the 1912 Act attempted to address wartime concerns about sabotage, foreign propaganda, and foreign radio interference.[7] Without prescribing a hard-and-fast numerical benchmark, Congress questioned whether it was permissible to proscribe foreign influence in domestic communications.[8] When the 1912 Act proved

6. While § 310 applies to both traditional and newer broadcast technologies, this Note considers only the effect that the WTO Agreement will have on the telecommunications market. Although regulation of both springs from common precedent, the two differ significantly. *See generally* Howard A. Shelanski, *The Bending Line Between Conventional "Broadcast" and Wireless "Carriage,"* 97 COLUM. L. REV. 1048 (1997) (discussing the differences between telecommunications and traditional broadcast technologies).

7. *See* J. GREGORY SIDAK, FOREIGN INVESTMENT IN AMERICAN TELECOMMUNICATIONS 9-12 (1997).

8. *See id.*

inadequate to address the concerns that prompted its enactment, Congress adopted the Radio Act of 1927.[9]

The 1927 Act contained a numerical benchmark which capped foreign ownership interests at twenty percent.[10] While the amendments resolved some of the 1912 Act's uncertainty and addressed the rapid rise of radio communications, the intent was still to protect national interests and prevent excessive foreign involvement in United States communications.[11] Congress also wanted to prevent foreign control of American radio stations.[12] Congress intended both the 1912 and 1927 Acts to apply to sea-based and land-based communications.[13] While Congress was concerned about foreign influence in popular culture conveyed over radio airwaves, it was more concerned about maritime communications.[14] Congress wanted to ensure that if the country went to war, there would be an effective method of seizing stations that had some degree of foreign control or influence.[15]

While § 310 applies to both broadcasting and telephony, significant differences prevent them from being treated as the same medium by the FCC. The fundamental difference stems from the content/conduit distinction. Broadcasting contains both components. While it acts as a conduit for communication, it also has content that the FCC can regulate.[16] Broadcasters use this conduit as a medium to carry their messages to the public.[17] The federal government has recognized that, when necessary, it can regulate or even seize broadcasting facilities.[18] In addition, the FCC imposed content regulations, including the public inter-

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9. *See* Radio Act of 1927, ch. 169, § 12, 44 Stat. 1162 (repealed 1934).

10. *See id.*

11. *See* SIDAK, *supra* note 7, at 61-62; Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464, 466 (1930) (finding that the 1927 Act "was enacted as a regulation of interstate and foreign radio communication").

12. *See* SIDAK, *supra* note 7, at 63.

13. Ironically, Guglielmo Marconi, who received a patent for the radiotelegraph in 1896, aimed only to create an exclusive system for ships to wire each other in emergencies. He apparently did not foresee its use as a land-based communications medium. *See id.* at 13-14.

14. *See id.* at 63.

15. *See id.*

16. One commentator aptly lays out the differences between the two media and concludes that while the two are distinct, the line between them continues to bend. *See* Shelanski, *supra* note 6, at 1048.

17. *See id.*

18. *See supra* note 5 (discussing Senator Dill's statement during Congressional hearings that radio stations with foreign ownership could be seized in wartime).

est standard, which required broadcasters to program their stations for the public's benefit.[19] As broadcasting became an international industry, the FCC also began to consider questions of fairness and asked whether foreign governments provided equal opportunities for American broadcasters to enter into their markets.[20]

The FCC was also worried about the treatment of the growing number of telephony providers hoping to enter overseas markets.[21] Unlike broadcasting, however, telephony providers do not use their conduit for communication with the public.[22] Instead, they merely provide the conduit for the public's personal communications.[23] Thus, in applying § 310 to both broadcasters and telephony providers, the FCC must consider the underlying policy differences between the two mediums.

Like the two prior Acts, the Telecommunications Act of 1934 reflected fears of inadequate national security, xenophobia, and the unique American character of United States telecommunications. While it loosened the 1927 Act's restrictions by allowing an additional five percent of foreign ownership, it closed a loophole that had allowed American subsidiaries of foreign companies to invest without applying the twenty percent benchmark.[24] The 1934 Act also appointed the FCC to oversee the Act's application, granting it the power to "allocate the spectrum, assign frequencies, determine the power and location of transmitters, and award broadcast licenses."[25] Although foreign investment was allowed to increase, the appointment of the FCC indicated the government's intent to turn communications into a highly regulated industry. Finally, the 1934 Act added a comprehensive licensing scheme to quell "a widespread fear that in the ab-

19. *See* Shelanski, *supra* note 6, at 1055-56.

20. *See, e.g.*, Andrew M. Carlson, Note, *The Country Music Television Dispute: An Illustration of the Tensions Between Canadian Cultural Protectionism and American Entertainment Exports*, 6 MINN. J. GLOBAL TRADE 585, 588-89 (1997) (describing measures enacted by Canada to exclude American entertainment products).

21. *See* Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, 12 F.C.C.R. 23891, 23913 (1997) [hereinafter Report on Reconsideration].

22. *See* Shelanski, *supra* note 6, at 1062 (describing the advent of direct broadcast satellite (DBS) as a method of providing additional common carriage).

23. *But see id.* at 1069 (noting that cellular telephony carriers can "place some of their own content on their systems").

24. *See* SIDAK, *supra* note 7, at 64.

25. STEPHEN G. BREYER & RICHARD B. STUART, ADMINISTRATIVE LAW AND REGULATORY POLICY 428 (1985).

sence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field."[26]

Despite the comprehensive nature of the 1934 Act, changes in the American communications market present new problems that the Act is incapable of addressing. Technological advances significantly increased the size of the broadcast spectrum,[27] thereby decreasing the need to regulate based on the scarcity rationale.[28] The increasingly global economy demands that America seek out investment opportunities in foreign countries to remain competitive.[29] An increase in foreign investors in the United States market may also give consumers more choices in an expanding telecommunications marketplace, allowing them to determine which services best meet their needs. Finally, foreign investors may diversify a media market which has become more concentrated.[30] To address these differing concerns, the FCC has adopted a number of tests to measure whether an applicant meets the foreign ownership regulations.[31]

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26. Federal Communications Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 137 (1940).

27. *See* William B. Garrison, Jr. & Leslie A. Taylor, *Wireless Telecom Innovations: New Players, New Structures, New Regulation*, 11 COMM. LAW. 26, 30 (1994).

28. *See* William H. Read & Ronald Alan Weiner, *FCC Reform: Governing Requires a New Standard*, 49 FED. COMM. L.J. 289, 295 (1997). The scarcity rationale was one of the reasons Congress chose to regulate the broadcast industry. *See id. See, e.g.*, Turner Broad. Sys., Inc. v. Federal Communications Comm'n, 117 S. Ct. 1174, 1187 (1997) (finding that the purpose of the statutory must-carry provisions was Congress' desire to protect consumers from increasing media concentration) (citation omitted).

29. *See* Gregory L. Rosston & Jeffrey S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest*, 50 FED. COMM. L.J. 87, 112 (1997). The authors noted that "[r]adio waves do not stop at national borders." *Id.*

30. *See* Keith Conrad, *Media Mergers: First Step in a New Shift of Antitrust Analysis?*, 49 FED. COMM. L.J. 675, 677 (1997) (positing that a new study on media ownership will conclude that less than twenty companies control American mass media); Steve McClellan, *The Big Would Get Bigger with Dereg Law: Concentration of Ownership is Likely, as Are Rising Prices for Broadcast Properties in Wake of S. 652*, BROAD. & CABLE, June 26, 1995, at 38 (comparing the United States telecommunications market to Mexico's, where "a few companies own 100 or more outlets").

31. *See* Jim Chen, *Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835, 836 (1997) (asserting that telecommunications law undergoes waves of reform and development, "each shaped by contemporaneous political circumstances and warped by obsolete economic assumptions").

B. FCC STANDARDS OF REVIEW

The Telecommunications Act of 1934 created the FCC's mandate to issue licenses and use other means of regulating telecommunications to promote "public convenience, interest, and necessity . . . ."[32] The regulations adopted by the FCC were intended to further these goals, both by ensuring that licensed stations have technical broadcast capabilities and mandating that they promote the "public interest" through their broadcasts.[33] The FCC determines whether an applicant meets the public interest standard and decides what to do if adherence is not perfect.[34] An applicant who is denied a license or a petitioner appealing an FCC decision can take their case to federal court.[35]

The court will presume that the FCC applied the correct standard of review and will generally enforce the agency's decision to deny a license application.[36] "[T]he Administrative Procedure Act provides that a court may set aside an agency's

32. 47 U.S.C. § 309 (1934).

33. *See* National Broad. Co. v. United States, 319 U.S. 190, 217-19 (1943) (holding that the Commission has the authority to examine not only a station's technical qualifications, but also its ability to fulfill the public interest criterion). *Cf.* Shaffer Transp. Co. v. United States, 355 U.S. 83, 88 (1957) (finding that administrative agencies must evaluate the public interest in accordance with Congressional mandate).

34. *See, e.g.*, Telemundo Inc. v. Federal Communications Comm'n, 802 F.2d 513, 518 (D.C. Cir. 1986). The case involved a transfer of two Puerto Rican television stations which initially exceeded the alien ownership benchmarks. *See id.* at 513. After the applicant corrected the problem to align foreign ownership with the benchmarks, the FCC approved the amended application, even though it had the discretion to deny it on its initial failure to meet statutory guidelines. *See id.* at 515. *But see* Moving Phones Partnership v. Federal Communications Comm'n, 998 F.2d 1051, 1057 (D.C. Cir. 1993) (involving a cellular telecommunications lottery in which the winning applicant did not meet the "letter-perfect" requirement with regard to the foreign ownership benchmark; the FCC refused to allow Moving Phones to amend the defective application). While Moving Phones Partnership contended that its application did not violate § 310(b)(3) because the statute applied only to alien ownership, not alien partners, the FCC found that to allow alien partners in excess of the statutory limits would create an undesirable loophole in the statute. *See id.* at 1056-57.

