

FOREIGN OWNERSHIP CAPS AND THE WTO AGREEMENT: THE MOVEMENT TOWARD 'ONE SIZE FITS ALL'

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INTRODUCTION

For the past decade, many foreign markets have remained closed to U.S. telecommunications ("telecom") and television providers. Where U.S. companies have made inroads, market entry has been limited to cellular telephone and cable television services for which U.S. companies have pioneered technology and deployment.¹ Upon entering into the Agreement on Basic Telecom ("WTO Agreement") on February 15, 1997, sixty-nine member nations of the World Trade Organization ("WTO") made specific commitments to provide market access to and national treatment of basic telecom services. Now that the Federal Communications Commission ("FCC") has adopted new rules implementing the WTO Agreement, which became effective on January 1, many U.S. communications technology concerns have set wagons east and west, poised to enter previously closed markets. However, the WTO Agreement does not open numerous foreign markets. Instead, it provides inadequate access to many covered markets, and will expose U.S. companies to increased foreign competition in domestic markets. What does implementation of the WTO Agreement mean to telecom service providers in the U.S. and what foreign markets remain largely closed to international competition?

Background of the Breakthrough

Negotiations for the WTO Agreement commenced in April 1994 under the auspices of the

Negotiating Group on Basic Telecom ("NGBT"). The NGBT had been formed following the signing of the General Agreement on Trade in Services ("GATS") and formation of the WTO at the conclusion of the Uruguay Round of negotiations. The purpose of the NGBT was to open markets and establish national pro-competitive regulatory principles for the provision of basic telecom services among member nations.

The WTO Agreement secures these trade precepts only for 'basic telecom' services, a subset of telecom services which includes regulated voice and other services that can be supplied using analog or digital technologies.² Increasingly important value-added services, a subset of services relying on digital technology to manipulate data³ (e.g., e-mail, on-line data processing and database retrieval), are outside the scope of the WTO Agreement. As new outgrowths from the increasingly sophisticated use of computers in telecom technology, value-added services had not been subject to domestic monopoly control within member nations and were not included in the negotiations.

As of 1996, international services, both basic and value-added, accounted for approximately 15 percent of all telecom traffic,⁴ while domestic local and long-distance telecom traffic within national borders continues to comprise the vast majority of all telecom services. Prior to the WTO Agreement, only a handful of the world's markets (i.e., Canada, New Zealand, Sweden, the United Kingdom and the United States), were open to re-

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¹ See *Future of International Telecommunications Trade Issues: Hearings Before the Subcomm. on Commerce, Trade and Hazardous*

Materials of the House Comm. on Energy and Commerce, 104th Cong., 3 (1996) [hereinafter *Future of Int'l Telecomms.*] (testimony of Congressman Edward J. Markey).

² See *Future of Int'l Telecomms.*, *supra* note 1, at 12 (testimony of Jeffrey Lang, Deputy U.S. Trade Representative).

³ See *id.*

⁴ See *id.*

sale or facilities-based competition in international services.⁵ International trade in telecom services has been constrained by dominant carriers and above-cost accounting rates. Such highly inflated accounting rates are most often imposed on a market entrant by a domestic monopolist (and obligatory joint-venturer) as the 'price' for accessing a domestic network. Consequently, market entry for basic service providers had been limited to strategic investments in privatized former monopoly companies or for wireless or cellular service, which were unattractive alternatives for many potential entrants, particularly when coupled with the high costs of access to the foreign telco's infrastructure. As one might imagine, profit margins for domestic monopolies in a "cozy cartel" have been staggering⁶ and in many cases serve as the source of development financing for fledgling domestic networks.

