Testimony on Foreign Ownership Before the U.S. Senate Committee on Commerce, Science, and Transportation on SR-253

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Chairman Pressler, Senator Hollings, Members of the Commerce Committee:

Last June I had the pleasure to chair a panel at a CEO summit in Brussels, with you, Mr. Chairman, as a speaker. I well remember that you were quite conciliatory, pointing to instances of American protectionism such as the restrictions on foreign ownership in communications. And yet, the European respondents would not budge. The U.S. was described as anti-competitive, while Europe was wide open. I felt like Alice in Wonderland. A few days later, on June 16, 1994, you addressed the U.S. Senate. That speech didn't get the attention it would today, so let me quote a few sentences:

> ...I found this summit to be a real eye-opener. I was horrified--and that is not too strong a word to use--by the unremitting resistance of the Europeans to my polite suggestion that they need to open up their telecommunications market . . . [They] have little interest in breaking down their commercial barriers . . . [They] talk a good line about opening their telecommunications market, but to American firms trying to crack Fortress Europe, this progress appears to be snail-like in pace.

Today, we are engaged in the next major round in the evolution of American telecommunications--continuing the efforts of both parties, all three branches of government, and the States--to move from regulated monopoly to open and deregulated competition. Two of the questions which must be answered are how to deal with the vestiges of protectionism in our law and regulation, and how to get other countries to do the same. I am happy to see that you have addressed both questions as you promised in Brussels a year ago. The FCC, too, issued a Notice of Proposed Rulemaking. Vice President Gore raised the issue last month in Brussels at the G-7 meeting. And, the Commerce subcommittee of the House of Representatives just held hearings on Congressman Oxley's HR 514.

It makes no sense to maintain ownership rules dating to 1914, when a German-owned high-power radio transmitter on Long Island, N.Y., sent messages to German naval ships in the Atlantic in violation of American neutrality. (The 1912 Radio Act still permitted indirect foreign ownership). In the best of worlds, all countries would fully open markets to each other in multilateral free trade. Unfortunately, countries are at different points of telecom policy evolution. The UK, Japan, Australia, New Zealand, and Sweden are reasonably open to domestic and sometimes foreign competition, or about to become so. Yet, even the UK--everyone's Exhibit Nr. 1 for openness--moved out of its cozy domestic duopoly arrangement only in 1991 and still maintains a closed duopoly for international service. And in cable TV service Britain let in Americans only when not enough interested Europeans showed up.

Of the other countries of Europe and the Pacific, many are moving from state monopoly to competition, but many still have a long way to go. It is a historic process, marked by painful progress that we should applaud, and by significant internal opposition that we should recognize. It is best for us not to be confused by liberalizations that are more smoke and mirror than fiber and microwave: *paper liberalization*, with none of the details worked out; *eye-gleam liberalizations*, promising the future--Europe 1998, Singapore 2007--and *"everything except" liberalization*, opening "everything except" 85% of the respective telecommunications market.

No doubt, many of these countries will become competitive, but what do we do in the meantime? Is it a second-best solution for the US to open unilaterally, or is it third-best only, less preferred than requiring reciprocity?

The arguments for unilateral market opening are that we should not care if others restrict their own markets and hurt their own economies; let us focus instead on making US markets even more competitive, attract foreign investment and technology, give consumers more options, and protect freedom of expression. By setting a shining and successful example the US will lead, shame, and attract others to follow. Moreover, a full and unconditional opening is easy to administer.

One drawback to this approach is that it negates any inducement for other countries to open their markets to American carriers and service providers. Such negotiations are taking place now as part of the GATS, optimistically scheduled to be concluded by April 1996. These restrictions have been estimated in one study (Economic Strategy Institute) to represent almost one trillion dollars of revenues denied for the decade of the 90's ($874 billion for 9 years, $81.2 billion this year), and rising. Another study (Strategic Policy Research) similarly finds that by removing impediments to free trade, and reforming the international settlement rate system, the U.S. would experience growth of 120,000 to 260,000 new jobs, increase GDP by

$120 to $160 billion, and improve the overall balance of trade by $50 to $60 billion per year. We need not accept those numbers beyond observing that they indicate big ticket items affecting American jobs, dividends, equipment sales, information services, marketing opportunities, and the trade balance. Operations abroad may also generate economies of scale and scope benefitting American consumers at home.

Second, unilateral opening tilts the level playing field. Networks are not like refrigerators where the best and cheapest tends to win in the marketplace. One buys connectivity from point A to point B; but if A is open to all while B is restricted to its own monopoly company, that company will get the business. Consumers today want seamless one-stop service, which gives competitive advantages to a company controlling a critical and protected territory, even if it has no efficiency advantage. Such a protected foreign company could, for example, extend its domestic monopoly over its customers vertically into the US by carrying all of that country's outgoing traffic inside the U.S. to the local market, effectively taking that traffic away from competition among carriers for enduser business. For global competition, both points A and B need to be open,, not just one of them.

Thus, a unilateral removal of barriers may benefit Americans as consumers in the short run but harm them as producers of communications equipment and services over time. And the benefit to consumers will be moderated by the fact that most American communications markets likely to be targeted by foreign entrants are already substantially competitive.