35. *See* Federal Communications Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470, 476 (1940) (finding that a disappointed applicant has the right to appeal when the FCC denies a license). *Cf.* Ashbacker Radio Corp. v. Federal Communications Comm'n, 326 U.S. 327, 333 (1945) (holding that an applicant who submits a "bona fide" application has the right to an FCC hearing before a license can be denied due to exclusivity); *Telemundo*, 802 F.2d at 514. This occurred in *Telemundo*, when an applicant denied a license for not meeting the foreign ownership benchmarks took the FCC to court for a reconsideration of the issue. *See Telemundo*, 802 F.2d at 514.

36. *See id.* at 518.

'action, findings, and conclusions' only if it finds them to be 'arbitrary, capricious, an abuse of discretion, or not in accordance with law.'"[37]

While the FCC's primary task is to determine whether an applicant meets various statutory requirements,[38] it also has the power to grant a waiver for an application that does not facially meet the requirements but nevertheless fulfills the public interest standard.[39] The FCC can refuse to enforce alien ownership restrictions if it deems that the application fulfills a particular public goal.[40] Conversely, the FCC can deny an application that facially meets the alien ownership benchmarks if another applicant meets the public interest standard better.[41]

The public interest standard is nebulous. As stated earlier, the FCC determines what constitutes the public's best interest, and courts rarely question it unless the Commission's decision seems clearly erroneous.[42]

While courts normally defer to the FCC, which it presumes to have superior and specialized fact-finding abilities,[43] there are several instances where the FCC has been held to have gone too far in its rulemaking.[44] While the FCC utilizes an informal

37. *Id. (citing* 5 U.S.C. § 706(2)(A) (1977)).

38. *See* United States v. Storer Broad. Co., 351 U.S. 192,´203 (1956). The Court found that the Communications Act of 1934 vested in the FCC the power to regulate broadcast ownership and concentration in keeping with the public interest standard. *See id.*

39. *See Sanders Bros.*, 309 U.S. at 475 (stating that the Act's purpose is protecting the public's interest, not protecting an applicant station from competition).

40. *See id. See also* United States v. GTE, 48 Fed. Reg. 46634, 46636 (1983), *aff'd and clarified* 603 F. Supp. 730 (D.D.C. 1984) (explaining the importance of a merger which might otherwise violate alien ownership benchmarks); Seven Hills Television Co., 2 F.C.C.R. 6867, 6890 (1987) (finding that a license that appears to be in contravention of § 310 should still be renewed because of the importance of providing programming for Hispanic Americans).

41. *See* SIDAK, *supra* note 7, at 130. The public interest standard has undergone a revision with the globalization of telecommunications. These changes will be further discussed later in this Note. In the context of domestic broadcasting, the FCC may be able to use the public interest standard as a tie-breaker between two applicants that otherwise meet the licensing requirements. *See, e.g.,* Allentown Broad. Corp. v. Federal Communications Comm'n, 222 F.2d 781, 783-84 (D.C. Cir. 1954). Although the court reversed the FCC's finding that the two applicants would provide substantially similar service, it did not state that the Commission could never choose one applicant over another on the basis of superior service to the public. *See id.* at 787.

42. *See Telemundo*, 802 F.2d at 518.

43. *See id.*

44. *See Ashbacker*, 326 U.S. at 333 (finding that when the FCC granted one of two competing applications without granting a hearing to the losing appli-

rulemaking procedure, courts review its decisions according to the arbitrary, capricious, or abuse of discretion standard which places a stringent burden on the appellant.[45]

While recognizing the right to an appeal, the Supreme Court in *United States v. Storer Broadcasting Company* held that the FCC is not required to hold a hearing when an applicant does not meet the criteria for a license and has not set forth valid reasons why the Commission should grant a waiver.[46]

While rote use of the Act would result in denial of a license to an applicant who does not meet the alien ownership criteria, such a use may not be good policy in an age of telecommunications deregulation and globalization. Certain mergers that appear to violate the regulations should not be denied, because such a denial hampers the ability of the FCC and the Justice Department to increase competition and make the United States an active player in the international telecommunications market. However, an applicant seeking a waiver of the foreign ownership requirements must demonstrate that it deserves a waiver because it is otherwise beneficial.[47] In order for the FCC and Justice Department to fulfill their goal of increasing global competition and access to foreign markets, they must reconsider the interpretation of § 310.

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cant, proper procedures were not followed and the decision should be set aside); *Sanders Bros.*, 309 U.S. at 476 (holding that the FCC denied a hearing to a losing applicant on improper grounds, while nevertheless upholding the Commission's decision on public interest grounds); Bechtel v. Federal Communications Comm'n, 10 F.3d 875, 887 (D.C. Cir. 1993) (setting aside a proposed FCC policy preference on the grounds that it was arbitrary and capricious, and therefore did not warrant the court's deference); Ventura Broad. Co. v. Federal Communications Comm'n, 765 F.2d 184, 193 (D.C. Cir. 1985) (finding that when the FCC departs from previously established policy without sufficient explanation, its decision should be vacated).

The Administrative Procedure Act (APA) defines the level of deference given to the FCC's, or any other administrative agency's, rulings. *See* 5 U.S.C. § 706(2)(A) (defining the standards of review for various types of administrative proceedings); Califano v. Sanders, 430 U.S. 99, 104 (1977) (stating that Congress intended the APA to make judicial review "widely available to challenge the actions of federal administrative officials").

45. *See* Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Automobile Ins. Co, 463 U.S. 29, 41 (1983) (describing application of the arbitrary and capricious standard both in reviewing informal rule-making decisions and rescinding or modifying an existing rule).

46. *See* United States v. Storer Broad. Co., 351 U.S. 192, 201-02 (1956).

47. *See id.* at 202 (holding that it "might be an abuse of discretion to fail to hear a request for a waiver which showed, on its face, the existence of circumstances making application of the rule inappropriate") (citation omitted).

The FCC's interpretation of the Communications Act of 1934 and the Telecommunications Act of 1996 should be consistent with the statutes' legislative history, purpose, and intent. However, interpreting the 1934 Act is hampered because it reflects on the xenophobic attitude prevalent between World War I and World War II.[48] According to the Act's legislative history, one senator urged that the foreign ownership provisions reflected "Americanism," just like the 1927 Act.[49] This fear intensified as World War II approached, and it escalated after the bombing of Pearl Harbor.[50] Thus the purpose of the Act may have been improper.[51] However, the statute survived a 1993 constitutional attack based on its facial classification of applicants by alienage, although the Supreme Court has yet to address the issue.[52] Using the rational basis standard, the Circuit Court of Appeals for the District of Columbia, which reviews FCC decisions, concluded that the national security precautions more than met the threshold necessary under such a review.[53]

Now, with the adoption of the Telecommunications Act of 1996, Congress has reaffirmed most of the ownership restrictions.[54] Thus a new interpretation of the restrictions must be found that does not take xenophobia into account.

C. CASE LAW INTERPRETATIONS OF THE COMMUNICATIONS ACT OF 1934

The first major cases relating to the alien ownership provisions dealt with the scope of the 1934 Act.[55] In *Noe v. Federal*

48. *See* SIDAK, *supra* note 7, at 71.
49. *See id.*
50. *See id.* at 73.
51. *See id.*
52. *See* Moving Phones Partnership v. Federal Communications Comm'n, 998 F.2d 1051, 1056 (D.C. Cir. 1993). The Supreme Court typically uses the rational basis standard for examining classifications based on alienage. *Id.* (*citing* Mathews v. Diaz, 426 U.S. 67, 83 (1976)). *See, e.g.,* Sugarman v. Dougall, 413 U.S. 634, 642 (1973) (stating "that aliens as a class 'are a prime example of a 'discrete and insular' minority . . . and that classifications based on alienage are 'subject to close judicial scrutiny'") (citation omitted).
53. *See Moving Phones*, 998 F.2d at 1056.
54. *See* Bob Jones Univ. v. Goldsboro Christian Sch., Inc., 461 U.S. 574, 600-01 (1983) (stating that Congress' failure to overturn a longstanding interpretation by a government agency can imply that Congress acquiesces in that interpretation). In amending the Communications Act in 1996, Congress did not make significant changes to the foreign ownership restrictions, further supporting this implication. *See id.* at 601.
55. *See* Noe v. Federal Communications Comm'n, 260 F.2d 739, 741 (D.C. Cir. 1958) (*citing* Kansas City Broad. Co., 5 P & F R.R. 1057 (1952)).