Country Commitments Control

Under the WTO Agreement, sixty-nine countries, which comprise roughly 95 percent of the global market for basic telecom services,⁷ have agreed to permit competition from foreign suppliers of basic telecom services. Sixty-five of the signatory countries also have committed to enforce fair rules of competition for basic telecom services which cover interconnection of competing telecom services suppliers, safeguards for competition, and transparent and independent regulation of telecom services.⁸

However, the commitments to these general principles of fair access and competition by foreign telecom providers vary widely among the signatories to the WTO Agreement. Although sixty-one countries commit to competitive supply of voice telephone services, two signatories (Brazil and Switzerland) limit competitive opportunities

to voice services only over closed user groups.⁹ Only about 40 percent of these sixty-one commitments specify a phased-in implementation of competitive access for domestic long-distance, local and international services.¹⁰ Competition in resale of public voice telephone is included in forty-two of the country commitments.¹¹ Further, of the fifty-five commitment schedules to the WTO Agreement (the European Union schedule accounts for fifteen government commitments), only eleven schedules commit to full, non-phased-in competitive access to the domestic market for local, domestic long-distance, international and resale of public voice services.¹²

Among the most liberal competitive access commitments, the fifteen member-states of the European Union, Australia, New Zealand, Mexico, Japan and the U.S., all have agreed to immediate competitive access commitments to local, domestic long-distance, international and resale services concurrent with the January 1, 1998 entry-into-force of the Agreement.¹³ Nonetheless, there are several member-specific restrictions within the European Union commitment, including caps on investment from non-European Union nations in Portuguese and Finnish telecom concerns.¹⁴ Even these more liberal commitments do not contain direct references to accounting and settlement rate reform, but monopolist carriers that continue to rely on anti-competitive bilateral traffic routing and extremely high margins on international traffic will face severe competitive pressures as market entry restrictions are eased.¹⁵

In contrast, other countries have maintained existing limits on foreign ownership/access to telecom facilities. Citing fear that its telecom market would be overrun by foreign competition, Canada, for example, refused to increase its 46.7 percent limit on foreign ownership of its national

⁵ See Alan Cane, *Global Sell-off Gathers Pace*, THE FIN. TIMES, Sept. 19, 1996, at 1.

⁶ See *Future of Int'l Telecoms.*, *supra* note 1, at 17 (testimony of Reed E. Hundt, then Chairman, Federal Communications Comm'n).

⁷ See *In re Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, Order and Notice of Proposed Rulemaking*, 12 FCC Rcd. 7847, para. 1 (1997) [hereinafter *Notice on Foreign Participation*].

⁸ See *id.* para. 2.

⁹ See *The WTO Negotiations on Basic Telecommunications: Informal Summary of Commitments and M.f.n. Exemptions, Annex I—Overview of Results of WTO Basic Telecommunications Negotia-*

tions (Mar. 6, 1997) [hereinafter *WTO Informal Summary, Annex I*].

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ See *id.*

¹⁴ LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION 137-143, Booklet 12D (Joseph F. Dennin ed., Oceana Publications, Inc. 1997), European Communities and Their Member States Schedule of Specific Commitments, GATS/SC/31/Suppl.3.

¹⁵ See *Notice on Foreign Participation*, *supra* note 7, para. 7, at 1130.

telephone companies, despite an increase in the U.S. limit effectively from 25 percent to 100 percent.¹⁶ However, Canada recently has harmonized its foreign ownership and control caps for broadcast and telecom entities. Whereas different caps existed for foreign ownership or control of either type of entity, the present attributable cap of 46.7 percent¹⁷ is now in force across the board. Canada's telecom authority, the Canadian Radio-Television and Telecommunications Commission ("CRTC"), exercises broad statutory discretion in determining actual control of a telecom or broadcast licensee. Consequently, the CRTC examines the "personal, financial, contractual and business relationships between the parties, as well as any other relevant considerations"¹⁸ in examining the control issue for a given licensed entity or license applicant. This broad authority flows from the CRTC's mandate that it not license a corporation that is *effectively* controlled by foreigners.¹⁹

Hungary's commitment provides another example of the varied ownership limitations in some commitments. Hungary precludes foreign investment in domestic telecom concerns without at least a 25 percent Hungarian interest and one director vote retained for the Hungarian monopoly provider MATÁV.²⁰ The commitment also contains restrictions which will stall competitive access for international long-distance and domestic services until December 31, 2002, and local calls until December 31, 2003.²¹ Additionally, Hungary explicitly prohibits any type of 'bypass' arrangement²² (a method of routing calls in order to benefit from lower accounting rates).

