

# Deal or No Deal: Reinterpreting the FCC’s Foreign Ownership Rules for a Fair Game

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## I. INTRODUCTION

Fourteen-year-old girls, accompanied by their mothers, compete in weekly song and dance performances to win the ultimate birthday party and a talent contract with a television network. Four well-known judges try to shore up their waning fame as former celebrities by ripping apart the performances with theatrical and sometimes stinging criticisms.

Twenty-six models, identically-dressed and each bearing a metal suitcase, saunter onto a brightly-lit stage. Contestants guess the amounts in the suitcases; they agonize over taking the risk of guessing for more money or accepting settlement offers from a mysterious banker in an elevated and darkened glass chamber.

These are just two of the latest reality television shows captivating American audiences, with one possibly unexpected twist: they are both broadcast in Spanish. *Quinceañera* mirrors other successful reality shows, notably *American Idol*, except that the show's prize is based on the Latin-American/Hispanic tradition of celebrating a girl's entrance into womanhood at the age of fifteen, and the girls and judges are all Latin-American/Hispanic.<sup>1</sup> *Vas o No Vas* is identical in every respect to the new hit American show, *Deal or No Deal*, except that the multicultural yet identical models, contestants, host, and audience are all Latin-American/Hispanic.<sup>2</sup>

Popular American television programming is fast being transposed to appeal to Latin-American/Hispanic viewers as the Spanish-speaking populations in the United States and Latin America become critical markets for broadcasting networks. As of June 2005, the United States Census Bureau estimated that 41.3 million Latin-Americans/Hispanics resided in the country.<sup>3</sup> Mexico, an ever-growing market for telecommunications, boasts approximately seventy million residents from the ages of fifteen to

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1. See Telemundo Eventos, *Quinceañera*, <http://www.telemundoeventos.com/quinceanera/elshow.html> (last visited Nov. 6, 2007).

2. See Telemundo Eventos, *Vas o No Vas*, <http://www.telemundoeventos.com/vonv/> (last visited Nov. 6, 2007).

3. *Hispanic Population in U.S. Soars*, CBS NEWS, June 9, 2005, <http://www.cbsnews.com/stories/2005/06/09/national/main700582.shtml>.

sixty-four.<sup>4</sup> Both American and Mexican broadcasting companies are eager to capitalize on each country's burgeoning Spanish language markets.

With the changing racial and linguistic composition of the American market and the emerging strength of the Mexican market, American broadcast companies are facing a new competitive playing field. Mexican and other Latin-American broadcasting companies are guarding their own regional markets while aggressively pursuing growing Spanish-speaking American audiences; increasingly, regulated competition between the two countries has elevated to a no-holds-barred battle with uncertain legal boundaries. But the struggle over Spanish-speaking audiences is just one part of the global competition between the United States and other countries. The television broadcast community is truly international, and new competition over Spanish-language audiences merely exemplifies the broader efforts that broadcast companies are undertaking to target any nation with a substantial television-owning population.

This global competition is not without rules, at least within the United States. Section 310 of the Communications Act of 1934 ("Act") establishes the guidelines for when a foreign national is eligible to apply for a broadcast license from the Federal Communications Commission's ("FCC"). This provision sets forth limits on the percentage ownership that a foreign government or foreign agent may hold in an American broadcast license. The FCC currently interprets these limits on foreign ownership very leniently, favoring a policy of deregulation in an attempt to further open up the United States market. This interpretation of § 310, in turn, has influenced the FCC's formulation of criteria for granting and renewing broadcast licenses to foreign nationals under §§ 301 and 307 of the Act. This Note argues that once foreign nationals have cleared the hurdle of § 310's foreign ownership requirements, the licensing standards under §§ 301 and 307 are weakened and even ignored, allowing foreign applicants to engage in anticompetitive behavior in order to obtain broadcast licenses over domestic applicants.

This argument is illustrated through two notable broadcasting disputes that will be the subject of later sections of this Note. In 1994, the National Broadcasting Company ("NBC"), Columbia Broadcasting System ("CBS"), and the National Association for the Advancement of Colored People ("NAACP") filed a complaint and petition with the FCC alleging that Fox Broadcasting Company ("Fox") was violating the foreign ownership rules through its connection with the Australia-based News

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4. Central Intelligence Agency, *The World Factbook, Mexico* CIA – The World Factbook – Mexico, <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html> (last visited Nov. 6, 2007).

Corporation.<sup>5</sup> By violating the foreign ownership rules, NBC alleged, Fox was able to obtain numerous television broadcast licenses illegally and thus obtain an unfair advantage over NBC and other domestic broadcast companies. NBC asked that the FCC deny renewal of a number of Fox's broadcast licenses. The FCC declined to do so.<sup>6</sup>

More recently, Mexican broadcast companies TV Azteca and Televisa have thwarted NBC's attempts to break into the Mexican market; at the same time, the FCC has freely granted TV Azteca and Televisa license renewals to operate in the United States.<sup>7</sup> After documented reports of violent and aggressive behavior on the part of these Mexican broadcasters against NBC's Mexican affiliate, NBC filed a petition with the FCC asking the agency to deny renewal of TV Azteca's Los Angeles broadcast license; the FCC rejected NBC's petition and renewed TV Azteca's license.<sup>8</sup> TV Azteca and Fox are two examples of how the free-market, deregulatory policy behind § 310 has not had the desired result of opening up international competition and has instead promoted anticompetitive behavior leading to obstruction of the licensing requirements under §§ 301 and 307.

This Note first lays out the history of the FCC's regulation of foreign broadcast license holders and discusses the current regulation of foreign broadcast licensees under § 310. The current interpretation of § 310 affects license renewals under §§ 301 and 307, which are the topic of the second section of this Note. Furthermore, this Note, through case studies of Fox and TV Azteca, explores the problems that have arisen as a result of these interpretations of §§ 301, 307, and 310. Finally, this Note argues that the FCC must incorporate some requirement of reciprocity under § 310 if the agency indeed hopes to foster fair and legitimate international competition free of any anticompetitive behavior.

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5. Erik Larson, *Will Murdoch Be Outfoxed?*, TIME, Apr. 17, 1995, at 45, 45-47, available at <http://www.time.com/time/magazine/article/0,9171,982814-3,00.html>.

6. *Id.*

7. HispanicTips, *Azteca America Reports FCC Denies NBC's Objections Against Azteca America and Its License Renewal of Its Affiliate Station in L.A.*, available at <http://www.hispanictips.com/2007/04/17/azteca-america-reports-denies-nbcs-objections-against-azteca-america-license-renewal-affiliate-station-la/>.

