INTERNATIONAL TELECOMMUNICATIONS TRANSACTIONS: A CRITIQUE OF THE FCC'S "EFFECTIVE COMPETITIVE OPPORTUNITIES" ANALYSIS

I. INTRODUCTION

The telecommunications industry is highly capital-intensive. Even in the most developed economies, telecommunications companies are having difficulty meeting their capital needs. U.S. companies are now turning to the cash-laden, recently privatized telecommunications companies of Europe for assistance, trading U.S. managerial, marketing, and technological skills for European capital. These alliances are also attractive because they will give U.S. companies the ability to meet the growing international communications needs of their multinational customers.

Before a foreign company can invest in a U.S. telecommunications provider, the transaction must be approved by the Federal Communications Commission (FCC) and the Department of Justice (DOJ). This Note considers only the FCC's approval process, and in particular its new "effective competitive opportunities" (ECO) analysis, reviewing in depth the FCC's first use of this analysis in approving the recent investment in Sprint made by Deutsche Telekom and France Telecom.[1] This Note concludes that the ECO analysis is significantly flawed for three reasons: (1) the FCC's authority to perform such an analysis is unclear; (2) the analysis causes the FCC to inappropriately interfere with U.S. trade policy; and (3) the analysis' results are likely to have a chilling effect on the flow of investment capital into the U.S. telecommunications market, which would have effects harmful to the public interest. Therefore, the FCC should reconsider its ECO analysis.

1. The DOJ examines antitrust concerns under the Sherman, Clayton, and Federal Trade Commission Acts. In the Sprint case, although the DOJ found that Section 7 of the Clayton Act had been violated, it nonetheless approved the transaction after putting specific competition safeguards in place. For further discussion of the DOJ examination process, see generally Public Comments and Response on Proposed Final Judgment, United States v. Sprint Corporation and Joint Venture Company, 61 Fed. Reg. 3970 (Antitrust Div. 1996).

II. CURRENT LAW

A. The Communications Act of 1934

There are two bases for FCC regulation of foreign investment in the U.S. telecommunications market—Section 310 and Section 214 of the Communications Act of 1934 (1934 Act).[2] Section 310(b) limits the holding by, and transfer to, foreign entities of certain FCC licenses.[3] Section 310(b) limits foreign investment in a company with a radio license to 20 percent ownership and in a holding company with a radio license to 25 percent ownership.[4] The statutory language mandates the 20 percent limit, but allows a waiver of the 25 percent limit by the FCC if the given investment is determined to be in the public interest. These investment restrictions are invoked whenever a company uses radio technology to offer common carrier, broadcast, or aeronautical services. The slice of the electromagnetic spectrum covered by radio technology includes cellular, microwave and satellite services.[5]

Section 214 concerns a foreign carrier's entry into the U.S.-international services market by acquisition or operation of a telecommunications line. Section 214 is triggered by (1) "construction of a new line or an extension of any line"; (2) acquisition or operation of

2. 47 U.S.C. §§ 151-613 (1994).

3. *See* 47 U.S.C. § 310 (1994). Although the restrictions primarily apply to broadcast licenses, most major telephone companies are included because they use radio, satellite, or microwave links in their networks, requiring the holding of a radio license.

4. *See* 47 U.S.C. § 310(b) (1994):

> (b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station shall be granted to or held by —
>
> (1) any alien or the representative of any alien;
>
> (2) any corporation organized under the laws of any foreign government;
>
> (3) any corporation of which any officer or director is an alien or of which *more than one-fifth* of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;
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> (4) any 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 the refusal or revocation of such license.

(emphasis added). The language restricting foreign officers and directors was later removed by the Telecommunications Act of 1996 as discussed *infra* note 26 and accompanying text.

5. It is interesting to note, that because they are not broadcast or common carrier services, foreign investments in cable TV, private carrier services, multimedia services and enhanced services are outside the scope of Section 310. *See* 47 U.S.C. § 310 (1994).

any line, or its extension; (3) "engaging in transmission over or by means of such additional or extended line"; or (4) "discontinuance, reduction, or impairment" of service.[6] Thus, when a foreign carrier invests in a U.S. carrier, the FCC construes Section 214 to require FCC approval because the foreign carrier would be acquiring, operating or using a "line."

B. Regulatory Framework

Under new rules adopted pursuant to the 1934 Act on November 28, 1995, and effective January 30, 1996, the FCC incorporated an "effective competitive opportunities" (ECO) analysis into its public interest calculus.[7] This new test is triggered by two events: (1) foreign carriers and their affiliates seeking authorization to provide U.S. international facilities-based service under Section 214, or (2) foreign entities seeking to obtain an indirect ownership interest of more than 25 percent in a U.S. radio licensee under Section 310(b)(4).[8]

To initiate Section 214 review, the FCC lowered the required threshold level of foreign investment. In contrast to the FCC's previous standard of "control" (i.e., less than 51 percent), an "affiliation" (established at 25 percent equity ownership) is now the threshold limit above which Section 214 review is initiated.[9] Once review is initiated, the ECO analysis works as a new layer of review which must be satisfied before the FCC will permit a foreign carrier to enter the U.S.-international services market, either directly or through an "affiliation" with either a U.S. facilities-based or resale carrier. The ECO analysis examines whether "effective competitive opportunities" exist for U.S. carriers in the relevant "destination markets,"[10] that is, those markets where the foreign carrier is capable of exercising market power.[11]

6. 47 U.S.C. § 214(a) (1994). Specifically, Section 214(a) states that a carrier shall not undertake any of these four actions unless a certificate is granted by the FCC demonstrating the fulfillment of the public convenience and necessity test.

7. In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities, 11 F.C.C.R. 3873, 3975-76 (1996) [hereinafter FCC 95-475].

8. *See id.*

9. *See id.* at 3891-92. Although the term "affiliation" is not found in Section 214, the FCC's previous position was that only a controlling investment in a carrier created an affiliation that would qualify as an "acquisition" or "operation" of a "line" within Section 214. *See* Regulation of International Common Carrier Services, 7 F.C.C.R. 7331 (1992) (post-entry regulation "affiliates" are those U.S. carriers that control, are controlled by, or are under common control with foreign carriers); FCC 95-475, *supra* note 7, at 3092.