Similarly, although the Malaysian commitment proposes access to a larger plate of telecom services than those generally to be covered by the WTO Agreement, it allows for foreign sharehold-

ing of only up to 30 percent in domestic Malaysian operators that provide, *inter alia*, voice telephony, data transmission, domestic and international satellite services and either satellite links/capacity or satellite earth stations.²³

The Devil in the Details

In addition to the significant differences among basic commitments, the WTO Agreement will be subject to implementation by the national legislatures of WTO member nations. Only under rare circumstances have such treaties been self-effectuating (given automatic force-and-effect in domestic law) and then only with regard to minor, non-contentious issues. In spite of the WTO Agreement's fundamental purpose of enabling uniform competitive access for the supply of basic telecom services among WTO nations, varying methods of regulatory implementation and the wide variety of country-specific limitations within country commitments may lead to a quagmire of varying access requirements and limitations for a telecom services provider seeking entry into multiple national markets.

The FCC's initial efforts to implement the U.S. commitment illustrate the kind of detailed process and rules that will accompany numerous country commitments. Authorization of a foreign carrier to provide telecom services in the U.S. is subject to two statutory tests under Sections 214 and 310(b) of the Communications Act.²⁴ Section 214 governs *access* to the U.S. market, and Section 310(b) controls the *licensing* of a foreign owned broadcaster or carrier.

In order to ensure competitive access to the home markets of Section 214 applicants, the FCC adopted the Effective Competitive Opportunities

¹⁶ See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1b, Canada, Schedule of Specific Commitments, Supplement 3, Apr. 11, 1997, WTO AGREEMENT ON BASIC TELECOMMUNICATIONS, GATS/SC/16/Suppl.3 [hereinafter *Canada, Schedule of Specific Commitments*]. Even though Canada's foreign telecom ownership and control percentages are comparable to percentages used in the U.S., Canada's combined direct/parent ownership cap of 46.7 percent proved to be a contentious issue during the NGBT negotiations. See Mike Mills & Paul Blustein, *Nations Near Accord on Telecommunications*, WASH. POST, Feb. 15, 1997, at B1.

¹⁷ See *Canada, Schedule of Specific Commitments*, *supra* note 16.

¹⁸ Terence C.Y. Hui, (Vancouver, British Columbia), Decision, CRTC 96-224 (June 13, 1996).

¹⁹ See Direction to the CRTC (Eligible Canadian Corporations), C.R.C. ch. 376, §§ 2-4 (1996).

²⁰ See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1b, Hungary, Schedule of Specific Commitments, Supplement 2, Apr. 11, 1997, WTO AGREEMENT ON BASIC TELECOMMUNICATIONS, GATS/SC/40/Suppl.2.

²¹ See *id.*

²² See *id.*

²³ See General Agreement on Trade in Services, Apr. 14, 1994, Specific Commitments, Malaysia, Schedule d, Apr. 11, 1997, WTO AGREEMENT ON BASIC TELECOMMUNICATIONS, GATS/SC/52/Suppl.2.

²⁴ See generally 47 U.S.C. §§ 214, 310(b) (1994).

("ECO") test in November 1995. The ECO test utilizes six competitive access criteria to assess whether the home market of a potential entrant into the U.S. telecom market has reached competitive access parity with the U.S.²⁵ Under the ECO test, a foreign carrier can only receive a license for providing telecom services in the U.S. if U.S. carriers enjoy "effective competitive opportunities" in those markets where the foreign carrier is dominant. The ECO test was first used in approving Global One (a strategic alliance among Sprint, Deutsche Telekom and France Telecom), to determine whether the French and German telecom markets did or would grant competitive access to other U.S. carriers.²⁶

In November 1997, the FCC drastically revised its rules to implement the U.S. WTO market access commitment and open the U.S. telecom market to WTO Members. Applicants from WTO Members no longer need to satisfy the ECO test for: (1) Section 214 authority to provide international facilities-based service, resold switched services and resold non-interconnected private line services; (2) cable landing licenses; and (3) authorizations to exceed the 25 percent foreign ownership benchmark in Section 310(b)(4) of the Act.²⁷ The FCC also eliminated its equivalency analysis for carriers seeking to provide switched services over private lines between the U.S. and

WTO Members.²⁸ However, the FCC retained the rigorous ECO test for non-WTO Member applicants.²⁹