Communications Commission, the FCC considered three applicants for a New Orleans television station, one of which was Loyola University, a Jesuit institution.[56] After an FCC examiner awarded the license to Loyola, appellant Noe filed a complaint under § 310 alleging that granting the license to Loyola would allow undue alien influence over the local airwaves because the Jesuit order was based in Rome.[57] However, the court upheld the FCC decision and stated that the Loyola Jesuits, by virtue of their organizational structure, were sufficiently insulated from any foreign control.[58] Specifically, the court found that "this hierarchical chain of authority . . . has never been used in the past to impinge upon the independence of the University . . . ."[59] The court found that the head of the Jesuit community at Loyola, while appointed by the Rome-based Superior General, was an American citizen.[60] Indeed, all of the directors of Loyola's Jesuit order were required to be American citizens.[61] In upholding the FCC, the court indicated that only a direct and provable alien influence could justify denial of a license on § 310 grounds.[62]

Later FCC rulings, however, supply mixed messages regarding what constitutes an unacceptable degree of alien influence or control. For example, in a Memorandum Opinion and Order regarding Fox Television Stations' license renewal application for its New York City station, the FCC held that the renewal was in the public interest despite the fact that the owner of Fox's parent company was an Australian corporation.[63] Fox Television Stations was owned by Twentieth Holding Corporations, which in turn was owned by News Corporation Limited.[64] News Corporation Limited, an Australian company, owned 99% of the equity capital of Twentieth Holdings Corporation, but only 24% of its voting stock.[65] Fox Television Stations assumed that because News Corporation Limited owned a qualifying amount of voting stock under § 310, it did not exceed the permis-

56. *See Noe*, 260 F.2d at 740.
57. *See id.*
58. *See id.* at 741.
59. *Id.*
60. *See id.* at 740.
61. *See id.*
62. *See id.* at 741.
63. *See* Fox Television Stations, Inc., 10 F.C.C.R. 8452 (1995).
64. *See id.* at 8454.
65. *See id.*

sible degree of alien influence. Despite the existence of a competing applicant for the license, the FCC granted the renewal.[66]

This result appears to be inconsistent with § 310(b)(4)'s admonition that "any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens" should not hold a license,[67] a standard to which the FCC steadfastly adhered in *Noe*. Although News Corporation Limited did not exceed the guidelines with regard to voting stock, in *Primedia Broadcasting*, the FCC found that it should consider equity interests, in addition to voting interests, in determining whether an applicant meets the benchmarks set by the 1934 Act.[68] In *Primedia*, the FCC determined that it would count equity interests in telecommunications companies or corporations when determining § 310 compliance, regardless of actual voting interests.[69] Together, these cases demonstrate the importance of financial control in determining whether an applicant exceeds the foreign ownership benchmark.

A related, but distinct, issue with which the FCC struggled under the original Act was the permissible level of control that foreign citizens could exert over United States broadcasting entities. For example, when the Seven Hills Television Company applied for a license renewal for its Phoenix station, the FCC found that a financial relationship existed between Emilio Azcarraga Viaurreta (Azcarraga), a Mexican national, and Seven Hills President Reynold Anselmo.[70] Specifically, the Commission found that the Azcarraga family lent Anselmo hundreds of thousands of dollars to invest in other ventures and that a significant amount of that money had never been repaid.[71] Other Seven Hills officials also received money from Azcarraga.[72] Anselmo, an American citizen, carried programming produced by Azcarraga-influenced concerns, including an Azcarraga-controlled Mexican company for which Anselmo was also a member

66. *See id.* at 8495. *See* Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1442-44 (1996) (finding that the FCC's previous policy emphasizing local ownership and control failed "[e]ven before new avenues for mass communications emerged").

67. 47 U.S.C. § 310(b)(4) (1934).

68. *See* 3 F.C.C.R. 4293, 4295 (1988).

69. *See id.* at 4293.

70. *See* Seven Hills Television Co., 2 F.C.C.R. 6867, 6876 (1987).

71. *See id.*

72. *See id.*

of the board of directors.[73] An intervener also complained that Azcarraga had either de facto or de jure control over the company.[74]

Nevertheless, the FCC concluded that Azcarraga did not have significant control of Seven Hills or the station in question.[75] The Commission found that the loans were inconsequential because they were not used to finance the purchase of that particular station.[76] Similarly, it determined that de facto control did not exist because financial leverage no longer factored into its decision-making process.[77]

The FCC considered, but disregarded, the fact that Azcarraga and Anselmo had a highly personal relationship.[78] When Anselmo left Azcarraga's employ the parties continued a relationship for thirty years prior to the filing of this case.[79] Furthermore, Anselmo and Azcarraga understood that Anselmo would assist Azcarraga in developing international, and specifically American, markets for Azcarraga's products.[80]

The FCC's determination that Azcarraga's influence over Seven Hills and its subsidiary station should not be considered defies the logic of § 310 which clearly forbids an excessive degree of alien influence.[81] Nevertheless, the FCC renewed the Phoenix license.[82] The FCC noted the importance of providing programming to a growing population of Hispanic Americans.[83]

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73. *See id.* at 6870. Spanish International Network (SIN) produced most of the programming in question. *See id.* Anselmo was the president of SIN, and owned 25% of the company's stock. *See id.* Televisa, a corporation based and headquartered in Mexico, owned the remaining 75% of SIN's voting stock. *See id.* While Azcarraga was not a stockholder of SIN, one of his holding companies, Laura Investment Co., Inc., owned 20% of stock in Spanish International Communications Corporation, the company which broadcasted SIN's productions. *See id.* Azcarraga and his family owned the entirety of Laura Investment Co. *See id.*

74. *See id.* at 6877.

75. *See id.* at 6878-79.

76. *See id.*

77. *See id.* at 6880.

78. After working free-lance in Mexican communications for several years, Azcarraga hired and mentored Anselmo in one of his own Mexican companies. *See id.* at 6869.

79. *See id.*

80. *See id.* at 6870-71.

81. *See* 47 U.S.C. § 310.

82. *See Seven Hills*, 2 F.C.C.R. at 6891. *Cf.* Chen, *The Last Picture Show*, *supra note* 66, at 1444 (finding that the FCC's previous policy emphasizing local ownership and control failed "[e]ven before new avenues for mass communications emerged").

83. *See Seven Hills*, 2 F.C.C.R. at 6890.

However, the Commission ignored the mandate that it intervene when alien influence is probable.[84]

Seven Hills increased the evidentiary burden of proof placed on the party opposing the application. The Commission went beyond the "probable" standard and required absolute certainty of Azcarraga's direct control.[85] One possible rationalization of this holding is that the license at issue was a renewal, not an initial grant, and, therefore, the FCC simply rubber-stamped the application. However, the FCC extensively considered the matter, and the burden of proof is ostensibly the same for renewals and initial applications.[86]

In *Univision Holdings, Inc.* the FCC denied a hearing to interveners who complained of the same type of managerial control found in *Seven Hills*.[87] While objector Telemundo put forth significant proof regarding control of voting rights and programming supplied by a foreign minority shareholder, the FCC held that a hearing was not necessary because Univision met the alien ownership benchmarks. Furthermore, the petitioners' prediction "that the Buyer will depart from its representations . . . [was] based solely on inferences drawn from material on file with the Commission and is not supported by any additional allegations of specific facts."[88]

Univision left the door open for a petitioner to prevent a renewal or sale even if an applicant does not facially exceed the alien ownership benchmarks.[89] It quoted language from a District of Columbia case holding that even when statutory requirements are met, de facto control can exist in violation of § 310(b)(4).[90] Interestingly, had the FCC applied this loophole in either *Seven Hills* or *Univision*, it might have denied licenses to those companies.

84. *See id.* at 6876. "[W]here other direct or circumstantial factors animate that 'potential,' making improper de facto control not merely possible but almost probable . . . the Commission can surely act in advance of licensing to forefend [sic] any transgression of . . . general 'statutory policy.'" *Id. But see id.* at 6875 (stating that the FCC is "in agreement . . . that Congress wanted to guard against actual alien control rather than the mere possibility of alien control").

85. *See id.* at 6884.

86. *See* Univision Holdings, Inc., 7 F.C.C.R. 6672, 6673 (1992).

87. *See id.* at 6685.

88. *Id.* at 6674.

89. *See id.* at 6679.

90. *See id.* (*citing* Telemundo, Inc. v. Federal Communications Comm'n, 802 F.2d 513, 516 (D.C. Cir. 1986)).

Recently, FCC and court opinions have shifted away from questions of content to questions of conduit. These cases present more complicated problems, as many of them involve not only the FCC, but also the Justice Department's antitrust division.[91] The Justice Department has occasionally supported deals that appear to bring foreign influence into U.S. business.

For example, in *United States v. Western Electric*, the Justice Department supported an agreement between Pacific Telesis (Pactel) and a Japanese carrier, International Digital Company (IDC), to supply international telecommunications services originating in Japan and terminating in North America.[92] The Pactel-IDC agreement allowed Pactel to acquire less than a ten percent interest in the Japanese provider.[93] The agreement effectively ended longtime provider Kokusai Denshin Denwa's monopoly on Japan to United States carriage.[94] The dispute arose when other North American carriers argued that Pactel should not be able to provide interexchange services unless Pactel proved that it would not monopolize that market.[95] However, the court and the Justice Department approved the venture on the ground that "the public interest obviously favors adherence to a promising trade venture eagerly sought by our government . . . [T]he Court has considered not only its language but also the underlying purposes, and among those purposes the public interest, particularly as evidenced by congressionally-mandated policies."[96] The court particularly considered the United States' desire to gain a foothold in the Japanese economy, especially in the previously monopolized field of telecommunications.[97]

91. *See, e.g.*, Michael H. Botein, *Cable/Telco Mergers and Acquisitions: An Antitrust Analysis*, 25 SW. U. L. REV. 569, 600-01 (1996) (stating that the current policy is to avoid mechanical application of merger guidelines, even when the result is to increase the size of an already large competitor).

92. *See* United States v. Western Elec. Co., No. Civ.A.82-0192, 1989 WL 13378, *1 (D.D.C. Feb. 13, 1989).

93. *See id.* at *2. Even though this case did not involve § 310, the policy considerations remain substantially the same.

94. *See id.* at *1. While IDC originated the calls in Japan, it needed to subcontract with an American company, namely Pactel, to terminate international calls in the U.S. *See id.*

95. *See id.* The agreement did not implicate § 310(b)(4), as IDC did not acquire an interest in Pactel. However, had IDC received an interest similar to the one it granted Pactel, the statutory benchmarks still would not have been exceeded.