8. *Id.*

## II. REGULATING FOREIGN OWNERSHIP OF BROADCAST LICENSES

### A. *Background: The National Security Concern*

The policy behind foreign ownership restrictions has undergone various transformations since the very first restriction appeared in 1912. This early restriction was based on national security concerns. After the United States Navy had conducted a study of the Japanese Army's use of wireless communications in the 1904 Russo-Japanese War, President Theodore Roosevelt requested that the navy bring the fledgling communications industry under government control.<sup>9</sup> The navy had succeeded in persuading "Congress of the potential military importance of radio, and foreign ownership restrictions were written into the Radio Act of 1912 to prevent foreign agents from transmitting radio messages, especially during wartime."<sup>10</sup>

Congress revisited the Radio Act of 1912 through the Radio Act of 1927, further restricting levels of foreign ownership by prohibiting foreign nationals from holding office in licensee companies and limiting foreign ownership of stock in licensee companies to twenty percent.<sup>11</sup> In the Communications Act of 1934, Congress created the foreign ownership restrictions that are still in effect today.<sup>12</sup>

Motivated by lingering World War I national security concerns, Congress used § 310 of the Act to close up any loopholes left over from the previous two Radio Acts and to prevent foreign domination, both direct and indirect, of American broadcast licenses.<sup>13</sup> Section 310 lays out the qualifications that foreign applicants must fulfill in order to apply for broadcast, radio, or common carrier licenses.<sup>14</sup> Ownership restrictions are specifically laid out in § 310 (b):

(b) Grant to or holding by alien or representative, foreign corporation, etc.

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9. Donna M. DiPaolo, *Foreign Ownership in Communications: Are the Restrictions Outdated?*, NAT'L DEFENSE UNIV. INST. FOR NAT'L STRATEGIC STUDIES, Oct. 1, 2002, <http://www.ndu.edu/inss/books/Books%20-%202000/essa/essafoca.html> (citing J. GREGORY SIDAK, FOREIGN INVESTMENT IN AMERICAN TELECOMMUNICATIONS (1997)).

10. *Id.*

11. Radio Act of 1927, ch. 169, 44 Stat. 1162 (repealed 1934).

12. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.).

13. See J. GREGORY SIDAK, FOREIGN INVESTMENT IN AMERICAN TELECOMMUNICATIONS 64 (1997).

14. This Note will focus primarily on the Act's application to television broadcast licensing.

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license 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 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;
- (4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, 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.<sup>15</sup>

National security, public interest, and competition were the three concerns under which the FCC evaluated § 310 (b), although the national security concern trumped the other two in importance for some time.<sup>16</sup> Until the mid-1990's, the FCC and federal courts took the national security concern very seriously and allowed very few partly foreign-owned companies to apply for broadcast licenses.<sup>17</sup> In many cases, the FCC cited national security as the main reason for denial of a license, giving a rundown of the very same legislative history described above.<sup>18</sup>

The national security concern's domination of the FCC's and the courts' interpretations of § 310 led many critics to categorize the provision as anachronistic; one critic even referred to the provision as a "sacred cow" that legislators have feared to touch.<sup>19</sup> Indeed, on its face, § 310(b) did seem to restrict foreign ownership to a degree that may seem unreasonable in light of the globalized economy and increase in free trade. This view resounded with corporations and trade groups who had been seeking legislative reform for years. As the Motion Picture Association of America explained in 1995:

Historically, the U.S. Government had been concerned that foreign control of mass media facilities would confer control over the content of widely available broadcast material, which could lead to the possibility of foreign propaganda and misinformation. These fears

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15 Communications Act of 1934, 47 U.S.C. § 301 (2006).

16. See 47 C.F.R. § 43.51 (a)-(e) (1999).

17. See, e.g., *Moving Phones P'shp. v. FCC*, 998 F.2d 1051 (D.C. Cir. 1993).

18. See *Seven Hills Television Co., License Renewal*, 2 F.C.C.R. 6867, 6893 nn. 25-29 (1987). See also *Data Transmission Co., Declaratory Ruling*, 52 F.C.C.2d 439, 440 (1975).

19. DiPaolo, *supra* note 9. See also Ian M. Rose, *Barring Foreigners from our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188 (1995).

were not unreasonable during a period when there were relatively few sources of information available to the public. MPAA does not believe that foreign ownership provides the same sort of risk in today's environment, where sources of information have multiplied tremendously.<sup>20</sup>

*B. Fall of the National Security Concern and Rise of the Public Interest Concern*

Interpretation of § 310 changed course in the mid-1990's. Much of this change was prompted by the new Telecommunications Act of 1996.<sup>21</sup> Although this piece of legislation did not affect the foreign ownership restrictions contained in the 1934 Act, it was still "the first major overhaul of telecommunications law in almost 62 years. The goal of this new law [was] to let anyone enter any communications business -- to let any communications business compete in any market against any other."<sup>22</sup> Building on this free-trade sentiment, the FCC's interpretation of foreign ownership restrictions began to focus more on a public interest concern centered on economic gains and less on an anachronistic national security concern.<sup>23</sup>

In order to clear up confusion surrounding these changes, the FCC's International Bureau laid out the new, competition-friendly application of § 310 (b) in the Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses.<sup>24</sup> These guidelines clarified the various provisions of § 310(b), specifically the last provision. While all of § 310 concerns foreign ownership restrictions, most foreign companies choose to pursue § 310(b)(4) rather than (b)(1), (b)(2), or (b)(3) because it provides the most flexibility and potential for actually obtaining a broadcast license. Section 310(b)(4) "establishes a 25 percent benchmark for investment by foreign individuals, corporations, and governments in entities that control a U.S." broadcast license.<sup>25</sup> The FCC has the discretion "to allow higher levels of foreign ownership unless it finds that such ownership is inconsistent with the public interest."<sup>26</sup> This concern with the "public interest" supplanted the national security concern.

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20. DiPaolo, *supra* note 9.

21. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

22. Telecommunications Act of 1996, FCC Web site, available at <http://www.fcc.gov/telecom.html>.

23. *See* Mkt. Entry and Reg. of Foreign-affiliated Entities, Report and Order, 11 F.C.C.R. 3873, para. 183 (1995) [hereinafter Market Entry Report].

24. Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses, available at: [http://www.fcc.gov/ib/Foreign\\_Ownership\\_Guidelines\\_Erratum.pdf](http://www.fcc.gov/ib/Foreign_Ownership_Guidelines_Erratum.pdf) (last visited Nov. 6, 2007).

25. *Id.* at 7.