This leads to the question of reciprocity. The problem with reciprocity is that it is easy to state as a general proposition but hard to operationalize. Nobody stands still, every market is different, there are hundreds of submarkets, each with its own particular rules.

Also, reciprocity requirements beget the same requirements, or stricter ones still, by other countries. Thus, one may reach a "reciprocity gridlock" that encourages continuous and time-consuming inter-governmental negotiations--like last month's high-visibility but low-productivity G-7 event in Brussels.

So what to do?

Strictly speaking, you need not do anything, since the FCC already has discretion under 310(b)(4) to let non-governmental foreigners own anything they want to so long as it is not contrary to public interest. The Commission has historically interpreted this quite narrowly, but Congress can always redefine the public interest for the Commission. It seems the FCC is already doing so in its NPRM. Even the FCC need not issue any new rules and simply exercise its statutory discretion in a new way. Practically speaking, however, you want to reform section 310(b) to focus thinking, set national policy, reduce uncertainty, send a signal to other countries, and take a molehill away from those who would make a mountain out of it in order to resist liberalization. And it **is** a molehill, because already today a foreign telecom company can own virtually everything except over-the-air licenses--and those they can lease and resell.

Your bill gives us back leadership and the moral high ground. by invalidating 310(b) conditionally on a USTR determination. This is a sound approach. I have several comments.

First: I like the fact that you do not try to micro-manage the conditions for market opportunities, and market definition. The shifting circumstances of any test defy codification, and you should resist calls for greater specificity by any interest group. It is much better to leave this to the FCC which has already embarked on the task. What your committee could do, however, is to give signals to the FCC that you do not seek mirror-image reciprocity; and that the determination should be based on actual telecom outputs, rather than on the minutiae of rules as inputs. For example, are telecom prices much higher for carriage from country X into the US than in the opposite direction?

Second: let the FCC rather than the USTR make the determination on market access. It has the expertise, staff, and ability to compare US conditions. Its independence can also provide some shelter if a determination is unpopular. As a practical matter, the USTR would likely follow the FCC's findings anyway, just as the FCC would accept the Executive's policy lead. If Executive branch authority is critical, you could give both the FCC and the USTR the ability to make a positive determination without requiring the other to concur.

Third: I would add a concrete incentive to other countries to reach multi-lateral or bi-lateral agreements with the US. Progress in the GATS Round will be difficult to achieve, if one considers that in several years of the Uruguay Round no basic telecommunications agreement was reached. So every little bit of help counts. This could be done by adding a phrase to the effect that "a multi-lateral or bi-lateral agreement on telecommunications trade among the United States and other countries would constitute such a determination, unless expressly excluded in the agreement."

Fourth: To reduce litigation for dilatory purposes after a determination, you might want to add language that makes the granting of a stay by a court presumptively unlikely.

Fifth: I would substitute for the drafted condition ("mutually advantageous market opportunities") the term "effective market access." The former, by requiring mutual advantage, might not be met if an American company proves too successful. The latter matches the FCC's terminology, which has the advantage of being already part of a rulemaking process that would clarify standards and definitions.

Relatedly, the draft language speaks of "market opportunities for...*licenses*." Yet a license could be granted to a US company under circumstances that still prevent competitive viability, such as without interconnection arrangements, access charges that create a price squeeze, etc.

Sixth: While the inclusion of broadcasting as open to foreign ownership is correct, it is also true that the issues in broadcasting are different than those for common carriage, being more connected with general standards for broadcasters. I would not want to see the common carriage element fail to receive a majority by being tied to broadcasting. Therefore, you may want to deal with broadcasting separately.

Seventh: It is not clear in the draft language whether a determination of openness is required for all of the media listed (broadcast, common carriers, or aeronautical enroute or fixed radio stations) or for either of them singularly.

The second part of the draft bill section deals with a "Snapback for Reciprocity Failure." The intent of this clause is to put some teeth into enforcement, which is laudable. However, the present language invalidates existing licenses upon the USTR determination of non-openness, which will be destabilizing. Other countries, no doubt, will enact mirror image provisions, and this will provide a tool for governments to periodically threaten American companies' licenses abroad. For this reason, I would leave the actual remedies to the FCC. Such remedies could then include, for example, partial or gradual divestiture, stricter controls of interconnection and unbundling, or other safeguards, rather than the all-or-nothing of a license loss that might, in fact, discourage a negative determination in the first place.

Finally: while you are at it, there are a few other dusty ownership restrictions on the books that you may want to give a proper burial also, such as the Telegraph Act of 1900 and the Submarine Cable Landing Act of 1921.

Conclusion: A unilateral flash-cut opening has the advantage of simplicity but reduces leverage in the upcoming trade negotiations. Instead, the United States should offer in its legislation an "anticipatory flash cut," with full market opening in the US already being assured to other countries upon reaching a multilateral trade agreement. This would give us the high ground, and help the reciprocity spiral move towards liberalization. Even without a multilateral agreement, your bill will increase openness and consumer benefits at home, reward similar openness abroad, and increase opportunities for American exporters. Those other countries that are committed to market liberalization should have no problem with these provisions, and those that are less committed might find them another reason to reevaluate their restrictions to competition.

Senators, I appreciate the opportunity to speak to you, and am ready to be of assistance on this or other topics of the major reform task before you.