10. FCC 95-475, *supra* note 7, at 3917.

11. *See id.* Furthermore, "market power" is defined as "the ability of the carrier to act

The FCC has outlined four main factors in the ECO analysis. First, the FCC will examine whether there are de jure restrictions on entry into the foreign market.[12] If there are none, the FCC will then examine any de facto limitations preventing U.S. carriers from competing effectively.[13] Second, the FCC will determine whether reasonable and nondiscriminatory charges and conditions for interconnection exist.[14] Third, the FCC will survey the level of protection from anti-competitive practices.[15] And fourth, the FCC will consider whether an effective regulatory regime exists in the destination country.[16]

The new market entry analysis may also be triggered by Section 310(b)(4) and flows from the "public interest" determination required of the FCC. The ECO analysis under Section 310(b)(4) is limited to common carrier radio licenses (e.g. Cellular, PCS), thus exempting broadcast and aeronautical licenses.[17] This Section 310(b)(4) ECO analysis regarding foreign acquisitions of an indirect ownership interest in U.S. wireless licenses is identical to the four-step ECO analysis under Section 214, although its focus is on home markets rather than destination markets.[18]

The FCC's prescribed methodology suggests a quid pro quo scheme for international investments. According to the FCC, the ECO test will be presumed satisfied if "U.S. companies can acquire a controlling interest in the 'home market' of a foreign investor."[19] Thus, when such controlling investments are allowed abroad, the FCC presumably would permit foreign ownership at any level in the U.S., absent other public interest considerations.[20] In determining the "home market," the focus will be service-by-service.[21] Although the

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anti-competitively against unaffiliated U.S. carriers through the control of bottleneck services or facilities on the foreign end." *Id.*

12. *See id.* at 3891-92.

13. *See id.* at 3892.

14. *See id.*

15. *See id.* at 3893. These anti-competitive safeguards should include (1) cost allocation rules to prevent cross-subsidization; (2) disclosure of technical information needed to interconnect with the foreign carrier's facilities; and (3) protection of proprietary information. *See id.*

16. *See id.* at 3894. The focus of the fourth factor is on the separation between the foreign regulator and operator, and fair and transparent regulatory procedures. *See id.*

17. *See id.* at 3943.

18. *See id.* at 3954.

19. *See id.* This presumption could be rebutted by showing significant de facto barriers. *See id.*

20. *See id.*

21. *See id.* at 3952-53.

statutory trigger for Section 310 review is a minimum of 25 percent foreign ownership, the FCC reserves the right to scrutinize a foreign investment below 25 percent if it presents a significant potential impact on competition.[22]

The ECO analysis under either Section 214 or 310(b)(4) is not dispositive, however. Decisions in the affirmative or negative based on the ECO analysis alone may be outweighed by consideration of additional public interest factors. Under both Section 214 and Section 310, the FCC will consider the general significance of the proposed entry by the foreign entity on competition in the U.S. telecommunications market, and any national security, law enforcement, foreign policy or trade considerations raised by the executive branch.[23] In addition, the Section 214 analysis examines the presence of cost-based accounting rates,[24] whereas an added consideration in the Section 310 analysis concerns "the extent of foreign participation in the applicant's parent corporation (in particular the presence of alien officers and directors in excess of the statutory benchmarks)."[25]

C. The Telecommunications Act of 1996

The U.S. Congress recently overhauled the 1934 Act in the Telecommunications Act of 1996 (1996 Act). This new law makes two significant changes relating to foreign investment. It removes the ban on non-U.S. nationals serving as an officer or director of a common carrier licensee or of its holding company,[26] and it instructs the states and local governments to abandon local loop restraints, thus opening up the local loop to competition from domestic and partly-foreign-owned telecommunications service companies alike.[27] The 1996 Act does not, however, alter the restrictions on foreign investment in radio licenses under Section 310(b).[28]

22. *See id.* at 3906. It appears that foreign investments below the level of 10 percent would be safe from scrutiny. *See id.* at 3905.

23. *See id.* at 3897.

24. *See id.*

25. *See id.* at 3955.

26. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 1996 U.S.C.C.A.N. (110 Stat.) 56, 131-32.

27. *See id.* at 62.

28. *See Oxley Paid His Dues, Now He Wants His Just Desert,* COMM. TODAY, Feb. 21, 1996, *available in* WESTLAW, 1996 WL 2328572. Language that would have lifted the restrictions on foreign ownership was removed from the final conference committee agreement. *See id.*

III. APPLICATION OF U.S. LAW TO THE SPRINT CASE

A. The Transactions

On January 31, 1996, Global One,[29] a strategic alliance among Sprint, France Telecom, and Deutsche Telekom, opened for business.[30] Global One will provide seamless global telecommunications services to business, consumer and carrier markets worldwide.[31] The market targeted by this alliance is estimated to eventually total a combined $500 billion.[32]

The parties agreed to three related transactions: (1) an investment of roughly four billion dollars by Deutsche Telekom and France Telecom in Sprint; (2) the creation of a joint venture between Sprint, Deutsche Telekom and France Telecom; and (3) the creation of a joint venture between Deutsche Telekom and France Telecom.

The three entities involved all have a major presence in their home markets. Sprint, the third largest long-distance telecommunications carrier in the United States, is a diversified international telecommunications company with revenue greater than $14 billion in 1996.[33] It provides global long-distance voice, data and video products and services, along with local telephone services to more than 6.6 million subscriber lines in 19 states.[34]

Deutsche Telekom, with total revenues of forty-four billion dollars in 1994, is the third largest carrier in the world and Europe's largest telecommunications company.[35] Prior to 1994, Deutsche Telekom was a state-owned telephone monopoly and a division of the German Ministry of Posts and Telecommunications.[36] On January

29. The formation of Global One was announced in June 1994 and was then known as "Phoenix." *See* Mike Mills, *Sprint Selling 20% Stake to Foreign Firms*, WASH. POST, June 15, 1994 at F1.