26. *Id.*

In *Market Entry and Regulation of Foreign-affiliated Entities*, the FCC made it clear that they would indeed exercise discretion and embrace a policy of allowing higher levels of foreign ownership.<sup>27</sup> The limits set forth in § 310 (b) could be relaxed in order to promote competition in the international market.<sup>28</sup> Thus, the limits were easily stretched because the concern of “public interest” had become consonant with a desire for increased foreign investment in the American broadcast industry.

In addition to putting forth a general policy of encouraging foreign applications and international competition, the FCC issued a Foreign Participation Order upon the creation of the World Trade Organization’s (“WTO”) Basic Telecommunications Agreement. In the Foreign Participation Order, the FCC declared that WTO member countries would enjoy certain benefits and presumptive validity when applying for broadcast licenses.<sup>29</sup> A notable foreign licensing case,<sup>30</sup> *Applications of Voicestream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310 of the Communications Act (“Deutsche Telekom”)*, heralded this development.<sup>31</sup>

In *Deutsche Telekom*, the FCC announced that the public interest standard—in cases involving foreign entities holding licenses—should be decided in light of the Foreign Participation Order, a document setting forth the FCC’s commitment to international cooperation.<sup>32</sup> The Foreign Participation Order recognized that the United States, as a member of the WTO, was committed to fostering competition with other members. It reiterated that standards restricting foreign ownership of licenses would be relaxed in the spirit of encouraging international competition; it introduced a rebuttable presumption that anticompetitive concerns were not raised by indirect ownership of United States licenses by WTO member countries

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27. See Market Entry Report, *supra* note 23.

28. See Rules and Policies on Foreign Participation in the U.S. Telecomm. Mkt. & Mkt. Entry and Reg. of Foreign-Affiliated Entities, *Report and Order and Order on Reconsideration*, 12 F.C.C.R. 23891, para. 29 (1997) [hereinafter Foreign Participation Order].

29. See *id.*

30. Although this case involves wireless communication, the FCC’s interpretation of § 310 is applicable to all mediums of communication, including television.

31. *Applications of Voicestream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, Memorandum Opinion and Order*, 16 F.C.C.R. 9779, 2001 WL 476559 (F.C.C.) (2001).

32. See *id.* at para. 18.



under § 310(b)(4).<sup>33</sup> Previously, the main hurdle under § 310(b)(4) had been that indirect foreign ownership exploited the potential for secrecy and resultant anticompetitive behavior. Under the Foreign Participation Order, the FCC effectively waived § 310(b)(4) restrictions for any applicant who hails from a WTO member country. This rebuttable presumption was a critical blow to the national security concern, putting foreign broadcast license applicants on virtually the same or better footing as domestic applicants.<sup>34</sup>

The FCC took the mandate of the WTO Basic Telecommunications Agreement seriously and loosened the foreign ownership restrictions (through interpretation rather than through a change in statutory language) in an effort to gain the same reciprocity for Americans seeking licenses in other countries.<sup>35</sup> The FCC and members of Congress applauded the about-face in FCC interpretation as a step toward open competition.<sup>36</sup>

Based on the considerable cushion afforded to foreign nationals through the waiver of § 310(b)'s public interest requirement, nationals of Mexico and other WTO member countries are no longer reined in by § 310(b) when applying for broadcast licenses in the United States. Effectively, once foreign applicants qualify under the permissive restrictions set forth in § 310 (b), they are then limited only by the regulations that govern renewals of licenses for domestic applicants under §§ 301 and 307 of the Act.

### III. LICENSE GRANT AND RENEWAL UNDER § 301 OF THE ACT

Section 301 requires anyone who wants to broadcast in the United States to obtain a license from the FCC:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.<sup>37</sup>

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33. *See id.*

34. Foreign Participation Order, *supra* note 28.

35. *See id.*

36. *See Hearing Before the H. Comm. on Commerce, Subcomm. on Telecommunications, Trade and Consumer Protection*, 106th Cong. (2000) (testimony of William E. Kennard, Chairman, FCC), available at <http://www.fcc.gov/Speeches/Kennard/Statements/2000/stwek071.html>.

37. Communications Act of 1934, 47 U.S.C. § 301 (2006).

The FCC has licensed and continues to renew the licenses of approximately 4,000 television broadcasting stations throughout the country.<sup>38</sup> Under current FCC policy, licenses are valid for eight years;<sup>39</sup> thereupon, the broadcaster must apply for a renewal of the license. The licensing and renewal requirements allow the FCC to control not only who operates broadcast stations but also what is broadcast in the first place.

Unfortunately, the Act overall is a vague text. Although § 301 clearly states that anyone who wishes to broadcast must hold a license, it is not as clear regarding the standards for determining who may receive and renew a license. The governing standard is for the FCC to act “as public convenience, interest, or necessity requires.”<sup>40</sup> As in the § 310(b) analysis, the question of public interest is presented, but the basis for public interest takes on different contours under the licensing renewal requirements of § 301.

#### A. *General Requirements*

Under the general licensing procedures of § 301 of the Act, a domestic applicant must first show that the broadcast station is technically operable in a table of spectrum allotments. This requirement ensures that the use is technically feasible and will not interfere with the operation of other services.<sup>41</sup> In the case of those seeking licenses for television stations, this requirement is not problematic because the FCC has already allocated portions of the spectrum for television stations.

After clearing the first hurdle of service, the applicant may face another problem depending on whether the application is opposed or uncontested. If the application is uncontested, the license will most likely be granted. The only requirements that must be satisfied are: (1) the applicant must be a United States citizen, or the station must be principally owned by a United States citizen; (2) the applicant must pass a character qualification assessment showing that he has not violated FCC rules or antitrust laws; (3) the applicant must have sufficient financial stability to support the station; and (4) the applicant must give advanced notification of proposed programming.<sup>42</sup> The first requirement, of course, is satisfied if the foreign applicant has already gotten past § 310(b)'s foreign ownership

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38. Federal Communications Commission, Broadcast Station Totals as of September 30, 2006 (Nov. 20, 2006), *available at* [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-268509A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-268509A1.pdf).

39. *See* THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 23 (2d ed. 1998).

40. *See id.*

41. *Id.* at 93.

42. *Id.* at 93.

requirements. As long as the other three requirements are also satisfied, the FCC will grant the license.

However, if the application is opposed, as has begun to happen with foreign applicants who have perhaps unfairly cleared § 310(b)'s hurdles, the field of requirements changes considerably. The opposition may come in two different forms: first, it may be opposed by a rival applicant who seeks a license to operate the same station;<sup>43</sup> second, it simply may be opposed by the filing of a petition to deny the license.<sup>44</sup> The FCC is confronted with the task of determining what the public interest dictates in situations involving contested applications for licenses or renewals.<sup>45</sup> This public interest question is independent from the public interest inquiry under § 310(b)(4).