In proposing to open the U.S. telecommunications market, the FCC had noted that some WTO Members "have made no [competitive access] commitments, have committed to less than full market access, have not committed to enforcing fair rules of competition or might not implement their commitments fully."³⁰ Nonetheless, the FCC concluded that it was not "necessary or appropriate"³¹ to examine each WTO Member's market-opening commitments or the extent to which it had implemented such commitments when evaluating the propriety of foreign carrier entry into the U.S. market. Instead, the FCC determined that the commitments of the WTO Members, coupled with the FCC's revised dominant carrier safeguards, "No Special Concessions" rule and separate affiliate requirements,³² settlement rate benchmarks conditions and continuing major changes in technology and traffic routing, are sufficient to prevent anticompetitive behavior in the U.S. international services market.³³ Further, the FCC anticipates additional international competitive pressure on WTO Members to follow through with their open-market commitments and will rely on the U.S. Trade Representative to monitor WTO Member compliance and to pursue consul-

²⁵ See *In re Market Entry and Regulation of Foreign Affiliated Entities, Report & Order*, 11 FCC Rcd. 3889, para. 40 (1995) (Commissioners Barrett and Ness issuing separate statements). The six competitive access criteria include:

(1) ability of U.S. carriers to offer in the foreign country international facilities-based services substantially similar to those that the foreign carrier seeks to offer in the United States; (2) existence of competitive safeguards in the foreign country to protect against anti-competitive and discriminatory practices, including cost-allocation rules to prevent cross-subsidization; (3) availability of published nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services; (4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities; (5) protection of carrier and customer proprietary information; and (6) existence of an independent regulatory body with fair and transparent procedures to enforce competitive safeguards.

Id.

²⁶ See generally *In re Matter of Sprint Corp., Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended*, 11 FCC Rcd. 1850 (1996).

²⁷ See *In re Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, FCC 97-398 (rel. Nov. 26, 1997), at para. 29

[hereinafter *Foreign Participation Order*].

²⁸ See *id.*, para. 76.

²⁹ See *id.*, para. 124.

³⁰ *Notice on Foreign Participation*, *supra* note 7, para. 14.

³¹ *Foreign Participation Order*, *supra* note 27, para. 29. The FCC noted that Article II of the GATS requires WTO Members to accord "service and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country." *Id.* para. 40. Consequently, the FCC feared that limiting access to the United States market based on the "existence or quality" of a WTO Member's commitment could be viewed as a violation of Article II. See *id.*

³² The FCC's No Special Concessions rule generally prohibits all U.S. international carriers from agreeing to accept special concessions from any foreign carrier or administration. See *id.*, para. 17 n.20. The FCC has limited application of the rule by adopting a rebuttable presumption permitting U.S. carriers to accept special concessions granted by foreign carriers which possess less than a fifty percent market share in each relevant foreign market without obtaining FCC approval. See *id.*, para. 161. The FCC also specified the kinds of exclusive dealings with foreign carriers with market power in services, facilities or functions on the foreign end of a U.S. international route required for the provision of basic telecom services that are covered by the No Special Concessions rule. See *id.*, para. 165.

³³ See *id.*, paras. 33-34.

tation and dispute settlement in the event of non-compliance.³⁴

In view of its own safeguards and increasing international competition, the FCC found it highly unlikely that a Section 214 applicant for international facilities-based service from a WTO Member would pose a risk to competition in the U.S. market. It identified the following extreme circumstances and applicant conduct which might justify denial of a Section 214 application from a WTO Member applicant:

- the ability, upon entry or shortly thereafter, to raise the price of U.S. international service by restricting its output (particularly a carrier that is affiliated with multiple foreign carriers that control bottleneck facilities);
- involvement in adjudicated violations of U.S. anti-trust law or other laws protecting competition;
- history of anti-competitive or fraudulent behavior in a foreign market;
- past fraudulent representations to U.S. governmental units; and
- involvement in criminal misconduct involving false statements or dishonesty.³⁵

The FCC also may deny an application where issues of national security, law enforcement, foreign policy, or trade concerns are raised by the Executive Branch.³⁶

In addition to eliminating the ECO test from the "public interest" standard of Section 310(b)(4) of the Act,³⁷ the FCC determined to allow presumptively indirect investment from WTO