30. *See Sprint Closes Pact to Sell Stake to Foreign Concerns*, WALL ST. J., Feb.1, 1996, at A8.

31. *See Global One: Global One Finally Obtains EU Approval*, M2 Presswire, July 22, 1996, *available in* WESTLAW, 1996 WL 10349179.

32. *See* Mills, *supra* note 29, at F1.

33. *See* Standard & Poor's Profile, *available in* WESTLAW, S&P-CORPDE database.

34. *See id.* Sprint's cellular service operations were spun off in the spring of 1996. *See id.*

35. *See* Rick Atkinson, *In Germany Another Wall Is Coming Down; Nation Hopes Sale of State Phone Monopoly Will Open Markets and Profit Opportunities*, WASH. POST, Feb. 5, 1995, at H1; Michael Lindemann, *Warning on Deutsche Telekom*, FIN. TIMES, Sept. 13, 1996, *available in* WESTLAW, 1996 WL 10612781.

36. *See* John Blau, *Sprint Hit by U.S.-German Resale Spat*, COMM. WEEK, Oct. 7, 1996, *available in* 1996 WL 8647304; Gautam Naik, *Tidal Wave of Global Telecom Offerings Builds*, WALL ST. J., Nov. 15, 1996, at A10.

1, 1995, in preparation for its planned initial public offering (IPO), Deutsche Telekom became Deutsche Telekom AG, a joint stock company.[37] Then, on November 18, 1996, Deutsche Telekom launched the largest IPO in European history by selling 26 percent of its stock to investors around the world.[38] Deutsche Telekom was able to issue 600 million shares for an amount in excess of $13 billion.[39]

France Telecom is the world's fourth largest telecommunications operator with 1996 revenues of 151 billion francs [U.S. $30 billion].[40] Like Deutsche Telekom, France Telecom operated as the French telephone monopoly and was also a division of the French government.[41] On December 31, 1996, France Telecom became France Telecom S.A., a French public corporation owned entirely by the French government.[42] In May 1997, France Telecom will make an IPO, offering between $5.3 billion and $8.86 billion in shares.[43]

In June 1995, Sprint, Deutsche Telekom, and France Telecom agreed to the terms by which Deutsche Telekom and France Telecom would purchase a 20 percent equity investment in Sprint.[44] Within a year of this agreement, Deutsche Telekom and France Telecom had paid $3.66 billion for 20 percent of Sprint.[45] Next, Deutsche Telekom and France Telecom formed the joint venture known as Atlas, of which each owns 50 percent.[46] Atlas is the mechanism by which France Telecom and Deutsche Telekom will participate with Sprint in the joint venture known as Global One.[47] Finally, on January 31, 1996, Global One, a joint-venture between Atlas and Sprint, was formed.[48] Global One was created as a separate company with assets

37. *See* Atkinson, *supra* note 35, at H1.

38. *See* Editorial, *Telekom's Lesson*, WALL ST. J., Nov. 25, 1996, at A18.

39. *See Deutsche Telecom's Mobile Phone Subsidiary Backs PCS Provider*, COMM. TODAY, Nov. 22, 1996, available in WESTLAW, 1996 WL 11476733.

40. *See France Telecom Posts Lower '96 Profit Because of Charges*, WALL ST. J., Mar. 20, 1997, at A12 [hereinafter *France Telecom*].

41. *See* Naik, *supra* note 36, at A10.

42. *See France Telecom to Have 25B FRF Initial Capital: Report*, Dow Jones News Service, Dec. 30, 1996, *available in* WESTLAW, ALLNEWSPLUS database.

43. *See France Telecom*, *supra* note 40, at A12.

44. *See* Gautam Naik, *Sprint Signs $4.1 Billion Agreement with French, German Phone Carriers*, WALL ST. J., June 23, 1995, at B2.

45. *See European Giants Complete Purchase of Sprint Stake*, WALL ST. J., Apr. 29, 1996, at B7. The amount was less than the originally anticipated deal in excess of four billion dollars due to Sprint's spin-off of its cellular operations.

46. *See Global One Signs First Clients as Final EC Approval Looms*, TELECOM MARKETS, Feb. 29, 1996, *available in* WESTLAW, 1996 WL 8687805 [hereinafter *Global One*].

47. *See id.*

48. *See Sprint Global One Venture With German, French Carriers Challenges MCI, AT&T*,

contributed by Sprint, France Telecom and Deutsche Telekom.[49] Global One's seamless international services will be initially targeted at large multinational corporations.[50]

B. FCC Review

On December 15, 1995 the FCC approved the investment in Sprint by France Telecom and Deutsche Telekom.[51] The ECO analysis—adopted only 17 days before the final decision in the Sprint case—was applied for the first time. Although the FCC found that no competitive opportunities existed in Germany or France, it nevertheless approved the investment based on the investment's beneficial effect on U.S. competition.[52]

1. *ECO Analysis Under Section 214.* The 20 percent investment by Deutsche Telekom and France Telecom did not meet the FCC's new 25 percent definition of "affiliation" required for application of the ECO test under Section 214.[53] Nevertheless, the FCC applied the ECO analysis, out of concern over the size of both Deutsche Telekom and France Telecom.[54] The "destination" markets analyzed were France and Germany.[55] The FCC concluded that U.S. carriers were legally prohibited from entering the French and German international telecommunications services markets because of de jure monopolies in both countries.[56] Thus effective competitive opportunities did not exist.[57]

2. *ECO Analysis Under Section 310.* Although Deutsche Telekom and France Telecom only sought to acquire 20 percent of Sprint, when aggregated with other holdings by foreigners, total foreign ownership of Sprint's capital stock would be more than 25 percent. Due to its publicly-traded nature, fluctuating foreign ownership was likely to approach 28 percent. As a result, Sprint sought approval under Section 310 for up to 28 percent foreign

COMM. DAILY, Feb. 1, 1996, *available in* 1996 WL 2365145.

49. *See Global One*, *supra* note 46, at WESTLAW, 1996 WL 8687805.