In the case of opposition in the form of two applicants seeking a license for the same station, one of the earliest notable cases is *Ashbacker Radio Corp. v. FCC*.<sup>46</sup> In *Ashbacker*, the Supreme Court re-emphasized the "public interest" standard in granting licenses but additionally determined that in the case of opposing applications, the FCC must hold a comparative hearing. "[W]here two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him."<sup>47</sup> The Supreme Court initially required a comparative hearing pursuant to this decision but declined to specify the criteria for determining which applicant would better serve the public interest.

In *Johnston Broadcasting Co. v. FCC*, the District of Columbia Court of Appeals clearly summarized the basic guidelines for determining which applicant should receive the FCC license:

When the minimum qualifications of both applicants have been established, the public interest will be protected no matter which applicant is chosen. From there on the public interest is served by the selection of the better qualified applicant, and the private interest of each applicant comes into play upon that question. Thus, the comparative hearing is an adversary proceeding.<sup>48</sup>

It is clear that the question of what public policy requires is a very fact-specific one; the FCC is afforded a great amount of discretion in formulating the public policy from circumstance to circumstance. Today, comparative hearings have been abolished in the case of renewal

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43. *Id.* at 97.

44. *Id.* at 93.

45. *Id.* at 123.

46. *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

47. *Id.* at 333.

48. *Johnston Broad. Co. v. FCC*, 175 F.2d 351, 357 (D.C. Cir. 1949).

applications; the FCC guarantees that licensees are afforded some measure of renewal expectancy.<sup>49</sup>

Currently, two factors are truly determinative in denying an applicant's petition for license renewal: diversity and character.<sup>50</sup> In the 1965 Statement on Comparative Broadcast Hearings, the FCC laid out the substantial factors to be considered in awarding licenses: diversification of control of the media of communication,<sup>51</sup> owners' full-time participation in operation of the station, past experience in broadcast station operation, and strength of character.<sup>52</sup> This last factor, character, has subsequently been modified by the FCC's issuance of Character Qualifications in Broadcasting Licensing.<sup>53</sup> The FCC is now concerned with fraudulent representations to government units, criminal misconduct involving false statements or dishonesty, and broadcast-related violations of antitrust or other laws dealing with competition.<sup>54</sup>

Today, character has become the central factor in most of the FCC's refusals to renew licenses. In a 1980 study of license renewals, researchers found that the most-stated reason for revocation of license was proof of misrepresentations made to the FCC.<sup>55</sup> This factor becomes even more important in light of the fact that applicants who are seeking renewal of a license have already demonstrated the capital and commitment to run a station. Thus, opponents to an applicant's petition for renewal are left with virtually one route of attack: character—to the extent that the applicant has misrepresented himself in some way to the FCC.

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49. See *Citizens Commc'ns Ctr. v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971). In *Citizens Communications Center*, the court ruled that any challenges to a renewal application would not be sustained unless there were "serious deficiencies" in the incumbent's past performance. *Id.* at 1210.

50. See Policy Statement on Comparative Broadcast Hearings, *Public Notice*, 1 F.C.C.2d 393 (1965).

51. Diversification questionably refers not only to common versus individual control of broadcast stations, but also racial minority ownership of stations. See *Metro Brdcst., Inc. v. FCC*, 497 U.S. 547, 547 (1990). The uncertainty stems from a subsequent case that may or may not have ruled the FCC's diversification program unconstitutional. See *Adarand Constr. Inc. v. Pena*, 515 U.S. 200, 201 (1995). Additionally, the FCC seems to have moved in a direction that would place diversity of output over diversity of ownership. See Jeng Fen Mao, *The Racial Implications of the Telecommunications Act of 1996: The Congressional Mandate of Neighborhood Purity*, 41 *HOW. L.J.* 501, 503 (1998).

52. Policy Statement on Comparative Broadcast Hearings, *supra* note 50, at paras. 1-2, 6.

53. Policy Regarding Character Qualifications in Broadcast Licensing, *Policy Statement and Order*, 5 F.C.C.R. 3252, paras. 1-2 (1990).

54. See *id.* at para. 3.

55. See Frederic A. Weiss et al., *Station License Revocations and Denials of Renewal, 1970-1978*, 24 *J. OF BROADCASTING* 69, 76 (1980).

Therefore, the standard for denying a broadcast license or application for a renewal of a broadcast license is a high one: fraud or misrepresentation directed toward the FCC on the part of the applicant. As outlined in Part II of this Note, under § 310(b), foreign applicants enjoy a rebuttable presumption of operating favorably for the public interest; in reviewing denials of licenses under § 301, it is clear that the only attacks that can overcome this rebuttable presumption would be attacks that evince fraud or misrepresentation on the part of the foreign applicant. Unfortunately, even these attacks have proved unsatisfactory in persuading the FCC that certain license renewal applications must be denied.

Foreign applicants who pass the lax test of § 310(b) operate a license for a number of years and then apply for a renewal of that license; their renewal application is then evaluated under § 301. The rationales of international competition and free market enterprise behind § 310 have transposed themselves onto the basic licensing requirements of § 301. The FCC has begun to incorporate the policy of promoting foreign trade in their § 301 license renewal evaluation, impermissibly giving foreign applicants an extra “bonus” over their domestic counterparts seeking broadcast licenses within the United States.<sup>56</sup> This bonus allows foreign owners to enjoy advantages in station ownership while United States companies grow frustrated by attempts to obtain broadcast licenses in other countries like Mexico and minority American voices are shut out of their own broadcast market.<sup>57</sup>

#### IV. PRACTICAL PROBLEMS ARISING FROM CURRENT INTERPRETATION OF §§ 310 AND 301

##### A. *Australian Ownership of Fox Broadcasting Company*

One of the earliest examples of discontent under the permissible interpretation of § 310 is illustrated by an FCC complaint filed by the NAACP and NBC Universal. The NAACP filed the original complaint, alleging that Fox had misrepresented its level of foreign ownership when it applied for licenses in 1985.<sup>58</sup> Because of the foreign capital available through the News Corporation owned by Australian Rupert Murdoch, Fox

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56. See Bill Carter, *The Media Business; NBC is Challenging Fox TV Operations As Foreign-Owned*, N.Y. TIMES, Nov. 30, 1994, at A1, available at <http://select.nytimes.com/gst/abstract.html?res=F50A12FB3B540C738FDDA80994DC494D81&n=Top%2fReference%2fTimes%20Topics%2fOrganizations%2fF%2fFederal%20Communications%20Commission%20>.