Members in excess of the twenty-five percent foreign ownership benchmark through a streamlined application process.³⁸ Previously, the "public interest" analysis required for FCC approval of foreign ownership of a holding company for a common carrier licensee had involved an arduous application process.³⁹ Although Executive Branch agencies may oppose applications because of concerns of national interest as noted above during the streamlined application process, the FCC cautioned that other opponents will have to overcome a "strong presumption" in favor of granting such applications.⁴⁰

In the Running: Satellite Earth Stations and Non-U.S. Satellite Systems

Foreign ownership also raises issues for satellite uplink/downlink licenses. The FCC has determined that the ownership restrictions of Section 310(b) and Section 100.11(e) of the Rules⁴¹ apply only if the earth station licensee is a broadcaster or a common carrier.⁴² The FCC has clarified that operators of subscription television services, including DBS and DARS, are neither broadcasters nor common carriers⁴³ and specifically noted that Section 310(b)(4) would not apply to DBS and DARS.⁴⁴ However, Section 310(a) of the Communications Act states that a "station license

³⁴ See *id.*, para. 39.

³⁵ See *id.*, paras. 52-53.

³⁶ See *id.*, paras 61-62.

³⁷ See 47 U.S.C. § 310(b)(4).

³⁸ See *Foreign Participation Order*, *supra* note 27, paras. 322-29.

³⁹ Presumably, the method for measuring the level of foreign ownership and control will remain unchanged. The FCC has devised a method of "ownership attribution" which is determined "by successive multiplication of the ownership percentages for each link in the vertical ownership chain. . . except that wherever the ownership percentage in the chain exceeds 50 percent, [it is not] included in the multiplication." See 47 C.F.R. § 63.18, Note 4 to para. (h). For example, if A owns 30 percent of company X, which owns 60 percent of company Y, which owns 26 percent of "the carrier," then X's interest in the carrier would be 26 percent, the same as Y's (as X's interest in Y exceeds 50 percent). *Id.* In this case, if either X or Y is a foreign entity with investment in a U.S. telecom concern, each of their ownership percentages would exceed the 25 percent threshold presently set by Section 310(b)(4).

⁴⁰ *Foreign Participation Order*, *supra* note 27, paras. 112-13. The FCC's analysis and approval of applications to enable the merger of MCI Communications Corporation and British Telecommunications plc while finalizing its open access rules suggest that the competitive impact of foreign ownership and

consolidation will remain significant in the FCC's analysis, particularly where "one of the merging parties is or was the incumbent monopoly provider." See *In re Merger of MCI Communications Corp. and British Telecommunications plc*, GN Docket No. 96-245, FCC 97-302 (rel. Sept. 24, 1997) para. 5 [hereinafter *MCI Order*]. Of course, MCI subsequently agreed to merge with WorldCom, Inc. See John J. Keller and Steven Lipin, "WorldCom, MCI Deal Could Rewrite Script for a New Phone Era," WALL ST. J., Nov. 11, 1997, at A1.

⁴¹ See generally 47 U.S.C. § 310(b) (1994); 47 C.F.R. § 100.11(e) (1996).

⁴² See, e.g., *In re Licensing Under Title III of the Communications Act of 1934, as amended, of Non-common Carrier Transmit/Receive Earth Stations for Operation with INTEL-SAT Global Communications Satellite System*, *Declaratory Ruling*, 8 FCC Rcd. 1387, at 1390, para. 20 (1993) (stating that foreign-owned applicant would be ineligible for earth station license under alien ownership restrictions if found to be a broadcaster or common carrier).

⁴³ See *id.* para. 21 n.28, citing *In re Subscription Video*, 2 FCC Rcd. 1001 (Feb. 17, 1987), *aff'd sub nom.*, National Ass'n for Better Broadcasting v. FCC, 849 F.2d 665, 669 (D.C. Cir. 1988); see also *In re MCI Telecommunications Corp.*, in 73-SAT-P/L-96, DA96-1793, para. 21 (Dec. 6, 1996) [hereinafter *MCI*].