50. *See id.*

51. *See* In the Matter of Sprint Corp., 11 F.C.C.R. 1850, at 1850 (1996) [hereinafter FCC 95-498].

52. *See id.* at 1850.

53. *See id.* at 1856.

54. *See id.*

55. *See id.*

56. *See id.* at 1852, 1857, 1858.

57. *See id.* at 1857.

ownership.[58]

The FCC, however, chose not to make a determination under Section 310's ECO analysis.[59] The FCC had already made the finding under Section 214 that effective competitive opportunities did not exist.[60] Moreover, the FCC thought the examination would be unnecessary because it approved the transaction based on public interest factors.[61]

3. *Public Interest Factors.* According to the FCC, two factors militated in favor of approval. First, the investment of roughly four billion dollars in the U.S. telecommunications market has procompetitve effects.[62] A large capital infusion into Sprint, a carrier with a 10 percent share of the U.S. market, would allow Sprint to meet the huge capital requirements of future expansion.[63] Second, the governments of Germany and France pledged to open their respective telecommunications markets before 1998.[64] These assurances by France and Germany consisted of existing European Union Member State obligations and further proposals for national legislation leading to full liberalization in each nation.[65]

One negative public interest factor concerned France's disproportionately high accounting rates between the United States and France.[66] This concern was addressed in one of the FCC's conditions to approval discussed below. In its Foreign Carrier Entry Order, the FCC discussed other public interest factors, such as national security, law enforcement, foreign policy, and trade concerns, but those other factors were not relevant in this proceeding.[67]

4. *Conditions of Approval.* The FCC concluded that the 1934 Act alone provided sufficient jurisdiction to address all of the anticompetitive concerns over the Sprint transaction.[68] The FCC deemed

58. *See id.*
59. *See id.*
60. *See id.*
61. *Id.*
62. *See id.* at 1860.
63. *See id.* at 1863.
64. *See id.* at 1857, 1860.
65. *See id.* at 1861, 1862.
66. *See id.* at 1865.
67. *Id.*
68. *See id.* at 1859.

use of its power under Section 7 and Section 11 of the Clayton Act[69] to disapprove anti-competitive acquisitions of stock in common carriers to be unwarranted.[70] Based on the positive effect the transactions would have within the U.S. market, the FCC approved the deal as being in the "public interest" as long as five restrictions on market power abuses were implemented.[71] These conditions are effective until full facilities and services competition are instituted in both France and Germany.[72]

First, Sprint is not allowed to operate new international circuit capacity to France or Germany for either its own use or the use of Global One. This restriction will be lifted when infrastructure liberalization has occurred in France and Germany and opportunities exist in France and Germany for basic public switched voice resale services to be provided on a competitive basis.[73]

Second, Sprint is subject to regulation as a dominant carrier with respect to the provision of U.S.-international services on the U.S.-France and U.S.-Germany routes.[74] This restriction is a result of Sprint's relationship with Deutsche Telekom and France Telecom, which are both considered to be dominant carriers in their home markets. This restriction will apply until Sprint can allay fears of any future anti-competitive effects in the United States stemming from its connection to Deutsche Telekom and France Telecom.[75]

Third, Sprint may neither directly nor indirectly accept any "special concessions" from any foreign carrier or administration, including both Deutsche Telekom and France Telecom, in connection with traffic or revenue flows between the United States and any foreign country, including Germany or France.[76] The FCC defines "special concessions" to include any arrangements that affect traffic or revenue flows to or from the United States that are offered to a particular U.S. carrier but not to other similarly situated U.S. carriers

69. 15 U.S.C. §§ 18, 21 (1994) (§ 7 and § 21 of the Clayton Act respectively).

70. *See* FCC 95-498, *supra* note 51, at 1859.

71. *See id.* at 1866.

72. *See id.* at 1867.

73. *See id.* at 1868-69.

74. *See id.* at 1867-68. FCC dominant carrier requirements include the following: A tariff filing on 14 days notice; prior Section 214 authorization for circuit additions or changes; the filing of quarterly traffic and revenue reports; and upkeep of provisioning and maintenance records that cover the network facilities and services a dominant, foreign-affiliated carrier procures from its foreign carrier affiliate. *See id.* at 1867.

75. *See id.* at 1867.

76. *See id.* at 1869.

that are authorized to serve a particular route.[77]

Fourth, the FCC required Sprint to obtain written assurances from France Telecom that it would lower its accounting rates to a level more in line with current U.S.-U.K. and U.S.-German prices. The U.S.-France rates were 28 percent above these other levels, a deviation which the FCC determined was unjustified.[78]

Fifth, Sprint will be required to file annual reports relating to the status of the telecommunications markets and regulatory regimes in France and Germany. If by spring 1998 France and Germany have not implemented the market liberalization assurances they made, the FCC will initiate proceedings to consider whether the public interest continues to be served.[79]

IV. ANALYSIS

This Note argues that the ECO analysis is flawed for three reasons. First, the FCC's statutory authority to create and implement the ECO analysis is unclear. Second, the ECO analysis leads the FCC to interfere in U.S. trade policy. Finally, implementation of the ECO test seems to produce several curious results, which are likely to have a chilling effect on the flow of investment capital into the U.S. telecommunications market.

A. FCC Authority to Impose the ECO Analysis

In its Notice of Proposed Rulemaking (NPRM), the FCC requested comments on the scope of its jurisdiction to consider an effective market access test over foreign markets.[80] In its final Foreign Carrier Entry Order, the FCC concluded that the ECO analysis was within its authority under Section 1, Section 214, and Section 310(b)(4) of the 1934 Act.[81] Although the FCC claimed that most commentators to the NPRM agreed that FCC jurisdiction existed, upon closer inquiry, jurisdiction seems doubtful.[82]

77. *See id.* at 1869 n.166 (citing 47 C.F.R. § 63.14).

78. *See id.* at 1872.