96. *Id.* at *3.

97. *See id.*

After the Pactel decision, both the courts and the FCC began to focus on the economic benefits of the application at hand, rather than numerical benchmarks. This shift in focus became necessary as the FCC received a large number of applications for major telecommunications mergers.

D. TESTING INTERPRETATIONS OF § 310: THE NEW TELECOMMUNICATIONS MEGA-MERGERS

Despite the wealth of case law interpreting § 310, prior constructions of the statute do not provide insight on the Act's application to the new mega-mergers, which generally involve combinations of two telephony providers.[98] One of the earliest mergers occurred in 1983, when GTE wanted to acquire Southern Pacific's satellite and telecommunications company.[99] Although the merger would have given GTE significant control over the local telecommunications market, as well as the ability to enter the long-distance market on an unprecedented scale, the Justice Department permitted the merger over AT & T's objections.[100] The Justice Department believed that the merger would serve the public's interest, so long as GTE took protective measures to ensure that it did not expand more than the decree allowed.[101]

Since the GTE decree,[102] mergers have become significantly more complicated and are closely reviewed by the FCC and the Justice Department even when alien ownership restriction issues do not arise.[103] The Justice Department continues to monitor the anticompetitive aspects of these mergers, while the FCC examines them for adherence to statutory mandates such as the foreign ownership provisions.[104]

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98. For purposes of this Note, the term "telecommunications" refers to global telephony providers.

99. *See United States v. GTE*, 48 Fed. Reg. 46634 (1983) (Justice Department's Proposed Final Judgment and Impact Statement), *aff'd and clarified,* 603 F. Supp. 730 (D.D.C. 1984).

100. *See id.* at 46636.

101. *See id.* at 46656, 46662.

102. The parties subsequently called off the deal; however, the decree paved the way for future telecommunications mergers.

103. *See* Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1-7 (1982)). *See also* Conrad, *supra* note 30, at 685 (noting that the Sherman Act is intended to prevent monopoly control over a given market).

104. *See* Proposed Final Judgment and Competitive Impact Statement: United States v. MCI Communications Corporation and BT Forty-eight Company ("Newco"), 59 Fed. Reg. 33009, 33016-17 (1994) [hereinafter United States v. MCI]. *See also* Merger of MCI Communications Corp. and British Telecommunications PLC, 12 F.C.C.R. 15351, 15353-54 (1997) (finding that the appli-

When examining the proposed merger between MCI and British Telecom, the Justice Department wanted to ensure that customers in the countries affected by the merger, specifically Great Britain, would have access to telecommunications services without discriminatory treatment based on their choice of provider.[105] Ultimately, the Department allowed the merger to proceed as long as the companies disclosed certain information about customer access.[106] In addition, the Department required the information to be released to any competitor interested in applying for a license for the United States-British International route.[107]

These two mergers represent the beginning of an era marked by increased consolidation and sales of major telecommunications companies. One study of international telecommunications listed three major United States/foreign alliances: WorldPartners, Concert, and Global One, all of which represent a significant increase in U.S. access to foreign markets.[108] AT &T holds the American interest in WorldPartners, MCI and British Telecom form Concert, and Global One represents a joint venture among Sprint, Germany's Deutsche Telekom, and France Telecom.[109] Also, WorldCom, a telecommunications conglomerate comprised of long-distance carriers, fiber-optic networks, and switching facilities, offered to buy MCI in October 1997.[110] WorldCom made a bid for MCI to propel itself to the top of the international telecommunications market.[111] While WorldCom had previously acquired a smaller long-distance company with foreign market penetration, as well as foreign fiber-

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cant bears the burden of proving that the proposed merger would neither lessen competition nor create a monopoly. In addition, the applicant must demonstrate that the merger will actually enhance competition).

105. *See United States v. MCI*, *supra* note 104, at 33017. The Justice Department, while recognizing the importance of seamless global telecommunications services, also realized that this judgment was only the beginning of the telecommunications mega-mergers. *See id.* at 33017-18.

106. *See id.* at 33018.

107. *See id.*

108. *See* John H. Harwood II et al., *Competition in International Telecommunications Services*, 97 COLUM. L. REV. 874, 887 (1997). The authors believe that increased competition will revitalize the telecommunications marketplace and better service consumers. *Id.* at 886.

109. *See id.* at 887.

110. *See* Steve Rosenbush & Thor Valdmanis, *Global Reach: WorldCom's $30 Billion Bid for MCI Shows How Much It Wants to Be One of the Giants*, USA TODAY, Oct. 2, 1997, at B1-2.

111. *See id.* WorldCom completed its merger with MCI on September 14, 1988.

optic interests, MCI represented a larger share of the foreign telephone market.[112]

This wave of mergers raises less concern about foreign influence than about the impact these mergers will have on consumers and the competitive marketplace.[113] This is especially true when the market at issue is monopolistic[114] or controlled by government.[115] In addition, it is uncertain how the Justice Department and the FCC will view such mergers. While they have celebrated the ability of the United States to enter foreign markets,[116] these two entities have also taken a hard look at how such conglomerates will affect competition among telecommunications providers.[117]

The FCC continues to grapple with issues of competition and public interest when license applications present problems of foreign-owned or foreign-influenced partners or companies. Indeed, in 1995 the FCC issued a Notice of Proposed Rulemaking to receive public comments on a new series of policy guidelines, the effective competitive opportunity test (ECO test)

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112. *See id.*

113. Some have hypothesized that the mergers will mean neither a better deal for the consumer, nor a significant increase in the amount of competition in the telecommunications market. *See* Robin Knight, *Dialing for Dollars Won't Be Easy*, U.S. NEWS & WORLD REP., Apr. 15, 1996, at 52. Knight, in assessing the then-proposed and now finalized deal between British Telecom and another England-based company, Cable & Wireless, suggested that "there have been a number of cross-border ties but no real takeovers," implying that the merger has little positive impact for anyone other than the companies involved. *Id. See also* Steven V. Brull, *Commentary: a Free Phone Market in Japan? Don't Hold Your Breath*, INT. BUS. WK., Mar. 11, 1996, at 18 (finding that while foreign countries may superficially eliminate red tape when allowing foreign entities to buy into their telecommunications market, the practical effect of these actions is minimal); *Western Electric*, 1989 WL 13378, at *4 (discussing a monumental merger between the U.S. and Japan and demonstrating the difficulty in cracking a nation's telecommunications industry when it is controlled by the government).

114. *See* Veronica M. Ahern, et al., *Developments in the International Marketplace, in* 13TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS: POLICY AND REGULATION, 277 (PLI Pat., Copyrights, Trademarks, and Literary Prop. Course Handbook Series No. 427 (1995)).

115. *See* Harwood et al., *supra* note 108, at 876 (discussing the prominence of government-owned foreign telecommunications carriers).

116. *See Western Electric*, 1989 WL 13378, at *3. The court embraced the merger because the United States eagerly sought it out, in addition to the perceived enhancement of the public interest by expanding international telecommunications service. *See id.*

117. *See* Harwood et al., *supra* note 108, at 889-90. The authors describe the scrutiny given to the British Telecom/MCI, Global One, and Concert deals. *See id.* at 889-91.

which deals with these situations.[118] The FCC recognized two important concepts in this Notice. First, it acknowledged that the telecommunications market has become a global enterprise.[119] The FCC stated that the expansion of the global telecommunications market is a positive development and that increased competition benefits consumers.[120] Second, the FCC realized that the current policies and regulations did not address all the problems that could potentially arise from this expansion.[121]

The FCC continued to further its goals by applying § 310 in order to produce results in the public's best interest.[122] It stated that the 1934 Act provides the best framework for propounding regulations that serve the public and protect the United States from foreign influence.[123] The FCC reasoned that § 310 presents legitimate modern concerns.[124] Specifically, the FCC found that the public interest would be damaged by "asymmetric market access," or an imbalance of opportunities between the United States and the foreign country seeking to enter the American telecommunications market.[125] With that in mind, the Commission set three goals for regulating the international telecommunications market: (1) promote effective competition in the global market, (2) prevent anticompetitive conduct within this market, and (3) encourage foreign governments to open their markets to other countries, namely the United States.[126] The most important aspect of the Notice was the proposal of a new public interest standard by which the FCC would review the applications of foreign affiliates hoping to enter the American telecommunications market.

The Global One mega-merger involving Sprint, Deutsche Telekom, and France Telecom illustrates the new proposal standard. In its review of the public interest aspects of Sprint's ap-

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118. *See* Market Entry and Regulation of Foreign-Affiliated Entities, 10 F.C.C.R. 4844 (1995) [hereinafter Market Entry and Regulation].

119. *See id.* at 4845, 4853.

120. *See id.* at 4845. This assertion stands in marked contrast to the Justice Department's doomsday vision in *United States v. MCI*, *supra* note 104, at 33017.

121. *See* Market Entry & Regulation, *supra* note 118, at 4854.

122. *See id.* at 4845. In doing so, it explicitly reaffirmed the purpose of the 1934 Act and carried that purpose forward to apply to the telephony mergers, finding that national security concerns were still relevant in this new context. *See id.* at 4851-52.

123. *See id.*

124. *See id.* at 4853-54.

125. *See id.* at 4854.