⁴⁴ See *MCI*, *supra* note 43, para. 21 & n.40. Although section 310(b)(4) does not apply to DBS and DARS, it expressly

required under this chapter shall not be granted to or held by any foreign government or the representative thereof,"⁴⁵ and the FCC has concluded that this restriction applies to DBS and DARS. The FCC has determined that Section 310(a) does not prohibit all ownership by foreign government entities, but only *de facto* or *de jure* control of the license by a foreign government or its representative.⁴⁶

Notwithstanding the rapidly changing regulatory landscape, "a license is still required to use a receive-only earth station to receive a non-U.S. originated signal, or any signal transmitted over a non-U.S. satellite."⁴⁷ Consequently, the FCC will regulate access to the U.S. by non-U.S. satellites through the earth station licensing process,⁴⁸ because the earth station license provides "the only regulatory point available to the Commission."⁴⁹ The FCC will require non-U.S. satellite operators to apply to serve the U.S. either through: (a) participation in a U.S. space station processing round, or (b) the earth station licensing process.⁵⁰ However, the FCC will not require a non-U.S. satellite system to obtain a Title III license for its space station.⁵¹

Again, in implementing the U.S. WTO commitments, the FCC has opened the U.S. satellite market by waiving the ECO-Sat test for applicants seeking to access satellite systems licensed by WTO Members to provide satellite services covered by the U.S. commitments.⁵² In evaluating WTO Member applications, the FCC will determine whether grant of the requested authority is consistent with the public interest, convenience and necessity, considering factors such as the effect on competition in the United States, spectrum availability, eligibility and operating require-

ments, and national security, law enforcement, trade and foreign policy concerns.⁵³ Nonetheless, entry by WTO Member satellite systems will be presumed to promote competition in the United States satellite services so that parties opposing a grant of authority will have a heavy burden to show competitive harm.⁵⁴ Thus, the foreign ownership restrictions on the uplink/downlink of telecom and data transmission common carrier services have been transformed dramatically for WTO Member applicants.

Regardless of the level of foreign ownership in the proposed licensee, the FCC has proposed to apply an ECO-sat analysis in evaluating applications for earth station licenses that involve one-way satellite television and radio services, including DTH-FSS, DBS and DARS,⁵⁵ using a foreign-licensed satellite and for access to satellites licensed by non-WTO Members for all services.⁵⁶ The FCC has retained the ECO-Sat analysis for such earth station licenses because "of the continuing need to encourage open markets for these services and to avoid anticompetitive conduct in the U.S. market."⁵⁷ Other executive branch departments have urged the FCC to "consider foreign ownership restrictions and public interest criteria for subscription DBS services in a rulemaking proceeding prior to reaching any such determination in an adjudicatory proceeding, "and the FCC has indicated that it may initiate a rulemaking."⁵⁸

In order to minimize the burden of such applications, the FCC will permit applicants to request "blanket" licenses covering thousands of technically identical receive-only antennas such as home satellite dishes.⁵⁹ The space station operator, service supplier, equipment manufacturer, or even

applies to common carrier, broadcast, aeronautical en route, or aeronautical fixed radio station licenses. *See id.*

⁴⁵ 47 U.S.C. § 310(a) (1994).

⁴⁶ *See, e.g., In re STARSYS Global Positioning, Inc., Request for a Declaratory Ruling Concerning Section 310 of the Communications Act*, 10 FCC Rcd. 9392, para. 9, at 9393 (1995); *see also* 47 U.S.C. § 310(a) (1994).

⁴⁷ *Televisa International, LLC*, DA97-1758 (rel. Aug. 18, 1997), para. 6; *see also* 47 C.F.R. § 25.131(j) (1996).

⁴⁸ *See In re Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Report and Order*, IB Docket No. 96-111, FCC 97-399 (rel. Nov. 26, 1997), at paras. 183-188 [hereinafter *Satellite Entry Order*].

⁴⁹ *In re Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide*

Domestic and International Satellite Service in the United States, Further Notice of Proposed Rulemaking, FCC 97-252, paras. 20, 56 (July 18, 1997) [hereinafter *Further Notice on DISCO II*].

⁵⁰ *See id.* paras. 48-49.

⁵¹ *See Satellite Entry Order, supra* note 48, para. 188.

⁵² *See id.*, paras. 39-40.

⁵³ *See id.*, paras. 41, 149-50, 154-59, 166-67, 173-74, 178-79.

⁵⁴ *See id.*, para. 41.