79. *See id.* at 1871, 1872. The FCC cannot act directly against the French or German governments for not fulfilling their assurances to deregulate their telecommunications markets by 1998. *See id.* at 1872. But the FCC suggested that it might take direct measures against Sprint for taking unfair competitive advantage of any halt in market liberalization. These measures, it suggested, could even include revoking the authorization of Sprint's line to Europe. *See id.*

80. *See* In the Matter of Entry and Regulation of foreign-affiliated Entities, 10 F.C.C.R. 5256, 5270-71 (1995) [hereinafter FCC 95-53].

81. *See* FCC 95-475, *supra* note 7, at 3956.

82. *See id.*

1. *Section 1 Authority*. The FCC found authority for the ECO analysis in Section 1 of the 1934 Act, which charged the FCC to create a "rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges."[83] This language in the 1934 Act's preamble seems a tenuous base for FCC authority. The preamble in Section 1 does not provide a delegation of authority to the FCC.[84] Instead of a broad delegation of authority to regulate "foreign commerce in wire and radio communication,"[85] the only perceptible delegation of power in Section 1 is to "execute and enforce the provisions of this chapter."[86]

Assuming, however, that the preamble in Section 1 does delegate authority, the logical extension of the FCC's reasoning seems to reveal an excessive result. It would seem to allow the FCC to order pro-competitive reforms upon foreign governments. Examples could include price caps, use of American cost-accounting rules, and the approval of certain tariffs—all premised on a connection to the goal of making US-international services available at a reasonable cost. But this connection between ensuring reasonable cost service and the use of the ECO analysis is weak. Under the pressure of administrative law, the statutory language must be capable of accommodating a reasonable interpretation by the FCC.[87] Such a weak connection is arguably an unreasonable interpretation.

Moreover, because the FCC had previously concluded that it lacks authority to act solely on "a desire for reciprocity in international investment policies,"[88] the FCC should have provided a "reasoned analysis" to support reversing its previous policy.[89] This

83. *Id.*; *see also* 47 U.S.C. § 151 (1994).

84. The FCC was created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio . . . ." 47 U.S.C. § 151 (1994). According to legislative records: "Section 1 contains a declaration of the purposes of and necessity for the [Communications Act] and establishes the Federal Communications Commission." H.R. REP. NO. 73-1850, at 4, *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 726 (Max Paglin ed., 1989).

85. 47 U.S.C. § 151 (1994).

86. *Id.*

87. *See* Chevron USA v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984).

88. In the Matter of Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licensees in the Cable Television Relay Service, 77 F.C.C.2d 73 at 79 (1980) [hereinafter FCC 80-156]. In a parallel proceeding to this case, the FCC rejected foreign ownership restrictions on cable operators as a means of leveraging open foreign markets to U.S. investment. *See id.* The FCC admitted that it lacked "responsibility for investment policy with respect to communications systems in foreign countries." *Id.*

89. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29, 57 (1983).

was not discernible from the FCC's Market Entry Order.

2. *Section 2(a) Authority*. Sections 2 and 3 of the 1934 Act specify both the statute's applicability and define its key terms. Section 2(a) provides: "[T]his chapter shall apply to all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States, and to all persons engaged within the United States in such communication . . . ."[90] This provision is further clarified by Section 3 which defines "foreign communication" as "communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States."[91]

This source of jurisdictional authority is also suspect. These sections limit the FCC's jurisdiction to matters involving "communication or transmission," not investment. When addressing the similar issue of foreign ownership restrictions on cable companies as a mechanism for opening foreign markets, the FCC explained that its responsibilities relate to

> telecommunications within the United States and between the United States and foreign countries. This does not imply, however, any responsibility for investment policy with respect to communications systems in foreign countries. We do not believe a desire for reciprocity in international investment policies by itself provides an adequate basis for action on our part.[92]

Although other sections in the 1934 Act may restrict investment, the sections at issue here for justifying the ECO analysis do not and, as a result, are presumably improper foundations for the creation of the ECO analysis.

3. *Section 214 Authority*. The FCC concluded that it also had jurisdiction under the 1934 Act "to adopt the effective competitive opportunities analysis as part of our public interest determination under Section 214 . . . ."[93] In support of this conclusion, the FCC enumerated previous cases where it had already considered "the

90. 47 U.S.C. § 152(a) (1994).

91. 47 U.S.C. § 153(f) (1994).

92. FCC 80-156, *supra* note 88, at 78-79.

93. FCC 95-475, *supra* note 7, at 3873 and 3956.

competitiveness of foreign markets."[94] These cases, however, only focused on the anti-competitive effects of foreign carrier entry into the U.S. market.[95] The FCC did not explain this apparent discrepancy in its analysis and instead supported its jurisdictional use of Section 214 by simply repeating two of its primary reasons for implementing the ECO analysis.[96] First, the FCC stated its goal of preventing anti-competitive conduct in the U.S.-international route service market.[97] This application of FCC authority with respect to the U.S. market alone would be clearly within its jurisdiction.[98] However, the FCC appended to this acceptable exercise of jurisdiction a second dubious goal, namely to "encourage foreign governments to open their communications markets to competition."[99] The FCC then attempted to link these two goals by adding a seemingly unsupported conclusory statement: "Further, we find that only with effective competitive opportunities to compete at the foreign end can . . . the prevention of anti-competitive conduct actually be achieved."[100] Thus the FCC attempted to link a valid use of jurisdiction and an invalid use with an unsupported sleight of hand.

In addition to these unaddressed concerns, other questions arise regarding the use of Section 214 as a proper source of authority for the creation of the ECO analysis. As mentioned previously, there are four triggers that initiate review by the FCC under Section 214. The FCC's use of the ECO analysis is triggered when a foreign carrier enters the U.S.-international services market by "acquir[ing] or operat[ing]" a "line." If a controlling investment by a foreign carrier was at issue, normal FCC review (i.e., ignoring the separate question of whether Section 214 approval may be used as a coercive trade device) under Section 214 would be appropriate because the acquisition or operation of a line was involved. The FCC's use of the ECO

94. *See id.* at 3957 (citing In the Matter of International Competitive Carrier Policies, 102 F.C.C.2d 812, 843 (1985); Telefonica Larga Distancia de Puerto Rico, 8 F.C.C.R. 106, 109 (1992); AmericaTel. Corporation, 9 F.C.C.R. 3993, 4000 (1993)).