126. *See id.* at 4855.

plication, the FCC prospectively applied the new standard, named the effective competitive opportunity test (ECO test), which synthesizes the three goals of the Notice of Proposed Rulemaking.[127] The proposed ten percent ownership by the French and German monopoly providers, in addition to a corresponding proportion of seats on Sprint's board, exceeded the twenty-five percent ownership benchmark. Nevertheless, the FCC approved the merger.[128] It did so for two reasons. First, both France and Germany made specific commitments to liberalize their telecommunications markets. Second, the merger would allow Sprint to upgrade facilities, increase competition, and provide seamless global coverage, all of which the FCC believed would benefit consumers.[129]

II. TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996 significantly altered the existing regulations.[130] It did not eliminate the alien ownership requirements altogether. However, it deleted the portion of § 310(b) forbidding foreign corporate ownership if "any officer or more than one-fourth of its officers or directors is an alien."[131] This change renders many of the disputes over § 310(b)(4) moot. For example, the FCC could no longer scrutinize Rupert Murdoch's applications for renewing his television station licenses, at least not for foreign ownership violations.[132] Similarly, Seven Hills President Reynold Anselmo would have had fewer problems with his application under this new legislation.[133] However, while the changes are significant, substantial obstacles still exist.

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127. *See* Sprint Corp., 11 F.C.C.R. 1850, 1855 (1996). *See also* Harwood et al., *supra* note 108, at 889-90 (describing the Global One merger).

128. *See* Sprint Corp., 11 F.C.C.R. at 1860.

129. *See id.* at 1862-64.

130. *See* Telecommunications Act of 1996 §403(k)(1).

131. *Compare* 47 U.S.C. § 310(b)(4), *with* Telecommunications Act of 1996 § 403(k)(1).

132. *See* Fox Television Stations, 10 F.C.C.R. 8452, 8455 (1995) (describing the difficulties in renewing a license because foreign owners had equitable control over Fox's parent company). In addition, Murdoch now has American citizenship.

133. *See Seven Hills*, 2 F.C.C.R. at 6875. Under the 1996 Act, the FCC could consider evidence of Azcarraga's financial contributions only as a matter of public interest, not as a potential violation of the ownership provisions. When, as here, the applicant facially met the remaining ownership requirements and the purchasing corporation itself was not foreign, there would be little scrutiny under the remainder of 310(b).

The FCC can continue to examine license applications and renewals for public interest reasons, and the Justice Department may scrutinize them for antitrust violations. Although the 1996 Act significantly deregulated broadcasting, it specifically retained the public interest consideration as an integral part of the FCC's evaluation.[134] While the Act continues to prohibit ownership by a foreign government or corporation, the amendment to § 310(b) allows many corporations the freedom to buy stock in or even merge with American telecommunications entities. Now, a corporation may buy AT & T stock, for example, without regard for corporate makeup, so long as the corporation is founded under American law.

Despite the significant deregulation that took place when Congress revised § 310(b), there is an anomaly in the Act. While the restrictions on foreign officers and directors have disappeared, the remainder of the foreign ownership regulations have not.[135] However, the benefit of the revised ownership restrictions is clear. Competition will flourish and the quality and quantity of programming will increase.[136] These benefits may be tempered, however. The public interest standard may simply replace the numerical benchmarks.[137] Under the arbitrary and capricious standard, courts will accept any FCC ruling that complies with Congress' 1996 mandate to deregulate.

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134. *See* 47 U.S.C. § 336(d) (reiterating the public interest standard for television stations).

135. *See id.* Facially, the Act appears to allow most kinds of foreign ownership short of outright purchase by a foreign government or a foreign-incorporated company. *See* Telecommunications Act of 1996 § 403(k)(1).

136. *See* Margaret L. Tobey & Phuong N. Pham, *Broadcast Ownership Provisions of the Telecommunications Act of 1996*, 14 COMM. LAW. 6, 6 (summer 1996). The authors believe that the FCC, in struggling to balance the goals of diversity and efficiency, will be able to implement the revised regulations to benefit consumers. *Id.*

137. *See id.* at 8. Tobey and Pham, both communications lawyers, hypothesize that the FCC will continue to have the ultimate authority to determine how the Act's provisions will be implemented. *Id.* Considering this, it is possible that the FCC could deny applications or renewals under the public interest standard, even if they meet the lessened 310(b) restrictions. For example, the Commission could choose to deny the Seven Hills application as not meeting the public interest standard if it is undercapitalized or does not originate significant programming. As the FCC has traditionally been concerned with its stations' financial viability, as well as providing a diversity of viewpoints in broadcasting, it could feasibly deny such an application even though it would pass muster under the statute's ownership requirements.

The 1996 Act gives the FCC more latitude than it had under the amended 1934 Act.[138] Congress's elimination of the numerical benchmarks allows the FCC to avoid denying an application just because a corporation has a high number of foreign officers or directors.[139] The retention of the public interest standard provides more flexibility for the FCC to approve or deny a license. In the Notice of Proposed Rulemaking, the FCC defined its existing policy as one that considers "national security, the extent of alien participation in the parent holding company, and the nature of the license."[140] There is no reason why the FCC should not continue to consider these factors.[141] Unfortunately, the FCC's balancing of a number of factors often leads to inconsistency in defining the public interest.[142] The effect that the 1996 Act will have on these inconsistent rulings is questionable. The changes that appeared so dramatic may not significantly alter the FCC's practices.[143]

The Act does not change the underlying foundation of the alien ownership restrictions. While Congress amended § 310(b)(4) in implementing the Telecommunications Act of 1996, the basic provisions of this section continue to stand. The original § 310(b)(4) read:

> [A]ny corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by refusal or revocation of such a license.[144]

The 1996 revision eliminated one piece of the foreign ownership regulations:

> [A]ny corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the

138. *Compare* 47 U.S.C. § 310(b)(4), with Telecommunications Act of 1996 § 403(k)(1) (eliminating the restrictions on how many foreign officers and directors a corporation could have and still meet the benchmark).

139. *See id.*

140. Market Entry and Regulation, *supra* note 118, at 4851.

141. *See id.*

142. *See supra* notes 63-90 and accompanying text (explaining the mixed messages embedded in the *Fox*, *Univision*, and *Seven Hills* decisions).

143. *See* Harwood et al., *supra* note 108, at 876-77 (suggesting that significant changes in telecommunications policy will emerge from enforcement of GATT, GATS, and NAFTA).

144. 47 U.S.C. § 310(b)(4).

> public interest will be served by the refusal or revocation of such a license.[145]

Indeed, one commentator has argued that the rationale behind the 1927 and 1934 regulations remains intact.[146] Others have suggested that the xenophobia behind the legislation undercuts the measure's necessity and effectiveness.[147] Perhaps the most severe criticism of the Telecommunications Act of 1996 is that the Act may have no competitive or consumer benefits at all.[148]

III. GATT AND GATS

If the Telecommunications Act of 1996 does not have the desired effect, the FCC will have to look for other methods of encouraging foreign investment while still preventing excessive alien influence.[149] Although no method will perfectly advance the goals of increasing globalization and American access to foreign markets, multilateral agreements may provide a basis for resolving these issues.[150]

By involving numerous countries in their development, multilateral treaties enable members to resolve a number of potential disputes at once. The Uruguay Round agreements set forth specific objectives for telecommunications, recognizing that the telecommunications industry had a distinct and important role

145. 47 U.S.C. § 310(b)(4), *amended by* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 131-32.

146. *See* Rahul Kapoor, Note, *Limits on Foreign Ownership of Radio Licenses Under 47 U.S.C. § 310: An Analysis of the Existing Restrictions and Proposed Changes in the Telecommunications Act of 1996*, 15 WIS. INT'L L.J. 163, 181 (1996). Kapoor argued, prior to the actual passage of the revised 1996 Act, that the national security concerns underlying the original legislation still existed and needed to be taken into account when determining whether § 310 should be abolished. *Id.* at 181-82. However, Kapoor also acknowledged that the restrictions impede globalization of telecommunications technology and ownership, and they resemble a "protectionist trade measure." *Id.* at 182.

147. *See, e.g.*, Ian M. Rose, Note, *Barring Foreigners from Our Airwaves: an Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188, 1190 (1995). Rose also argued that the restrictions unconstitutionally infringe on broadcasters' First Amendment rights. *Id.*

148. *See* Vincent M. Paladini, Note, *Foreign Ownership Restrictions Under § 310(b) of the Telecommunications Act of 1996*, 14 B.U. INT'L L.J. 341, 371 (1996) (terming the regulations "inefficient," Paladini claimed that they have significantly harmed the media and telecommunications industries, and discouraged investment in diverse American programming).

149. *See id.* at 371-72 (arguing that it is no longer necessary to prevent alien influence because "the airwaves are no longer susceptible to such misuse"). Therefore, he suggested a repeal of the entire section. *Id.* at 372.

150. *See* Harwood et al., *supra* note 108, at 876-77 (suggesting that treaties provide the best basis for global telecommunications reform, not Congressional enactments).

in the global economy.[151] Accordingly, under both the General Agreement on Tariffs and Trade (GATT)[152] and the General Agreement on Trades in Services (GATS)[153], a general most-favored-nation treatment applies. In the context of telecommunications, this means that a member nation must treat all foreign telecommunications providers equally, as long as the providers come from another signatory nation.[154] However, exceptions exist. Both treaties allow member nations to alter their schedules to avoid some of the incidents of these articles.[155]

In addition, member nations can undertake specific commitments to one another for particular products or services. Under GATT, contracting parties create schedules for the import and export of certain products, although the commitments generally cannot favor a contracting partner over other member nations.[156] GATS similarly allows for specific market access commitments that do not violate the most-favoured-nation requirement of the treaty.[157]

Both treaties also provide mechanisms to enforce the scheduled commitments. Under GATT, if a country believes that it is not receiving most-favoured-nation treatment or another scheduled concession, it must first contact the other contracting party. It can then negotiate to enforce the obligation.[158] Under GATS, member nations are required to establish tribunals to provide

151. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND VOL. 1 (1994), 33 I.L.M. 1125 (1994).

152. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

153. *See* General Agreement on Trade in Services, in Final Act Embodying the Uruguay Round of Multilateral Negotiations, *opened for signature* Apr. 15, 1994, 33 I.L.M. 1167 [hereinafter GATS]. GATS applies to all GATT members. *Id.*

154. *See* GATT art. I(1); GATS art. II(1).

155. *See* GATT art. I(2)-(4); GATS art. II(2)&(3). Additionally, the GATT Annex has significant limits on the type of trade activities it covers, and therefore will not resolve all the problems created by § 310. For example, GATT does not cover cable, radio, or television, although radio and television programming may arguably be considered goods.

156. *See* GATT art. II(1)(a)&(b).

157. *See* GATS art. XVI(1). Articles XIX and XX also detail the specific processes by which member nations should negotiate scheduled commitments. Article XX, for example, states what the schedule must specify for a given commitment: "terms, limitations, and conditions on market access"; "conditions and qualifications on national treatment"; "undertakings relating to additional commitments"; the applicable time frame for the commitment, and the effective date of the commitment. *Id.* art. XX(1)(a)-(e).

158. *See* GATT art. II(5).

for a prompt, impartial review and remedy of potential treaty violations.[159] In addition, the Council for Trade in Services can convene a disciplinary body to deal with unmet requirements or to determine whether the requirements are fair.[160]

Perhaps the most important aspect of the treaties is the transparency requirement. Nations must share all relevant information dealing with telecommunications services and networks as long as the information is public.[161] GATT requires member nations to share all agreements, regulations, and other information pertinent to international trade policy, and GATS similarly requires the publication of all information which could be relevant to any member nation's service providers.[162] This broad-based requirement, which would give member nations an unprecedented amount of information about the telecommunications markets of other members, can be avoided by invoking one of the exceptions. GATT allows exceptions to the generally applicable terms of the agreement if necessary to protect public morals,[163] human life,[164] or national security and applied on a nondiscriminatory basis.[165] Additionally, GATS exempts the release of any information which would impair a country's law enforcement, public policy,[166] and security interests.[167]

The major drawback to using these treaties to determine whether or not a foreign country represents a good opportunity for reciprocal investment is that member nations can specifically exempt countries, goods, and services from their schedules. If too many exemptions exist, the treaties essentially become good ideas that do little to alter countries' monopolistic or prejudicial practices. GATT allows a contracting party to withdraw or withhold concessions from another member under certain circumstances[168] and sets forth detailed procedures for contracting

159. *See* GATS art. VI(2).

160. *See id.* art. VI(4)(a)-(c).

161. *See id.* art. III.

162. *See* GATT art. X(1); GATS art. III(1).

163. *See* GATT art. XX(a).

164. *See id.* art. XX(b).

165. *See id.* art. XXI(a)&(b). Specifically, it exempts actions necessary to protect national security in a time of war. *See id.* art XXI(b)(iii). These provisions address one of the primary concerns which led to the enactment of the Communications Act of 1934.

166. *See* GATS art. III*bis*.

167. *See id.* art. XIV*bis*(a)&(b). Like GATT, GATS recognizes wartime as an emergency condition during which the transparency requirements do not apply. *See id.* art. XIV*bis*(b)(iii).

168. *See* GATT art. XXVII.

parties to alter specific scheduled commitments.[169] GATS also allows a member nation to modify its schedule subject to a time limit and notification requirements.[170]

Both GATT and GATS have similar goals to liberalize telecommunications restrictions,[171] assist developing nations,[172] and require disclosure on a previously unimaginable scale.[173] These treaties contain too many exceptions to effectively balance foreign ownership restrictions with telecommunications globalization.[174] These treaties will by no means resolve either of the problems of relaxing regulations under § 310 or increasing globalization in the telecommunications industry.

IV. EFFECTIVE COMPETITIVE OPPORTUNITY (ECO) TEST

In 1995, the FCC proposed a new rule, the Effective Competitive Opportunity (ECO) test,[175] whereby U.S. telecommunications providers could enter into an alliance with a foreign provider so long as the foreign provider's country allowed the

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169. *See id.* art. XXVIII.

170. *See* GATS art. XXI(1)(a)&(b). A party may only withdraw from a scheduled commitment after three years have lapsed since the commitment's effective date. *See id.* art. XXI(1)(a). In addition, the withdrawing or modifying party must notify the Council for Trade in Services no later than three months before the change is to become effective. *See id.* art. XXI(1)(b).

171. *See* GATT preamble; GATS art. XIX(2). GATS specifically seeks to liberalize telecommunications and promote its development in all member nations with respect to their current and desired levels of development. *See* GATS art. XIX(2).

172. *See* GATT art. XVIII(2). Members are encouraged to help developing countries raise "the general standard of living of their people." *Id.* GATS also encourages developed country members to assist developing country members. *See* GATS art. IV(2).

173. *See generally supra* notes 161-67 and accompanying text (discussing the transparency requirements embodied in GATT and GATS).

174. *But see* Harwood et al., *supra* note 108, at 877-84. The authors believe that multilateral approaches such as these represent potential solutions to accessing foreign telecommunications. *Id.* They speak in glowing terms of these agreements, which they believe will "benefit all North American providers of telecommunications . . . services by opening up new markets." *Id.* at 878. However, they also concede the possibility that these treaties will have little, if any, effect as individual countries' commitments differ. *Id.*

175. This test resembled the "competitive checklist" requirement imposed on Bell operating companies (BOCs) by the 1996 Act. *See* 47 U.S.C.A. § 271 (1996). To ensure that BOCs meet a number of conditions, namely that the access and interconnection offered were nondiscriminatory in nature. *See id.* at (c)(2)(B)(i)-(xiv).

United States to compete in its market.[176] The ECO test provides more than a numerical benchmark or a nebulous public interest standard with which to assess a potential alliance.[177] In applying the test, the FCC considers six non-exclusive factors: (1) Whether the United States had "substantially similar" opportunities in the country of the foreign applicant; (2) whether anticompetitive safeguards exist in the foreign country to prevent discriminatory behavior; (3) whether the foreign country has transparency requirements; (4) whether the foreign country would disclose, in a timely fashion, the technical information necessary for the United States to take part in that market; (5) whether the country protects information about its telecommunications carriers and customers; and (6) whether the foreign country has an independent regulatory commission to oversee the implementation or existence of the other five factors.[178] No factor is dispositive and all factors are weighed as the FCC sees fit.[179]

The FCC's proposal represented a major breakthrough in telecommunications reform, and the commission thought the world telecommunications market would grow in response.[180] With the increasing multinationalization of corporations, the FCC noted that the United States was increasingly involved in international telecommunications services.[181] It estimated that nearly 20% of such services already had ties to United States providers.[182] The FCC believed that the ECO test might ultimately provide the means to globalization in the telecommunications industry.[183]

Like GATT and GATS, the ECO test did not cover some of the basics of telecommunications, such as radio and televi-

176. *See* Market Entry and Regulation, *supra* note 118, at 4853. The FCC believed that this would not only increase opportunities for U.S. providers abroad, but would also show a good-faith effort to encourage foreign investment in American telecommunications, ultimately benefiting the consumer. *See id.* at 4853-54.

177. *See id.* at 4854. The FCC recognized that its prior methods of assessing foreign ownership created confusion and uncertainty about when a purchase or application would be approved. *See id.*

178. *See id.* at 4859.

179. *See id.*

180. *See id.* at 4853.

181. *See id.*

182. *See id.* (citation omitted).

183. *See* Market Entry and Regulation of Foreign-Affiliated Entities, 11 F.C.C.R. 3873 (1995) (embodying the final version of the proposed rule) [hereinafter Foreign-Affiliated Entities].

sion.[184] This presented a significant problem because broadcasters continued to be governed by one set of rules, namely § 310(b) and the public interest test, while the FCC scrutinized long-distance telephone companies under the ECO test.[185] The FCC believed that the ECO test would not be the most efficient way to resolve foreign ownership issues in the radio and television industries.[186] The Commission also realized the importance of the public interest test, and concluded that it should be taken into account along with the ECO test applications.[187]

One possible reason for the disparity is that communications facilities outside the United States are often owned by foreign governments.[188] Additionally, many foreign countries fear they will lose their cultural identity if the United States' mass media further permeates their communications markets.[189] The ECO test was, however, a good-faith effort by the FCC to resolve the inconsistencies and anomalous aspects of § 310(b) as it related to modern telecommunications.[190] The FCC proposed the ECO test as a means of promoting global competition, preventing anticompetitive conduct, and encouraging other governments to open their markets to foreign carriers.[191] These goals represented an important change by the FCC.

The test also satisfied the Justice Department's goals for international markets generally.[192] The Justice Department wanted to globalize the economy. However, it also wanted to ensure that other countries treat Americans fairly and do not take advantage of the increased leniency in the United States' anti-

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184. *See* Paladini, *supra* note 148, at 363.

185. *See* Market Entry and Regulation, *supra* note 118, at 4854.

186. *See id.*

187. *See id.* at 4857.

188. *See* Harwood et al., *supra* note 108, at 876 (discussing the prevalence of government-owned telecommunications entities).

189. Perhaps the best example of a country that fears loss of its cultural identity is Canada, which employs a substantial legal framework of subsidies and quotas to encourage production of Canadian-themed and -produced work and outright prohibitions to prevent importation of certain foreign materials that compete with the Canadian works. *See* Oliver R. Goodenough, *Defending the Imaginary to the Death? Free Trade, National Identity, and Canada's Cultural Preoccupation*, 15 ARIZ. J. INT'L & COMP. L. 203, 210 (1998); Carlson, *supra* note 20, at 588-89 (describing the measures Canada uses to protect itself from the prevalence of American culture).

