

A Fundamental Misunderstanding: FCC Implementation of U.S. WTO Commitments

Laura B. Sherman*

I. INTRODUCTION.....	395
II. THE SCOPE OF SECTION 310.....	396
III. U.S. TRADE COMMITMENTS.....	397
IV. NAFTA COMMITMENTS.....	398
V. OTHER TELECOMMUNICATIONS AGREEMENTS	399
VI. WTO COMMITMENTS.....	400
VII. FCC IMPLEMENTATION OF U.S. COMMITMENTS	403
VIII. CONCLUSION	406

I. INTRODUCTION

In *Deal or No Deal: Reinterpreting the FCC's Ownership Rules for a Fair Game*,¹ Cindy J. Cho concludes that the Federal Communications Commission (FCC) ought to apply a standard of reciprocity to initial and renewal applications for broadcast licenses by foreign-owned companies in order to deal with the anticompetitive conduct of foreign broadcasters in the U.S. market.² This conclusion is premised on a fundamental

* Ms. Sherman was the chief lawyer for the U.S. delegation to the WTO basic telecommunications negotiations from 1994 to 1997, while at the Office of the U.S. Trade Representative. She is now in private practice.

1. Cindy J. Cho, Note, *Deal or No Deal: Reinterpreting the FCC's Foreign Ownership Rules for a Fair Game*, 60 FED. COMM. L.J. 111 (2008).

2. *Id.* at 134.

misunderstanding of U.S. trade commitments and the FCC's implementation of those commitments. The market-opening U.S. trade commitments and FCC orders that Ms. Cho discusses do *not* apply to broadcasting services or broadcast licenses. In fact, nothing in current U.S. trade commitments or FCC orders precludes application of a reciprocity test to applications from non-U.S. companies for a broadcast license. This Article attempts to set the record straight.

II. THE SCOPE OF SECTION 310

Section 310 of the Communications Act of 1934,³ as originally enacted and as modified over time, imposes specific ownership restrictions on who may hold certain types of radio licenses, including: (i) broadcast, (ii) common carrier, and (iii) aeronautical en route and aeronautical fixed radio station licenses.⁴ Prior to 1934, § 310 contained a flat prohibition on the award of these three types of licenses to foreign individuals, foreign governments, foreign companies, and U.S. companies which are more than twenty-percent owned by foreign individuals, foreign governments, or foreign companies.

In 1934, § 310 was amended to give the FCC some discretion in allowing up to one hundred percent foreign indirect ownership.⁵ The revised § 310(b)(4) gives the FCC discretion to allow up to one hundred percent foreign ownership in broadcast and common carrier radio licensees, through a U.S. parent company that has a controlling interest in the licensee. Section 310(b)(4) provides that a company cannot receive a broadcast or common carrier radio license if the company is directly or indirectly controlled by any corporation of which more than twenty-five percent of the capital stock is owned by foreign individuals, foreign governments, and foreign companies, *if* the FCC determines that the public interest will be served by refusal or revocation of such a license.⁶ Thus, under § 310(b)(4), the statutory presumption has always been that foreign ownership of a broadcast or common carrier licensee in excess of twenty-five percent is permissible in the absence of an FCC finding to the contrary. In practice, the FCC has exercised its discretion “sparingly,” presuming that the twenty-five percent holding company limit should not be waived

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

4. While 47 U.S.C. § 310(b) also applies to aeronautical licenses, this Article is limited to a discussion of broadcast and common carrier licenses.

5. Act of Jan. 21, 1974, Pub. L. No. 93-505, § 2, 88 Stat. 1576, 1576 (1974) (amending the Communications Act of 1934 permitting the FCC to grant radio station licenses directly to aliens).

6. 47 U.S.C. § 310(b)(4).

unless the potential investor can demonstrate that the public interest will not be harmed.⁷

Ms. Cho suggests that the FCC's interpretation of § 310 changed in the 1990s, prompted by the 1996 Act, from a focus on national security to economic interests.⁸ There was definitely a change in the FCC's approach to foreign ownership in the mid-1990s, but *only* with respect to common carrier licenses. The FCC's policy on foreign ownership of broadcast licenses did not change. As will be described below, the U.S. trade commitments and the orders that Ms. Cho refers to as evidence of new FCC policies with respect to foreign ownership of broadcast licenses, in fact, are limited in scope to international § 214 authorizations,⁹ cable landing licenses, and authorizations to exceed the twenty-five percent foreign ownership benchmark in section § 310(b)(4) for common carrier radio licenses.¹⁰

III. U.S. TRADE COMMITMENTS

Ms. Cho refers to U.S. obligations under the North American Free Trade Agreement (NAFTA), obligations in the World Trade Organization (WTO) and other telecommunications agreements with Mexico as supporting the FCC's change in policy toward foreign ownership of broadcast licenses.¹¹ None of these agreements obligate the United States to allow foreign ownership of broadcast licenses. To the contrary, both the NAFTA and WTO commitments preserve the United States' ability to prohibit foreign ownership of broadcast licenses, and the telecommunications agreements that Ms. Cho refers to do not deal with broadcast licenses at all.