95. *See* FCC 95-475, *supra* note 7, at 3958.

96. *See id.* at 3958.

97. *See id.*

98. *See* 47 U.S.C. § 152 (a)(1994).

99. FCC 95-475, *supra* note 7, at 3958.

100. *Id.* The FCC makes only the barest attempt to support this statement. *See id* at 3880. It leaves unanswered the relevant question of why previous safeguards are inadequate to stop anti-competitive conduct. The FCC concluded simply that its previous safeguards are not "optimal" and that "ultimately the most potent safeguard" is the imposition of full competition in the foreign market. *See id.* The foundations for these heavily qualified statements—and rejection of past FCC policy—again are left unsupported by facts.

analysis, however, does not limit review to controlling interests.[101] Based on the FCC's new "affiliation" standard, Section 214 review would occur upon a non-controlling investment.[102] This new standard presents an extraordinary interpretation by the FCC. Yet, the FCC left unexplained how a non-controlling investment (i.e., the purchase of a minority stake in a carrier that owns a line) could qualify as an "acquisition" of a line. Also unexplained is how a non-controlling investment in a carrier that already operates a line in the U.S.-international market translates into the foreign minority-investor's "operation" of the affiliate's line.[103]

While a complete study of these issues cannot be completed in this Note, two further considerations warrant brief mention. The D.C. Circuit described the principal purpose behind Section 214 as "prevention of unnecessary duplication of *facilities*, not regulation of *services*."[104] Therefore, the FCC's use of Section 214 as a means to regulate services deserves thorough examination. Also Section 214 fails to specifically authorize reciprocity requirements on foreign governments. Although this silence is not dispositive, the FCC should more fully explain why both Congress and the President have specifically authorized the FCC to consider reciprocity measures in limited contexts[105] yet failed to do so with respect to Section 214.

4. *Section 310(b)(4) Authority*. As with Section 214, the FCC concluded that it had jurisdiction under the 1934 Act "to adopt the effective competitive opportunities analysis as part of our public interest determination under Section . . . 310(b)(4) . . . ."[106] The FCC relied upon "a specific mandate under Section 310(b)(4) to allow foreign investment unless . . . the investment is inconsistent with the

101. *See id.* at 3961.

102. *See id.*

103. The FCC's sole attempt to address these issues improperly cites *United States v. Storer Broadcasting Co.* The FCC points to this case stating: "Congress' failure to grant express authority to [the] Commission to regulate data processing services did not preclude the Commission from doing so pursuant to its general mandate under Section 1 and broad and comprehensive rule making authority." *Id.* at 3960 n.313 (citing United States v. Storer Broadcasting Co., 351 U.S. 192, 200-03 (1956)) This support is less than convincing, however. The FCC cites a case interpreting its breadth of powers where no statutory language speaks to the issue, but attempts to use it to support its direct contravention of Congress' statutory command.

104. MCI v. FCC, 561 F.2d 365, 375 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (emphasis added).

105. *See, e.g.*, 47 U.S.C. § 35 (1994) (§ 2 of the Submarine Cable Landing License Act of 1921); 47 U.S.C. § 305(d) (1994); 47 U.S.C. § 308(c) (1994); 47 U.S.C. § 310(c) (1994); Exec. Order No. 10530, 3 C.F.R. 189 (1954-1958).

106. FCC 95-475, *supra* note 7, at 3823, 3956.

public interest."[107] The FCC attempted to link the pressuring of foreign governments under the ECO analysis to the U.S. public interest by stating: "The effective competitive opportunities test will promote increased competition in the U.S. telecommunications market . . . by reducing rates . . . , increasing the quality of services, and encouraging the development of new and innovative services for U.S. consumers."[108] However, this base of authority is problematic.

The congressional purpose underlying the Section 310(b) restrictions was national security.[109] Even the NPRM acknowledges that Congress' goals in enacting Section 310 were "national security and preventing alien activities against the government during a time of war."[110] But the connection between this Congressional purpose and the ECO analysis' goal of opening foreign markets to U.S. investment seems remote. It is unclear how a foreign country's internal laws regarding investments in its telecommunications networks correlates with a threat against the U.S. when posed by citizens of that country that are permitted to hold an indirect interest in a U.S. radio licensee. This correlation should, at a minimum, be explained more clearly by the FCC.

No specific authorization is given to the FCC under Section 310(b)(4) to consider reciprocity issues.[111] In contrast, Congress has, as previously discussed, granted authority to the FCC in other provisions of Title 47 to consider reciprocity issues.[112] Though the "public interest" standard is broad, it must be read in context.[113] Because Congress has granted authority to the FCC to examine reciprocity in other sections of Title 47—even in the neighboring subsection 310(c)—the FCC should more fully explain how its creation of the ECO test can possibly be based on Section 310(b).

107. *Id.* at 3964.

108. *Id.*

109. *See* Robert G. Morse, *European Union Mobile Telecommunications Policy and the Act of 1934: Can Congress Avoid A Collision on the Information Superhighway*, GEO. WASH. J. INT'L. L. & ECON. 197, 232 (1995).

110. FCC 95-53, *supra* note 80, at 5263.

111. *See* 47 U.S.C. § 310(b)(4) (1994).

112. *See* 47 U.S.C. § 35 (1994); 47 U.S.C. § 305(d) (1994); 47 U.S.C. § 308(c) (1994); 47 U.S.C. § 310(c) (1994); Exec. Order No. 10530, 3 C.F.R. 189 (1954-1958).

113. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943).

B. Possible FCC Infringement Upon U.S. Trade Policy

1. *Telecommunications Trade Act of 1988.* The Telecommunications Trade Act of 1988[114] (1988 Act) establishes a detailed framework in which telecommunications trade issues may be bilaterally resolved by the executive branch and United States Trade Representative (USTR), with oversight and direction by Congress.[115] These trade issues include the openness of foreign markets to U.S. products and services—issues closely paralleled by those in the ECO analysis.[116] In addition to these similar purposes, the 1988 Act also requires the USTR and the President to consider factors identical to those in the FCC's ECO test.[117] Because Congress has already delegated to the executive branch policies and procedures almost identical to the FCC's new ECO analysis, the necessity and propriety of the ECO analysis is unclear.