190. *See* Market Entry and Regulation, *supra* note 118, at 4855.

191. *See id.*

192. *See Department of Justice, Opening Markets & Protecting Competition for America's Businesses and Consumers* (Apr. 7, 1995) *available in* 1995 WL 230585 (D.O.J.) [hereinafter OPENING MARKETS & PROTECTING COMPETITION].

trust policies.[193] The Justice Department's protection of United States telecommunications providers and simultaneous encouragment and expectation of equally open markets around the world, allowed Americans to take advantage of increasing globalization while hedging their bets against monopoly or government-owned international carriers.[194] Under the ECO test, the FCC would not approve a foreign transaction taking place in the United States unless the other country provided similar opportunities for American carriers.[195] The Justice Department also hoped that the European Telecommunications Standards Institute (ETSI), a nonprofit institution that develops European telecommunications standards, would aid the FCC in developing policies to decrease unreasonable demands placed on foreign companies trying to enter any country's telecommunications system.[196]

The best and worst aspects of the ECO test are identical. The test did not bring consistency to the FCC's rulings on whether a deal meets or exceeds the alien ownership guidelines. The Commission did not specify which factors it would consider dispositive in determining whether a country had liberal telecommunications markets.[197] In fact, the FCC stated that it would assess each country on a case-by-case basis.[198]

Not all commentators agree that the ECO standard was ambiguous.[199] Despite differences of opinion regarding the clarity

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193. *See id.* at *2.

194. *See* Harwood et al., *supra* note 108, at 885.

195. *See id.* Another problem that arose was what constituted similar opportunities. *See id.*

196. *See* OPENING MARKETS AND PROTECTING COMPETITION, *supra* note 193, at *5. The Department wanted to increase innovation in telecommunications on an international level while simultaneously breaking down barriers to foreign investment. *See id. See also* Milda K. Hedblom & William B. Garrison, Jr., *An Uncertain Sound: The European Union's Plan for the Information Society*, 12 COMM. LAW. 15, 16 (1995) (describing the European Union's desire to become more competitive in the global communications marketplace). *Accord* Today's News, *Broadcast Autonomy and Responsibility are Goals of European Commission*, COMM. DAILY, Sept. 12, 1996, *available in* 1996 WL 12298876 (stating the Commission's goal as breaking down anticompetitive barriers in telecommunications, such as government monopolies).

197. *See* Market Entry and Regulation, *supra* note 118, at 4853. The FCC did not specify what constituted a "liberal" market, or how equivalent opportunities must be in order to make the carrier's entry into the United States acceptable.

198. *See id.* at 4854.

199. *See* Kapoor, *supra* note 146, at 175 (finding the new standard clear and predictable). Kapoor believed this regulation would prevent "discriminatory and exclusionary behavior" and encourage competitive opportunities. *Id.* at

of the test, it did represent a step forward in globalizing the telecommunications market.[200] The FCC, while decrying the uncertainty caused by applying a combination of numerical benchmarks and the public interest standard, proposed the test as a definite determination.[201] The test remained somewhat ambiguous, as the factors had to be examined on a case-by-case basis and could result in multiple outcomes. The FCC continued to be able to deny a license, renewal application, or multinational merger under the ECO test. It could condition its response on the country involved, whether the country's government or private sector owned or controlled its telecommunications industry, or based on the country's level of transparency. Under this standard, the FCC had flexibility and its decisions would be granted judicial deference unless they were clearly arbitrary or capricious.[202]

This standard, in combination with the public interest assessment, was intended to provide greater economic and competitive benefits to American telecommunications owners.[203] However, it did not concretely resolve one of the major problems of modern-day § 310 application: how to determine whether another country offers reciprocal opportunities to United States companies to provide telecommunications services. Without the ability to determine whether a country will give equivalent access to the United States, it is impossible for the FCC to decide whether granting a license to a partially foreign-owned or foreign-influenced company is in the public interest.

V. THE NEXT FRONTIER: THE WTO AGREEMENT

The ECO test was short-lived. Early in 1997, the FCC determined that the World Trade Organization Agreement on Basic Telecommunications Services (WTO Agreement) would supplant the ECO test as the standard by which to judge appli-

175. *But see* Ahern et al., *supra* note 114, at 289 (explaining that the FCC had difficulty in applying the equivalency standard, especially in making determinations for several foreign countries with pending applications).

200. *See* Paladini, *supra* note 148, at 365. Paladini argued that the FCC's realistic approach and superior fact-finding ability made this proposal workable, despite the individual nature of the determinations. *Id.*

201. *See id.* (explaining why it adopted the test).

202. *See* Motor Vehicle Mfr. Ass'n of United States v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 41 (1983).

203. *See* Knight, *supra* note 113, at 52. The world telecommunications market will likely prove to be a very lucrative industry; estimates as to its worth range as high as $900 billion by the year 2005. *See id.*

cations that exceed § 310(b)(4) requirements.[204] The United States completed negotiations for the WTO Agreement in February 1997 and adopted this proposal in November 1997.

The WTO Agreement became effective on February 5, 1998.[205] In the fall of 1997, the FCC declined to apply the WTO standards prospectively, as it had previously done.[206] In *Telecom Finland*,[207] decided just prior to the final adoption of the WTO Agreement, the Commission continued to apply the ECO test[208] despite the commitments the Finnish government had made to the WTO.[209]

A. FCC ADOPTION OF THE WTO AGREEMENT

The FCC partially discontinued the use of the ECO test when it discovered that the WTO Agreement was the best method for determining whether reciprocal competitive opportunities exist in foreign markets.[210] In adopting the WTO Agreement, the FCC created a presumption in favor of allowing a foreign country to participate in the United States market.[211] The Commission found that this presumption served the public interest because it would facilitate opening foreign markets to United States providers while increasing global competition.[212] The presumption, however, is rebuttable and only applies to telecommunications carriers from WTO member countries.[213] The presumption allows member countries' carriers to escape

204. *See* Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, 12 F.C.C.R. 7847, 7849-50 (1997) [hereinafter Policies on Foreign Participation]. The Commissioners had previously stated that if the Executive Branch succeeded in negotiating a bilateral or multilateral telecommunications trade agreement "under the auspices of the World Trade Organization . . . we would gladly amend the rules we adopt today as necessary." Foreign-Affiliated Entities, *supra* note 183, at 3964-65.

205. *See* FCC electronic press release, *Entry into Force of WTO Telecom Agreement,* (Jan. 26, 1998) <http://www.fcc.gov/Daily_Releases/business/1998/db980127/nrin8001.txt>.

See also Sprint Corp., 11 F.C.C.R. 1850, 1862 (1996). The European Union announced January 1, 1998 as the date by which it hoped to see full market liberalization implemented. *See id.*

206. *See id.* at 1855-56 (finding that it "is well established that the Commission may apply new rules and policies to pending matters").

207. *See* 12 F.C.C.R. 17648 (1997).

208. *See id.* at 17652-53.

209. *See id.* at 17656.

210. *See* Report on Reconsideration, *supra* note 21, at 23913.

211. *See id.*

212. *See id.*

213. *See id.* The FCC anticipated that only rarely would anyone attempt to rebut the presumption. *See id.*

scrutiny under §310(b)(4) unless an intervener offers a rebuttal.[214] The Commission justified the presumption on grounds of administrative efficiency. It believed that if it could establish that the carrier is from a WTO member country, it would be unnecessary to make further inquiries into the opportunities in that country's telecommunications market.[215]

However, the FCC reserved the right to deny a license to a carrier from a WTO member country if it found that the carrier posed the risk of exercising excessive market power and discrimination against other countries' carriers.[216] The Commission also reserved the right to deny a license to an applicant who had previously violated FCC rules, U.S. anti-competition rules, or criminal laws.[217] In addition, if the Commission found that the carrier discriminated in the United States market and harmed American companies competing abroad, it could deny a license.[218] In most circumstances, the FCC believed that its own safeguards could effectively prevent a foreign carrier from establishing that kind of control.[219]

Although the FCC believed that this approach would encourage competition and promote administrative efficiency by expeditiously granting licenses to any applicant that fell within the presumption, it refused to adopt a position which would have allowed any foreign carrier to compete in the United States without restrictions.[220] This would have gone beyond the safeguards provided by the WTO Agreement.[221] Harking back to the genesis of the 1934 Act, the FCC maintained that it could consider whether an applicant poses national security risks.[222] In close cases involving questions of foreign trade or policy, the

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214. *See id.*

215. *See id.* "[W]e find that adopting a rebuttable presumption in favor of entry will allow the Commission to grant the vast majority of applications swiftly, while maintaining the oversight necessary to ensure that entry by an applicant from a WTO Member is consistent with the public interest." *Id.*

216. *See id.* at 23914.

217. *See id.* at 23915. It believed that an applicant who had been found guilty of such violations would not further the goals of competition. *See id.*

218. *See* Report on Reconsideration, *supra* note 21, at 23915.

219. *See id.* at 23913-14.

220. *See id.* at 23915-16.