7. Market Entry and Regulation of Foreign-Affiliated Entities, *Report and Order*, 11 F.C.C.R. 3873, para. 183 (1996) [hereinafter *Foreign Carrier Entry Order*]; James G. Ennis & David N. Roberts, *Foreign Ownership in U.S. Communications Industry: The Impact of Section 310*, 19 INT'L BUS. LAW. 243, 245 (1991).

8. Cho, *supra* note 1, at 177. Ms. Cho says that the 1996 Act did not change the foreign ownership provisions, but this is not correct. The 1996 Act removed the flat prohibition in § 310(b)(3) on granting a broadcast, common carrier or aeronautical license to U.S. companies with any non-U.S. nationals as an officer or director and the discretionary prohibition in § 310(b)(4) on granting such licenses to companies with any non-national U.S. officer or non-U.S. nationals comprising more than twenty-five percent of the board of directors.

9. 47 U.S.C. § 214 (concerning authorization of common carrier facilities and services).

10. Rules and Policies on Foreign Participation in the U.S. Telecomms. Market, *Report and Order on Reconsideration*, 12 F.C.C.R. 23891, para. 14 (1997) [hereinafter *Foreign Participation Order*].

11. Cho, *supra* note 1, at 119, 129.

IV. NAFTA COMMITMENTS

NAFTA¹² is one of the first trade agreements to include trade in services.¹³ Chapter Eleven establishes obligations relating to investments, which are broadly defined to include branches, subsidiaries, and joint ventures of companies and individuals of one NAFTA party in the territory of another, regardless of the business to be conducted.¹⁴ The NAFTA parties agreed to national treatment for investors of the other NAFTA parties and their investments. This requires each NAFTA party to treat NAFTA investors and their investments “no less favorabl[y] than it accords, in like circumstances, to its own investors [and their investments] with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”¹⁵ This national treatment obligation would cover the ability to obtain licenses from the FCC to provide telecommunications or broadcasting services in the United States.

Chapter Twelve deals with cross-border provision of services, requiring each NAFTA party to provide national treatment to services provided from the territory of one NAFTA party into the territory of another.¹⁶ Again, this nondiscrimination requirement applies to FCC licensing, such as the grant of § 214 licenses.

Chapters Eleven and Twelve each provide that a NAFTA party can exempt certain laws and regulations that do not conform to the national treatment and other obligations contained in the relevant Chapter.¹⁷ Laws and regulations which are listed as a reservation in the annexes to NAFTA are exempt from challenge by other NAFTA parties, and they allow a NAFTA party to maintain those existing or adopt new laws and regulations that vary from the nondiscrimination rules.¹⁸ The United States took such a reservation for telecommunications *and* broadcasting services, specifically referencing § 310(a) and (b) as existing, nonconforming measures.¹⁹

12. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

13. The first trade agreement to include services was the U.S.-Canada Free Trade Agreement, which was concluded in 1988 and was subsumed by NAFTA when that agreement entered into force. *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE NORTH AMERICAN FREE TRADE AGREEMENT, TEXTS OF AGREEMENT, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 103-159, at 457 (1993) [hereinafter STATEMENT OF ADMINISTRATIVE ACTION].

14. NAFTA, *supra* note 12, at Article 1139.

15. *Id.* at Article 1102 (1)-(2).

16. *Id.* at Article 1202.

17. *See id.* at Articles 1108, 1206.

18. STATEMENT OF ADMINISTRATIVE ACTION, *supra* note 13, at 602-03.

19. NAFTA, *supra* note 12, at Annex II.

Ms. Cho refers specifically to Annex VI of NAFTA as evidence of “a level of cooperative reciprocity.”²⁰ Article 1208 of NAFTA creates a mechanism in Annex VI for the NAFTA parties to record commitments to eliminate or phase out discriminatory restrictions that create barriers to cross-border services. In Annex VI, the United States agreed to treat Canadian and Mexican broadcast stations similar to U.S. broadcast stations when deciding whether to grant authority under § 325 of the Communications Act²¹ to transmit programming to Mexican or Canadian stations for retransmission into the United States. For example, § 325 applies in cases where a U.S. station near the United States–Mexico border transmits its local news and weather to a Mexican station on the other side of the border and the Mexican station rebroadcasts that programming.²² Taken together, nothing in NAFTA changed U.S. law or FCC policy with respect to foreign ownership of telecommunications or broadcast licenses.