Congress has previously rejected a provision that would have granted the FCC much of the same trade power it now seeks to exercise. That rejected provision would have allowed that "in making decisions on the basis of the public interest, convenience, and necessity, the FCC should, where appropriate, take into account the impact of international trade on the ability of the U.S. telecommunications industry to be competitive in the international marketplace . . . ."[118] The final legislation, however, reserved only a data collection role for the FCC.[119] In fact, the House Conference Report that accompanied the final bill noted "[t]he requirement that the FCC submit . . . certain data . . . should not be interpreted as suggesting that the FCC has *any legal authority to formulate trade policy*."[120]

The FCC's response to these concerns of conflicting jurisdiction over trade issues relating to telecommunications is that its ECO test

114. 19 U.S.C. §§ 3101-3111 (1994).

115. *See id.*

116. *See* 19 U.S.C. § 3101(b)(5)(1994) (providing one purpose as "to achieve a more open world trading system for telecommunications products and services through negotiation and provision of mutually advantageous market opportunities" for U.S. businesses).

117. *See, e.g.*, 19 U.S.C. § 3103(b) (1994); 19 U.S.C. § 3104(a) (1994); . 19 U.S.C. § 3104(b)-(d) (1994); 19 U.S.C. § 3106(a)(1)(B) (1994); 19 U.S.C. § 3106(a)(2) (1994); 19 U.S.C. § 3106(b) (1994); 19 U.S.C. § 3106(c) (1994).

118. H.R. CONF. REP. NO. 100-576, at 658-59 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1691-92.

119. *See* 19 U.S.C. §§ 3109(a), 3110 (1994).

120. H.R. CONF. REP. NO. 100-576, at 659 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1692 (emphasis added).

and the "USTR's actions under the [1988 Act] are separate, but complementary, approaches."[121] The FCC also quotes the National Telecommunications and Information Administration's (NTIA) view that the FCC must give the executive branch "great deference" regarding, among others, trade issues in telecommunications.[122] It is arguable, however, that the FCC would never be free to disregard the executive branch's views. But without the ability to make independent decisions, the FCC's goal of pressuring foreign governments to open their telecommunications markets would be largely unattainable. Foreign governments would simply plead their case directly to the executive branch.

In short, serious questions exist concerning the FCC's authority to encroach upon powers delegated by Congress to the executive branch and USTR on trade in telecommunications. Furthermore, any attempt by the FCC to pressure foreign governments to open their telecommunications markets will be undermined by the FCC's obligation to show "great deference" to the executive branch.

2. *Multinational Agreement on Basic Telecommunications*. On February 15, 1997, the international telecommunications negotiations sponsored by the World Trade Organization (WTO) were concluded and an agreement designed to further liberalize telecommunications markets around the world was reached.[123] The United States was a party to this agreement, which is designed to phase out monopolies and restrictions on competition.[124] It requires parties to permit foreign companies to compete with state monopolies and local phone companies starting in January 1998,[125] and will open the former phone monopolies to foreign investment.[126] All parties to the agreement will draft clearer competition rules for the telecommunications markets and guarantee fair competition through regulatory oversight.[127] The

121. FCC 95-475, *supra* note 7, at 3962.

122. *See id.* at 3888, 3962. The NTIA was one of over fifty parties to file a comment with, and one of thirty-five parties to submit a reply comment to, the FCC. *See id.* at 3877, 3981-83.

123. *See* Anne Swardson & Paul Blustein, *Trade Group Reaches Phone Pact; Experts Say Deal Will Result in Cheaper Long Distance Rates*, WASH. POST, Feb. 16, 1997, at A33.

124. *See Global Services: Telecom Executives Pleased with WTO Accord But Await Details*, TELECOMM. REP., Mar. 24, 1997, *available in* WESTLAW, 1997 WL 7757227.

125. *See* John Alden, *WTO States Approve World Telecoms Liberalization Agreement*, Deutsche Presse-Agentur, Feb. 15, 1997, *available in* WESTLAW, ALLNEWSPLUS database.

126. *See* Mike Mills, *Trade Agreement to Boost Global Phone Competition*, WASH. POST, Feb. 18, 1997, at C8; Robert J. Samuelson, *Global Phone Power*, WASH. POST, Feb. 26, 1997, at A19.

127. *See* Samuelson, *supra* note 126, at 19; Alden, *supra* note 125, *in* WESTLAW,

sixty-nine countries currently involved have until November 1997 to ratify the agreement[128] which will then take effect on January 1, 1998.[129]

In addressing the U.S. industry's concern about opportunities abroad, the final round of negotiations focused on foreign ownership limits.[130] The agreement opens the U.S. market to unlimited foreign investment, but the United States reserves the right to limit this access if other nations fail to remove remaining trade restrictions.[131] This reservation of rights is aimed at those countries that continue to limit foreign ownership to minority levels.[132]

With the conclusion of these talks at the WTO, new concerns over the future legality of the ECO analysis have been raised.[133] The Japanese government, for one, has indicated that the ECO analysis violates the most-favored-nation treatment rule because treatment depends upon nationality.[134]

The objective of the WTO agreement is to permit businesses to acquire controlling stakes in foreign telephone carriers in return for comparable access. This objective is identical to the one the FCC had in mind when creating the ECO analysis. Specifically, the FCC sought to "encourage foreign governments to open their communications markets"[135] by creating "effective competition" opportunities.[136] As a result, the WTO agreement resolves concerns similar to those which motivated the FCC to create the ECO analysis originally.

The FCC itself acknowledged that resolution of these issues by

ALLNEWSPLUS database.

128. *See* John Alden, *News Highlights: Markey Has Bill to Preserve Broadcast Foreign Ownership; Republicans Endorse WTO Pact*, TELECOMM. REP., Mar. 24, 1997, *available in* WESTLAW, 1997 WL 7757191.