57. See *id.*

58. See Edmund L. Andrews, *Issues of Foreign Ownership Cloud the Future of Fox TV*, N.Y. TIMES, June 3, 1994, at A1.

was able to dominate ownership of television stations and impermissibly deny ownership opportunities to American minorities.<sup>59</sup> The NAACP and NBC challenged Fox's ownership structure and asked that the FCC deny Fox's upcoming applications for renewal of broadcasting licenses in certain cities.<sup>60</sup> In the face of these complaints, the FCC asked Fox to disclose its complete company equity structure to see if any misrepresentation had occurred in Fox's original 1985 application for American licenses. In 1985, Fox had told the FCC that "the stations would be held by a company called the Twentieth Holdings Corporation, with 76 percent of the voting rights controlled by Mr. Murdoch and Barry Diller, then the chief Fox executive and an American citizen, and 24 percent held by the [Australian] News Corporation."<sup>61</sup> Additionally, Mr. Murdoch renounced Australian citizenship and became an American citizen. With this arrangement, Fox was well within the twenty-five percent benchmark set out in § 310(b)(4) for foreign ownership.

Fox had indeed misrepresented itself back in 1985. "Fox disclosed that Mr. Murdoch's financial stake in the company was less than 1 percent, with the [Australian] News Corporation owning more than 99 percent of the equity."<sup>62</sup> However, the FCC accepted Fox's argument that § 310(b)(4)'s twenty-five percent limit be enforced only as to voting interest rather than equity interest.<sup>63</sup> Thus, even though the News Corporation, an Australian company, held virtually all of the equity shares of Fox, Mr. Murdoch, now an American, still retained seventy-six percent of the voting interest of Fox. The FCC's acceptance of Fox's tenuous argument was most likely, at least in part, a reflection of the procompetition and open market attitude that drove relaxation of § 310(b) limitations. A supporter of relaxed § 310(b) limitations, among many, saw Fox's violation of foreign ownership guidelines and the FCC's refusal to deny Fox licenses based on that misrepresentation as cause for celebration: "It is a last-ditch attempt to destroy . . . Fox's nearly 9-year-long effort to end the hegemony of ABC, CBS, and NBC and emerge as a viable national network competitor."<sup>64</sup> However, it seems antithetical in every sense to promote competition

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59. See Larson, *supra* note 5.

60. See Carter, *supra* note 56.

61. *Id.*

62. *Id.*

63. Press Release, FCC Mass Media Bureau, FCC Allows Fox to Retain Ownership Structure; Renewal of WNYW-TV, New York City, Granted (Jul. 28, 1995), available at [http://www.fcc.gov/Bureaus/Mass\\_Media/News\\_Releases/nrmm5086.txt](http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/nrmm5086.txt) [hereinafter FCC Mass Media Bureau].

64. Ian M. Rose, *Barring Foreigners from Our Airwaves: An Anachronistic Pothole on the Global Information Highway*, 95 COLUM. L. REV. 1188, 1227 (1995).

through allowing misrepresentation and fabrication of information required by § 310 (b).

Nor is there any argument for allowing greater Australian ownership of American broadcast licenses in order to promote international cooperation and trade reciprocity; Australia only allows foreign companies fifteen percent ownership of Australian television stations.<sup>65</sup> The FCC is going beyond just providing an Australian corporation a broadcast license through flexible § 310(b) regulations; the FCC is turning a blind eye to misrepresentation on the part of this partly-Australian corporation. Australia, at least until recently, has certainly not been as obliging to American broadcast companies seeking licenses.

The FCC ultimately ruled that Fox made no misrepresentations in its 1985 foreign ownership disclosures and renewed Fox's licenses for broadcasting in Wisconsin and other areas.<sup>66</sup> Not only does it seem that the FCC allowed Fox to operate as a foreign-dominated corporation above the levels allowed in § 310(b), it also seems that the FCC pushed a policy of encouraging international cooperation and competition, thus turning a blind eye to misrepresentations that should have affected Fox's renewal application under § 301.

Even if Fox's growing presence as a major network has proved beneficial in providing a better variety of programming for Americans, the growth has come at a cost: broadcast networks are sent a signal that the FCC may be willing to overlook possible misrepresentations or omissions of crucial foreign ownership information in order to foster the spirit of competition and the free market enterprise. Additionally, Fox subsequently engaged in questionably anticompetitive tactics involving syndication of television shows.<sup>67</sup> The price of this signal may very well overwhelm any possibility of fair competition.

#### *B. Spanish Language Broadcasting: Drama in More than Just the Programming*

The main example of the failure of current § 310(b) interpretation in encouraging fair and open competition is embodied by the dispute between NBC Universal's Telemundo and Mexican broadcaster TV Azteca. Before discussing the dispute at hand, a brief overview of the corporate makeups of Telemundo, TV Azteca, and two other Spanish-language broadcast

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65. See Carter, *supra* note 55.

66. See FCC Mass Media Bureau, *supra* note 62.

67. See Carter, *supra* note 55 (“[T]he [FCC] exempted Fox from rules that kept the other networks out of the lucrative business of syndicating the programs they showed -- that is, selling reruns of those shows to local stations.”).

networks, Univision and Televisa, is necessary to show the complicated ownership structures that underlie and entangle each company.

### 1. Univision and Telemundo

Univision and Telemundo are the first- and second-largest Spanish-language broadcast networks in the United States. Univision, the older of the two networks, began in 1955 with a Spanish-language station in San Antonio, Texas. After years of expansion, the company was purchased in 1992 by A. Jerrold Perenchio.<sup>68</sup> To complicate the Univision ownership structure, ten percent is owned by a Mexican broadcasting powerhouse, Televisa, even though Televisa has challenged Univision over payments for popular Spanish-language programming.<sup>69</sup>

Telemundo originated in 1985 as the first full-time independent Spanish-language station in Los Angeles and then acquired stations in Fort Lauderdale/Miami, Puerto Rico, and New York; today, the network has stations all over the United States. Much of the early Telemundo staff was made up of former Univision employees. In 2001, NBC Universal—eighty percent owned by General Electric, a United States company, and twenty percent owned by Vivendi, a French company<sup>70</sup>—purchased Telemundo, also hiring a Mexican partner, Isaac Saba Raffoul. Thus, Mexican citizens own small shares in both Univision and Telemundo, the leading Spanish-language broadcast networks in the United States.