221. *See id.* The Commission found that it would be deprived of ensuring that the foreign carrier met the public interest standard if it adopted the unrestricted entry approach. *See id.*

222. *See id.* at 23919. However, the FBI expressed strong opposition to the FCC's new approach due to national security problems posed by foreign ownership of common carrier licenses. *See id.* at 23938. The Commission believed the FBI was overstating its concerns. *See id.*

FCC stated that it would also consider the opinions and concerns of Executive Branch agencies.[223]

Even if an applicant carrier from a WTO member country exceeds the twenty-five percent foreign ownership benchmark, the FCC streamlines the application process.[224] While such applications must receive the Commission's approval, they will not be subjected to the stringent public interest analysis as long as an obvious national security concern is not raised and the application appears to increase competition.[225] An applicant's nationality, for purposes of the WTO Agreement, is determined by the carrier's principal place of business or home market.[226]

If an applicant does not come from a WTO member country, however, the FCC continues to apply the ECO test.[227] The FCC determined that while WTO Agreement safeguards prevent anticompetitive behavior by member countries, there is no such assurance with non-members.[228] In addition, it argued, WTO members are bound by GATS obligations and generally believed in liberalization of trade laws and the importance of competition.[229] Because no such assurances exist for non-member countries' applicants, the FCC reasoned that the ECO test should still apply.[230]

Despite its belief that member countries would not engage in anticompetitive behavior, the FCC employs a number of safeguards, including some that are not contained in the WTO Agreement. For example, the FCC will closely scrutinize an applicant that is a dominant carrier in its home country and therefore has the ability to discriminate against other carriers.[231]

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223. *See id.* at 23919-21. The FCC reiterated its intention to remain independent of the Executive Branch, even while considering their concerns. *See id.* at 23921. Because it expected such Executive Branch concerns to arise very rarely, it did not expect executive interference to present a major problem. *See id.* at 23919-20.

224. *See id.* at 23940-41.

225. *See id.* at 23941.

226. *See id.* at 23941-42. If the Executive Branch believed an applicant was willfully misrepresenting its home country, it could urge the FCC to adopt a different test on a case-by-case basis. *See id.*

227. *See id.* at 23943.

228. *See* Report on Reconsideration, *supra* note 21, at 23944.

229. *See id.* at 23945.

230. *See id.* at 23945-46. As such, the FCC would still have to investigate whether the applicant's country provided equivalent opportunities for United States providers. *See id.*

231. *See id.* at 23959. The Commission adopted a presumption that if the applicant had less than a fifty percent market share in its home country, then it did not have the ability to leverage market power. *See id.* at 23959-60.

Such carriers are subject to reporting requirements,[232] quarterly revenue and traffic reports,[233] and quarterly maintenance reports.[234] The Commission also retained the "no special concessions" rule from the Notice on Proposed Rulemaking, which forbids United States international carriers from accepting special concessions offered by a foreign carrier. Such an arrangement could eventually lead to excessive control in the American telecommunications market.[235]

Although the Commission contemplated additional safeguards to prevent anticompetitive behavior by any carrier, not just non-member country applicants or dominant providers,[236] it found that additional safeguards were unnecessary because a number of applicable remedies were already available.[237] These remedies include revoking licenses, requiring a United States carrier to terminate its relationship with a foreign affiliate, and changing the structure of U.S.-foreign alliances in order to prevent anticompetitive conduct.[238]

The FCC also embraced the GATS requirements and safeguards that apply to all WTO members, especially the most-favoured-nation principle,[239] transparency requirements,[240] and market access for all basic telecommunications services.[241] Although it believed that these measures were largely adequate to protect carriers and consumers, the FCC defended its 1995 addition of the no special concessions rule as consistent with the spirit of GATS. Finally, the availability of GATS dispute resolution mechanisms reassured the FCC that it did not need to adopt additional safeguards suggested by interveners.[242]

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232. *See id.* at 23955.

233. *See id.* at 23993-94. These provisions are similar to the transparency requirements of GATT and GATS.

234. *See id.* at 24013. These reports would require the carrier to provide the FCC with information about the amount of usage and the amount charged for different types of uses. *See id.*

235. *See id.* at 24015-16.

236. *See* Report on Reconsideration, *supra* note 21, at 24022.

237. *See id.* at 24023.

238. *See id.*

239. *See id.* at 24036-37.

240. *See id.* at 24037.

241. *See id.* at 24040.

242. *See id.* at 24050.

B. FUTURE APPLICATION OF THE WTO AGREEMENT TO THE LICENSING PROCESS

It remains to be seen how effective the WTO Agreement will be in assisting the Commission's decision-making. Although the commissioners that proposed the adoption of the WTO Agreement believed that it provides the best standard, the Commission has since experienced a high degree of turnover.[243] In 1997, all the Commissioners except Susan Ness retired or were not reappointed by President Clinton.[244] This turnover may explain the hesitancy to prospectively apply the WTO Agreement standard in October 1997.[245] In addition, it is uncertain how much the new Commission supports the previous Commission's determination that the WTO Agreement provides the best basis for ruling on foreign ownership benchmarks and public interest considerations. Ness, however, participated and concurred in the rulemaking that ended in this determination.[246]

Of the four new commissioners, only William Kennard has spoken publicly on the use of the WTO Agreement.[247] He supports it, claiming that "we [the FCC commissioners] expect to see a widespread shift away from the monopoly provision of telecommunications . . . services and toward competition, open markets and transparent regulation."[248] The other commissioners have had little opportunity to make any statements regarding the new standard, but it is probable that they also support the measure. Harold Furchgott-Roth, the former chief economist for the House Commerce Committee, is expected to support measures which increase the United States' role in the international telecommunications market, which the WTO Agreement would

243. Of the current Commissioners, only Susan Ness served on the Commission that adopted Policies on Foreign Participation.

244. *See Federal Communications Commission Home Page* (visited Sept. 9, 1998) <http://www.fcc.gov> (listing biographies of the five current FCC Commissioners: Chair William Kennard, Gloria Tristani, Michael Powell, Harold Furchgott-Roth, and holdover Susan Ness).

245. *See supra* notes 206-09 and accompanying text (explaining the current FCC's reluctance to prospectively apply this new standard in *Telecom Finland*).

246. Policies on Foreign Participation, *supra* note 204, at 7849. Ness did not issue a separate statement or dissent; therefore, it may be assumed that she supported the decision.

247. FCC electronic press release, *Statement of FCC Chairman William E. Kennard, Re: Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, (Nov. 25, 1997) <http://www.fcc.gov/speeches/kennard/statements/stwek705.html>.

248. *Id.*

potentially accomplish.[249] Michael Powell, previously Chief of Staff of the Justice Department's antitrust division, publicly favors increased deregulation and competition, which could also indicate a favorable impression of the WTO Agreement.[250] Finally, former New Mexico public utilities commissioner Gloria Tristani remains uncommitted, cautiously approaching upcoming FCC issues, including foreign ownership.[251]

If at least four of the five current commissioners support the WTO standard for foreign ownership, the Agreement may provide the best method yet for assessing competitive opportunities and public interest.[252] It contains the best elements of the multilateral treaties, numerous commitments[253] and transparency requirements, and the goals of the ECO test.[254] In addition, the WTO Agreement eases the FCC's burden in determining which governments are actually allowing United States providers to compete.[255] Because countries have made scheduled, specific commitments to the WTO, it is significantly less difficult to determine whether a market is competitive.

Thus, the schedules and WTO regulations provide a clear standard by which the FCC can determine whether foreign ownership is in the public interest, as well as whether the reciprocal market allows a sufficient degree of competition. It avoids the ambiguity of the ECO test, while giving the FCC enough flexibil-

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249. Today's News, *FCC Nominees Criticize Telecom Act Implementation*, COMM. DAILY, Oct. 1, 1997, *available in* 1997 WL 13779410.

250. Chris McConnell, *Michael Powell: a General Impression*, 127 BROAD. & CABLE, Mar. 3, 1997, at 12.

251. Today's News, *Tristani Says She Will "Study Up" Before Deciding Issues*, COMM. DAILY, Nov. 18, 1997, available in 1997 WL 13780799.

252. *See* Policies on Foreign Participation, *supra note* 204, at 240 (finding that the WTO agreement's "successful conclusion would benefit U.S. consumers and carriers by increasing opportunities for end-to-end competition in the provision of basic telecommunications services, thereby leading to lower prices and greater choice and innovation").

253. At the time of adoption, 55 schedules representing 69 member governments had been submitted and accepted, including many former telecommunications monopolies. *See* Sprint Corp., 11 F.C.C.R. 1850, 1857 (1996) (indicating that the FCC considered monopoly providers France and Germany's public commitments to the WTO essential to the decision that the Sprint merger could proceed). Signatories included the United States and the European Union, as well as a number of developing countries.

254. *See* Policies on Foreign Participation, *supra note* 204, at 7849. The Commission believed the WTO agreement would fulfill the goals of increased competition and market entry, which were also covered by the ECO test. *See id.*

255. *See supra* notes 210-15 and accompanying text (setting forth the FCC's presumption toward granting the license applications filed WTO member countries' telecommunications providers).

ity to determine whether a given transaction benefits United States consumers. Combining the formal structure of GATT and GATS with the ECO's market analysis, the WTO agreement appears to take the best of both formats while avoiding most of their pitfalls.[256]

VI. CONCLUSION

The global telecommunications market represents a prime opportunity for the United States to expand its own industry while allowing other countries to present a diversity of viewpoints to Americans. Short of Congress repealing § 310, the FCC has considered a number of methods by which to determine whether a foreign individual or company should be allowed to invest in American telecommunications, as such investments are limited by 47 U.S.C. § 310.

The FCC recently settled on the WTO Agreement on Basic Telecommunications Services as the standard by which to judge an application involving foreign investment. The Agreement provides concrete assessments of how open the applicant's home country is to United States investment, as well as safeguards that ensure that the foreign applicant does not act in an anticompetitive manner. The Agreement represents the best option for globalizing the telecommunications industry in the twenty-first century.

256. *But see* notes 163-73 and accompanying text (explaining that both GATT and GATS member nations can choose not to schedule commitments that they deem competitively undesirable). While the WTO agreement generally provides that members should not discriminate against each other through the most favored nation principle. However, nine members scheduled exemptions from the most favored nation principle, including the United States.