⁵⁵ *Direct-to-home Fixed Satellite Service, Digital Broadcast Service, and Digital Audio Radio Service, respectively. See Further Notice on Disco II, supra* note 49, para. 20.

⁵⁶ *See id.* para. 98.

⁵⁷ *See id.*

⁵⁸ *See MCI Order, supra* note 40, para. 281.

⁵⁹ *Satellite Entry Order, supra* note 48, para. 204.

an electronics retailer may file such blanket applications.⁶⁰ If the FCC previously has granted a particular foreign satellite access to the United States to provide DTH/DBS services, it will permit the applicant for a blanket earth station license to include an exhibit citing the prior grant of access and confirming its intention to provide the same previously authorized services.⁶¹ Prior FCC decisions granting a blanket license to Televisa International, LLC and dismissing without prejudice the application of Telquest Ventures, L.L.C., suggest that the regulatory treatment of DTH providers in the foreign applicant's country will be critical to the Commission's review of an application and grant of authority.⁶²

Broadcast: The Final Frontier

Market access issues for broadcast and radio were not included in the most recent round of GATT negotiations on trade in services, and few WTO Members have independently addressed competition in these media. In the Telecommunications Act of 1996 (the "Act"), Congress relaxed the U.S. national limits on ownership of television stations and eliminated national limits on radio station ownership.⁶³ Specifically, section 202(a) of the 1996 Act eliminated any provisions which would limit the number of AM or FM broadcast stations which may be owned by one entity.⁶⁴ Section 202(c) of the Act eliminated restrictions on the number of television stations owned nationally, but it retained an increased national audience reach limitation of 35 percent.⁶⁵ Several FCC rulemaking proceedings are underway to revise ownership rules, most notably the method for determining ownership attribution, which are expected to tighten the ownership

rules.⁶⁶ However, Congress took no action on the foreign ownership restrictions. Thus, foreign investment in a U.S. broadcasting entity will continue to be governed by the same licensing and ownership restrictions under section 310(b).

CONCLUSION

Although the WTO Agreement will enable increased access to national telecom markets, how far and how fast a foreign competitor can enter a target market will largely be determined by that country's commitment schedule and legislative or regulatory action bringing the WTO Agreement into force-and-effect. As national regulators issue implementing rules similar to those adopted by the FCC, telecom carriers should take notice. The final test for whether competitive access has been truly granted to a given market will depend upon this implementation process. As the FCC has recognized, "there is considerable uncertainty concerning how quickly and to what extent regulatory and market conditions in various telecommunications markets will change."⁶⁷

Further liberalization of broadcast and satellite access and ownership rules will likely follow. The FCC's recent report order implementing WTO 'Agreement-like' foreign access requirements for the provision of services via satellite will not be the final word. Rather, it is an interim step in putting all communications services under the auspices of a liberalized global trade pact. With the next round of negotiations on trade in services slated to begin no later than January 1, 2000,⁶⁸ full MFN agreements on improved market access commitments and national treatment including broadcasting and satellite systems may not be far off.

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² Canadian restrictions requiring "a minimum amount of Canadian content" and "restrictions over the use of non-Canadian satellites for distribution of telephony and broadcasting services" were central to the FCC's dismissal of Telquest's applications. In granting the Televisa application, the FCC noted the reciprocal "Protocol Concerning Transmission and Reception of Signals from Satellites for Provision of Direct-to-Home Satellite Services in the United States America and the United Mexican States." Compare Telquest Ventures, LLC, DA 96-1128 (rel. July 15, 1996), at para. 7; Televisa International, LLC, DA 97-1758 (rel. Aug. 18, 1997), at para. 2.

⁶³ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(a), 110 Stat. 56, 110.

⁶⁴ See *id.* § 202(a), 110 Stat. at 110.

⁶⁵ See *id.* § 202(c) (1-2), 110 Stat. at 111.

⁶⁶ See generally *In re* Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy, *Further Notice of Proposed Rulemaking* in MM Docket Nos. 94-150, 92-51 and 87-154, FCC 96-436, (Nov. 7, 1996).

⁶⁷ See *MCI Order*, *supra* note 40, para. 5.

⁶⁸ World Trade Organization (97-0675), *Report of the Group on Basic Telecommunications*, (Feb. 15, 1997) S/GBT/4.