### 2. Televisa, TV Azteca, and Mexican Communications Regulations

Televisa and TV Azteca are the first- and second-largest broadcast networks in Mexico.<sup>71</sup> Televisa was the owner of the first television station in Latin America.<sup>72</sup> In 1997, Emilio Azcarraga Jean assumed presidency of Grupo Televisa and has been aggressively pursuing a world agenda for the company. Azcarraga has even stated that he would consider obtaining U.S. citizenship in order to gain a majority share of Univision.<sup>73</sup>

TV Azteca is much younger, having been established in 1993. It lacks the strong relations with the United States that Televisa has maintained

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68. Univision, Company Overview, History, <http://www.univision.net/corp/en/history.jsp> (last visited Nov. 6, 2007).

69. See Geri Smith, *Can Televisa Conquer the U.S.?*, BUSINESS WEEK, Oct. 4, 2004, at 70, available at [http://www.businessweek.com/magazine/content/04\\_40/b3902088.htm](http://www.businessweek.com/magazine/content/04_40/b3902088.htm).

70. NBC Universal, Company Overview, [http://www.nbcuni.com/About\\_NBC\\_Universal/Company\\_Overview/](http://www.nbcuni.com/About_NBC_Universal/Company_Overview/) (last visited Nov. 6, 2007).

71. See Smith, *supra* note 69.

72. See Televisa History, [http://www.televisa.com/index\\_eng.html](http://www.televisa.com/index_eng.html) (last visited Nov. 6, 2007).

73. See Smith, *supra* note 69.



through its Univision connection. TV Azteca launched its United States subsidiary, Azteca America, in 2001. Azteca America owns fifty-five stations in the United States,<sup>74</sup> including KAZA, the Los Angeles station that is at the heart of the most recent dispute.

Both Televisa and TV Azteca have maintained a tight seal on the Mexican television broadcast industry. Mexico's competition laws and policies have proven to be somewhat ineffective as American networks like Telemundo have tried to enter the broadcast market.<sup>75</sup> Even in other sectors such as air transport and cellular telephone service, fair competition has been an elusive condition for the country.

The Federal Competition Commission ("CFC") is the administrative agency in charge of the monitoring, surveillance, and protection of the competition process in Mexico.<sup>76</sup> The CFC has the authority to control mergers and sanction a range of anticompetitive behaviors; it has explicit control over the telecommunications industry. However, until recently, "in many cases the opinions and recommendations of the CFC are not binding and can be ignored by the sectoral authority. As a result, the power of the CFC to remedy anticompetitive outcomes is limited."<sup>77</sup>

### 3. Telemundo v. Mexico: A Storied Battle

It is within this tightly-controlled market with lax competition laws that Telemundo has repeatedly sought to establish a broadcasting presence. Beginning in 1994, NBC Universal, through Telemundo, orchestrated a deal in which Telemundo would own a small share of TV Azteca and thereby ease its way into the Mexican market. TV Azteca backed out of the deal before any broadcasts could occur, stating that NBC had not provided "programming and technical assistance."<sup>78</sup>

Fast forwarding to 2005, Telemundo finally broke into the Mexican market and began filming its new show, *Quinceañera*, in Mexico City, Mexico. In August 2006, TV Azteca, claiming an exclusive contract with the show's host, Alan Tacher, obtained an injunction from a Mexican court to stop production on *Quinceañera*. A few weeks later, TV Azteca staff,

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74. Azteca America, Corporate, <http://www.corporate-aztecaamerica.com/coverage/map.shtml> (last visited Nov. 6, 2007).

75. See Oliver Solano et al., *Challenges to the Effective Implementation of Competition Policy in Regulated Sectors: The Case of Telecommunications in Mexico*, 26 NW. J. OF INT'L L. & BUS. 527, 528 (2006).

76. *Id.* at 530.

77. *Id.* at 535.

78. Elisabeth Malkin, *Mexico's Newest TV Drama is a Bid to Block a Third Broadcaster*, N.Y. TIMES, Dec. 6, 2006, at C3, available at <http://select.nytimes.com/gst/abstract.html?res=F50914FA3D550C758CDDAB0994DE404482>.

lawyers, and Mexico City police broke into the Telemundo studio and forcefully shut down production of the show.<sup>79</sup>

After Telemundo moved its production site from Mexico City to Hialeah, Florida, Mexican television news shows were dominated by “exposés on how poor people suffer from the high cost of medicines.”<sup>80</sup> TV Azteca and the other Mexican broadcast company, Televisa, consistently ran television spots targeting pharmaceutical distributor Grupo Casa Saba, owned by one Isaac Saba Raffoul.<sup>81</sup> Mr. Saba, as mentioned above, also happens to be the Mexican partner of Telemundo. At the same time, TV Azteca launched news shows describing General Electric, the parent company of Telemundo, as “a transnational company accused of unfair and monopolistic practices, fraud and everything you can imagine.”<sup>82</sup> TV Azteca and Televisa mounted a two-pronged attack on Telemundo: first, they forcibly ejected the American broadcaster from Mexican soil, and second, they attacked the broadcaster’s parent company and Mexican partner through the use of news media.

Both TV Azteca and Televisa claim that the GE and Grupo Casa Saba coverage is simply a reporting of facts in the interests of the public, not an indirect attack on an American competitor seeking to enter the Mexican market.<sup>83</sup>

But in the face of the attack on *Quinceañera* production and the alleged abuse of Mexican media, Telemundo eventually filed its December 2006 request with the FCC to deny TV Azteca’s renewal application for its Los Angeles broadcast license.<sup>84</sup> In effect, Telemundo is arguing for some amount of reciprocity; if TV Azteca operates to deny Telemundo access to the Mexican audience, Telemundo wants the FCC to deny TV Azteca access to the American audience.

#### 4. Reconsidering the FCC’s Grant of Azteca America’s Los Angeles License

Azteca America, as a fully-owned United States subsidiary of Mexico’s TV Azteca, satisfies the requirements for foreign ownership under section 310(b)(4), especially as Mexico is a WTO member country

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79. TV Azteca *Uses Force to Stop Production of Telemundo Reality Show: The Network Feuds*, LATIN HEAT ONLINE (Sep. 28, 2006), <http://www.latinheat.com/news.php?nid=865&pag=0>.

80. Malkin, *supra* note 78.

81. *See GE accuses Mexico’s TV firms of Telemundo plot*, L.A. TIMES, Dec. 12, 2006, at C7.

82. *Id.*

83. Malkin, *supra* note 78.

84. *Id.*

and the FCC would want to foster its goal of international competition. In fact, the application would have been separately bolstered by a number of international agreements between Mexico and the United States that affect both nations' television broadcast industries.