129. *See* Swardson & Blustein, *supra* note 123, at A33.

130. *See U.S. Poised to Accept Global Telecom Pact*, L.A. TIMES, Feb. 15, 1997, at D1.

131. *See* Jeffrey Silva, *Lawmakers Say Telecom Pact Puts the U.S. at a Disadvantage*, RCR RADIO COMM. REP., Mar. 24, 1997, *available in* WESTLAW, 1997 WL 8324088.

132. Examples of such minority foreign ownership limits include: Canada - 46.7 percent; Japan - 20 percent; Mexico - 49 percent; South Korea - 49 percent; and India - 49 percent. *See U.S. Trade Report Shows Telecom Barriers Remain Despite Global Reforms*, COMM. DAILY, Apr. 1, 1997, *available in* 1997 WL 3943310; *USTR's Task of Eliminating Telcom Trade Barriers Far From Over*, COMM. TODAY, Apr. 2, 1997, *available in* 1997 WL 7465947.

133. Because the talks have been concluded, discussion of the FCC's probable violation of the General Agreement on Trade in Services "standstill" provision will not be discussed in this Note.

134. *See Panel Criticizes U.S. Telecom, Shipping Measures*, Japan Econ. Newswire, Mar. 31, 1997, *available in* WESTLAW, ALLNEWSPLUS database.

135. FCC 95-475, *supra* note 7, at 3877.

136. *See id.*

the executive branch would limit its authority. When creating the ECO analysis in its Foreign Carrier Entry Order, the FCC recognized this problem by stating: "If the Executive Branch succeeds in negotiating greater market access for U.S. carriers in exchange for still greater liberalization of the U.S. basic telecommunications market, then we would . . . amend the rules we adopt today as necessary."[137] Although some critics have called on Congress to implement the WTO agreement by removing the U.S. statutory limits on foreign investment, U.S. Trade Representative Charlene Barshefsky insists that the FCC's discretionary authority is enough—presumably by revoking the ECO analysis.[138] The acting FCC International Bureau chief, Peter Cowhey, recently indicated that the FCC would likely reexamine the ECO analysis in a new Notice of Proposed Rulemaking sometime in late May of 1997.[139] However, if a bill sponsored by Representative Oxley is successful, the 25 percent limit on indirect foreign investment of common carrier licensees would be eliminated altogether.[140] This bill, if successful, would seem to end the need for the ECO analysis. Even if the Oxley bill is unsuccessful, it is unclear whether continued FCC authority to block foreign ownership would yield the market access that the WTO agreement requires.

C. Disincentive to Investment

The FCC, through its ECO analysis, appears to pursue two goals: (1) to protect U.S. consumers against higher prices stemming from foreign monopolies, a legitimate safeguard issue; and (2) to promote trade policy, a seemingly illegitimate desire to force open foreign markets. The approval of an investment similar to the Sprint case under the ECO analysis requires a U.S. government agency to oversee European national economic policy. Indeed, the FCC has threatened to reexamine the Sprint investment if the French and German

137. *Id.* at 3965.

138. *See* Thomas J. Duesterberg, Editorial, *Foreign-Ownership Ban Slows Telecom Competition*, INVESTOR'S BUS. DAILY, Apr. 1, 1997, at A28, *available in* WESTLAW, 1997 WL 4602847; Silva, *supra* note 131, at WESTLAW, 1997 WL 8324088. In contrast to the WTO agreement's effect on common carrier investment, Rep. Edward Markey has drafted legislation intended to maintain the 25 percent cap on foreign ownership of television and radio broadcasting licenses which were not part of the WTO agreement. *See U.S. Regulatory Scene: Markey Unveils Bill on Foreign Ownership*, TR INT'L, Mar. 28, 1997, *available in* WESTLAW, 1997 WL 9319405.

139. *See No U.S. Implementation Legislation Necessary for WTO Agreement, Panelists Say*, COMM. TODAY, Mar. 24, 1997, *available in* WESTLAW, 1997 WL 7465820.

140. *See* Alden, *supra* note 128, at 1997 WL 7757191.

telecommunications markets do not, as pledged, offer equivalent market opportunities to U.S. companies. But the FCC can not take action against the governments of either France or Germany for failing to liberalize their markets "enough." As a result, one of the few options left the FCC would be to punish Sprint directly, thus punishing Deutsche Telekom and France Telecom indirectly through their minority ownership interests, for the shortcomings of European national legislatures.

This result creates a financial risk for the U.S. telecommunications industry, and U.S. consumers in general. If the policies developed at the FCC interfere too greatly with foreign governmental and corporate independence, then investments of the kind sought by Deutsche Telekom and France Telecom will be reduced in scope or avoided altogether. By reducing the level of investment capital and foreign know-how available in the U.S., the whole U.S. economy would suffer. The FCC's new policy could prove to be a disincentive to investment in the U.S. and, indeed, counter to the public interest.

As shown in the Sprint case, although the FCC determined that the markets in France and Germany were not fully competitive under its ECO analysis, the FCC nonetheless granted its permission. One should then ask: Why the costly exercise of creating a test that generates both greater complexity and possible disincentives to invest in the U.S., that leaves us, in the end, with an indeterminate conclusion? The FCC's desire to prevent anti-competitive effects in the U.S. market can be resolved by anti-competitive safeguards, as shown, once again, by the Sprint case. It seems that the FCC's unsupported rejection of the power of safeguards turns out, in the final analysis, to be quite potent indeed.

V. CONCLUSION

After reviewing the current state of the law in the U.S. regarding foreign investment in the U.S. telecommunications industry, this Note concludes that the FCC's ECO analysis is flawed. First, it is not clear that the FCC even has the jurisdiction to adopt such a test. In addition, the FCC's asserted policy of opening foreign markets to more liberalized trade in telecommunications seems to be more properly pursued by other parts of the government, such as the USTR. In the end, this regulatory regime is likely to act as a disincentive to foreign investment in U.S. telecommunications companies. Given the capital-intensive nature of the industry, this is truly an unfortunate result. This Note urges the FCC to grant the ECO analysis serious further consideration.

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