First, as members of the North American Free Trade Agreement ("NAFTA"), both Mexico and the United States have a history of cooperation within the telecommunications industry.<sup>85</sup> NAFTA does not address the specific issue of licensing, but it is clear from Annex VI of the agreement that both countries anticipated a level of cooperative reciprocity in television programming and in the broadcast television industry generally when they signed the agreement.<sup>86</sup> Second, the United States and Mexico have a number of specific telecommunications agreements that address the importance of cooperation, especially along the border of the two countries. The agreements concern radio and television operation in specific frequencies along the border, specifying uniform requirements for antennae reception and technical operations.<sup>87</sup> All of these agreements taken together evince the cooperative relationship that both countries intended to foster; they lend even more strength to § 310(b)'s built-in rebuttable presumption that Azteca America is acting in the public interest and not engaging in anticompetitive behavior.

And yet, TV Azteca, Azteca America's parent, has engaged in anticompetitive even violent behavior in order to prevent Telemundo, an American company, from obtaining a Mexican broadcasting license. This behavior goes against the spirit of the agreements mentioned above and indeed, the spirit behind the FCC's lenient interpretation of § 310. Additionally, Mexico simply has not provided any reciprocal hospitality to American companies.<sup>88</sup> But the FCC denied the NBC Universal's (Telemundo's parent company) petition to deny renewal of the Azteca America license in Los Angeles.<sup>89</sup>

The Telemundo situation illustrates the failure of the FCC's current interpretation of § 310(b) to promote international cooperation in fostering telecommunications competition. While the FCC issues and renews the licenses of foreign companies like TV Azteca, countries like Mexico are not similarly granting American licenses. TV Azteca has taken advantage

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85. North American Free Trade Agreement, U.S.-Can.-Mex., 32 I.L.M. 605, 767 (1993).

86. *Id.*

87. *See generally Agreement Relating to Assignments and Usage of Television Broadcasting Channels in the Frequency Range 470-806 MHz (Channels 14-69) Along the United States-Mexico Border*, U.S.-Mex., June 18, 1982, available at <http://www.fcc.gov/ib/sand/agree/files/mex-bc/uhftvbc.pdf>.

88. *See* Malkin, *supra* note 78; *see also* Solano, *supra* note 75, at 530.

89. *See* HispanicTips, *supra* note 7.

of the American Spanish-speaking audience through the competition-friendly foreign ownership regulations, while Telemundo is barred from taking advantage of the Mexican Spanish-speaking audience because of more protectionist Mexican foreign ownership regulations. The new § 310(b) interpretation does not promote free trade among different nations; it allows non-American companies to engage in anticompetitive behavior in order to gain an advantage over American companies in their own market. The FCC's final determination regarding Azteca America's application for renewal of their Los Angeles broadcast license is telling. Since the FCC, as it did in Fox's case, approved the license renewal, it is clear that § 310 (b)'s policy favoring free trade has grown so large as to overshadow misrepresentations and anticompetitive behavior that would normally bar license renewal under the current interpretations of §§ 301 and 307.

#### V. RECIPROCITY: PART OF A SOLUTION

In the 1997 Notice on Foreign Participation Order, the FCC stated that some WTO member countries "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."<sup>90</sup> Nonetheless, the FCC anticipated that member countries would fulfill their commitments and, on the basis of that expectation, implemented a more open policy for foreign owners under § 310(b). The FCC's position at that time was reasonable; in order to truly effect the United States' promises inherent in the WTO Basic Telecommunications Agreement, the FCC had to take this leap of faith and expect that member countries would take similar measures. However, ten years have since elapsed, and countries like Australia and Mexico have only just begun to reciprocate the level of openness that the United States has established. Australia's foreign ownership limits, until very recently, were substantially lower and less flexible than § 310(b),<sup>91</sup> and many investors still complain of the barriers to entry into Mexico's communications industry.<sup>92</sup>

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90. Foreign Participation Order, *Notice of Proposed Rulemaking*, 12 F.C.C.R. 7847, para. 14 (1997).

91. Jonathan D. Levy, *Australian and US Approaches to Media Ownership Regulation* 18 (presented to Telecommunications Policy Research Conference, Arlington, Virginia, 2004), available at <http://web.si.umich.edu/tprc/papers/2004/343/TPRC2JDL2004.pdf>; but see Kim Jackson, *Media Ownership Regulation in Australia*, available at [http://www.aph.gov.au/library/intguide/sp/media\\_regulations.htm](http://www.aph.gov.au/library/intguide/sp/media_regulations.htm)

92. See Geri Smith, *A Talk with Mexico's Competition Czar*, BUSINESS WEEK, Oct. 6, 2006, available at [http://www.businessweek.com/globalbiz/content/oct2006/gb20061006\\_350067.htm](http://www.businessweek.com/globalbiz/content/oct2006/gb20061006_350067.htm).

Clearly, the United States—through the FCC—must honor its WTO commitments and give foreign applicants access to our broadcast audiences, but it certainly does not follow that the FCC must give foreign applicants a better footing than domestic applicants, especially when these foreign applicants have violated the licensing requirements set forth in §§ 301 and 307.

A. *Past Preference for Reciprocity Test Under § 310(b)*

This Note's analysis thus far has suggested reciprocity as the best way to ensure that American broadcast companies will, at the very least, be afforded an opportunity to enter foreign markets. Unfortunately, the concept of reciprocity has been reviled since the mid-1990's when the FCC, Congress, and members of the telecommunications industry began to debate the issue of WTO commitments and deregulation through § 310(b).<sup>93</sup> The policy of reciprocity requires American authorities like the FCC to relax foreign ownership restrictions on the condition that other foreign countries do the same for American companies. Although reciprocity is not currently a part of § 310(b), both Congress and the FCC have flirted with adding this element throughout the years in various proposed amendments to § 310(b) and FCC reports and orders.<sup>94</sup>

Supporters of reciprocity as an element of § 310(b) have long been active in Congress. This movement began with Senator Larry Pressler, the Chairman of the Telecommunications Subcommittee of the Senate Commerce Committee, who first proposed his "Telecommunications Competition and Deregulation Act of 1995" on January 31, 1995.<sup>95</sup> This draft bill included the following reciprocity provision as a proposed amendment to § 310(b), stating that:

[Section 310(b)] shall not apply to any license held, or for which application is made . . . with respect to any alien (or representative thereof), corporation, or foreign government (or representative thereof) if the United States Trade Representative has determined that the foreign country of which such alien is a citizen, in which such corporation is organized, or in which such foreign government is in

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93. See *Trade Implication of Foreign Ownership Restrictions on Telecommunications Companies: Hearings Before the Subcomm. on Commerce, Trade and Hazardous Materials of the H. Commerce Comm.*, 104th Cong. (1995) (testimony of Sam Ginn, Chairman and Chief Executive Officer, AirTouch Communications).

94. See Erik W. Schmidt, *International Telecommunications Transactions: A Critique of the FCC's "Effective Competitive Opportunities" Analysis*, 7 DUKE J. OF COMP. & INT'L L. 629, 640 (1997).

95. See Sidak, *supra* note 13, at 240.

control provides mutually advantageous market opportunities for broadcast . . . licenses to citizens of the United States. . . .<sup>96</sup>

The draft bill further proposed a “snapback for reciprocity failure,” or a provision for repercussions if a foreign country refused to provide reciprocal treatment:

If the United States Trade Representative determines that any foreign country with respect to which it has made a determination under paragraph (1) ceases to meet the requirements for that determination, then—

(A) subsection [310](b) shall apply with respect to such aliens, corporations, and government . . . on the date on which the Trade Representative publishes notice of its determination under this paragraph, and

(B) any license held, or application filed, which could not be held or granted under subsection [310](b) shall be withdrawn, or denied, as the case may be, by the Commission . . . .<sup>97</sup>

After Senator Pressler and other senators had produced this draft bill, Senator Ernest Hollings, another ranking member of the Senate Commerce Committee, circulated a Democratic draft bill that did not contain any provisions addressing amendment of § 310(b). As a counter, Senator Pressler introduced a revised version of his Telecommunications Competition and Deregulation Act of 1995 that reflected certain provisions highlighted in Senator Hollings’ draft bill.<sup>98</sup> Notably, the new draft bill excluded broadcast licenses from the reciprocity.

So in this swift and partisan exchange, the reciprocity test was eliminated as it applied to broadcast licenses. At the same time, the House of Representatives formulated a draft bill, the Communications Act of 1995.<sup>99</sup> Like the Senate bill, this bill included an amendment proposing a reciprocity test for § 310(b)(4); also like the Senate bill, this reciprocity test did not apply to television and radio broadcast licenses.<sup>100</sup>

Also in 1995, the FCC itself adopted an interpretation of § 310(b) that was imbued with a reciprocity test. In its 1995 Market Entry and Regulation Report and Order,<sup>101</sup> the FCC added an Effective Competitive Opportunities (“ECO”) test to § 310(b)(4) that examined whether foreign markets offered effective competitive opportunities to American entities.<sup>102</sup>

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96. *Id.* at 240-41 (quoting Telecommunications Competition and Deregulation Act of 1995 (Senate draft, Jan. 31, 1995), § 105, at 39 ll. 4-19 (proposed 47 U.S.C. § 310(f)(1))).

97. *Id.* at 241.

98. *Id.* at 244.

99. *See* H.R. 1555, 104th Cong. (1995).

100. Sidak, *supra* note 13, at 250.

101. Market Entry Report, *supra* note 23.

102. *Id.* at para. 2.

However, this reciprocity test was also abolished with the 1997 Foreign Participation Order discussed earlier in this Note.

It is clear that reciprocity was a major concern before the FCC decided to loosen its foreign ownership guidelines. For a period, it seemed that this leap of faith on the part of the FCC was necessary; in order for American businesses to pose a credible chance of breaking into foreign markets, foreign owners had to be given a true opportunity to access the American market. However, this leap of faith has not paid off, and we have yet to see other countries afford American broadcast companies any share of the market; the need for a built-in reciprocity test in § 310(b), at least in respect to broadcast licenses, has surfaced again. Through Fox, Australian entities have used the liberal free trade policy behind § 310(b) to ensure renewal of more and more American broadcast licenses. And as evidenced by the most recent battle between NBC and TV Azteca, Mexican broadcast companies have taken advantage of the same foreign ownership guideline while Mexico has refused to open its borders to our broadcasters.

In other areas of the world, wholly United States-owned broadcast companies like NBC have faced fierce resistance from regulatory bodies in France and Belgium.<sup>103</sup>

#### *B. Possible Movement Toward Some Form of Reciprocity Test*

In a recent ruling that concerned only small disadvantaged businesses, the FCC at least has begun to re-acknowledge the importance of reciprocity.<sup>104</sup> In discussing the rebuttable presumption that applicants from WTO member countries enjoy, the FCC stated that this so-called “waiver” would not be presumed “in cases where it is demonstrated that the home country of the foreign investor does not, or will not over the ensuing five years, provide comparable reciprocal treatment to U.S.-based entities or persons.”<sup>105</sup> Although this declaratory ruling only applies to a narrow category of businesses, it is a step in the direction of acknowledging the problems that American broadcast licensees have faced in foreign markets.

Although the early reciprocity tests formulated by Congress and the FCC often placed too high a premium on reciprocity, the FCC would not violate the United States’ WTO commitments by requiring at least a

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103. Richard Covington, *Media Companies Seek Stakes in Networks Abroad: American TV Invades the World*, INT’L HERALD TRIBUNE, Oct. 19, 1994, <http://www.iht.com/articles/1994/10/19/media.php>.

104. See FCC International Bureau, *Adoption of an Declaratory Ruling on Section 310(b)(4) Waivers*, Dec. 10, 2004 (Financial Issues Subcommittee Recommendation to the Federal Communications Commission’s Advisory Committee on Diversity for Communications in the Digital Age), available at <http://www.fcc.gov/DiversityFAC/adopted-recommendations/ForeignOwnershipFinal.doc>.

105. *Id.*

minimal level of reciprocity from WTO member countries. By requiring such a baseline, the FCC may reduce the abuse of its own foreign ownership guidelines and at the same time, ensure that American broadcasters are able to obtain some licenses in more reluctant countries.

## VI. CONCLUSION

The history of § 310(b) of the Communications Act would seem to indicate that re-implementing some standard of reciprocity would be a step backwards toward the dark ages of protectionism and unfounded national security concerns. The new interpretation of § 310(b) was heralded as a definitive statement of the United States' commitment to the cooperative trade goals of the WTO's Basic Telecommunications Agreement. However, the interpretation has played out disappointingly; instead of propelling other countries to open up their borders to American telecommunications investment, the FCC has given foreign companies impermissible advantages over American companies while American companies struggle to survive in broadcast licensing industries outside of the United States. By adopting some measure of reciprocity, the FCC can enable American companies to at least break into markets like Mexico.

The increasing importance of foreign television audiences and free trade policies led the FCC to deregulate its foreign ownership restrictions in 1995; this was the first phase in the increasingly global nature of communications policy. But now, the world is entering a second phase in which many other countries are joining the race to win television audiences everywhere; Congress and the FCC must look at this second phase and formulate a new interpretation of § 310(b) that will continue to promote free trade while ensuring fair competition among all the players.