V. OTHER TELECOMMUNICATIONS AGREEMENTS

The other telecommunications agreements referred to by Ms. Cho did not cause changes in FCC policy with respect to foreign ownership. Since at least the 1950s, the United States has entered into a series of agreements with Mexico and Canada on the allocation and operation of radio frequencies along their respective borders. These agreements apply to frequencies used for radio and TV broadcasting, satellite transmissions, and other services using radio frequencies which are designed to prevent undue interference between stations in the respective countries.²³ While these agreements certainly “address the importance of cooperation,” as Ms. Cho states,²⁴ they do not have anything to do with foreign ownership of broadcast licenses.

20. Cho, *supra* note 1, at 129.

21. 47 U.S.C. § 325 (2000).

22. See, e.g., Metro Networks Comm., Inc., *Memorandum Opinion and Order*, 20 F.C.C.R. 2474 (2005).

23. These agreements can be found at the FCC, International Bureau, International Agreements, <http://www.fcc.gov/ib/sand/agree> (last visited Feb. 4, 2009). See Note No. 192 from John de Chastelain, Canadian Ambassador, to Warren M. Christopher, United States Secretary of State, (Nov. 16, 1993) (attached to the Working Arrangement for Allotment and Assignment of VHF and UHF Television Broadcasting Channels under the Agreement between the Government of the United States of America and the Government of Canada relating to the TV Broadcasting Service (Mar. 1, 1989)), available at <http://www.fcc.gov/ib/sand/agree/files/can-bc/can-tv.pdf>.

24. Cho, *supra* note 1, at 129.

VI. WTO COMMITMENTS

The WTO was created in 1995 as a result of multilateral trade negotiations, commonly referred to as the Uruguay Round.²⁵ In joining the WTO, a member undertakes commitments under a series of multilateral trade agreements, including the General Agreement on Trade in Services (GATS).²⁶ The GATS takes a different approach than NAFTA does on how a WTO member undertakes commitments dealing with trade in services. NAFTA assumes that a NAFTA party will provide national treatment and market access to all services and service suppliers of the other NAFTA parties in the absence of a reservation to the contrary. In contrast, WTO members specifically negotiate national treatment and market access commitments on a sector-by-sector basis. Unless a service is included in a member's Schedule of Specific Commitments, the WTO member has no obligation to provide national treatment or market access with respect to that service or service suppliers of other WTO members.²⁷

For purposes of this Article, there are two relevant market sectors—telecommunications and audio-visual services.²⁸ Telecommunications services are broken down into two major subgroups—“basic telecommunications” and “value-added services” and within each subgroup, services are further divided into market subsectors. Basic telecommunications refers to telecommunications transport networks and services,²⁹ such as fixed and mobile voice telephone services, fixed and mobile data services, private leased circuit services, and satellite services.³⁰ Value-added telecommunications services are those in which suppliers “add value” to the customer's information by enhancing its form or content or by providing for its storage and retrieval, such as e-mail and voicemail.³¹

25. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994 33 I.L.M. 1125 [hereinafter WTO Agreement].

26. Annex 1B General Agreement on Trade in Services, Apr. 15, 1994 33 I.L.M. 1167. [hereinafter GATS].

27. *Id.* at Article XX.

28. See World Trade Organization, Service Sectoral Classification List, Note by the Secretariat, WTO, MTN.GNS/W/120, July 10, 1991 [hereinafter W120], available at http://www.wto.org/english/tratop_e/serv_e/mtn_gns_w_120_e.doc. The GATS classification scheme was based on a United Nations effort to classify services, referred to as the *Central Product Classification (Provisional)*. United Nations Statistics Division, *Central Product Classification Provisional*, § 7, [hereinafter *CPCProv*], available at <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1> (last visited Feb. 4, 2009).

29. Ministerial Decision on Negotiations on Basic Telecommunications, The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 461 (GATT Secretariat 1994), available at 1994 WL 761488, at *16-17.

30. World Trade Organization, Coverage of Basic Telecommunications and Value-Added Services, http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_coverage_e.htm#basic (last visited Feb. 4, 2009).

31. *Id.*

Audio-visual services are also broken down into subsectors, of which only one is relevant—radio and television transmission services. “Radio and television transmission services” refer to the network services necessary for the transmission of radio and television signals.³²

Each WTO member’s Schedule lists the sectors for which the member is willing to undertake market access obligations, i.e., whether a foreign service may enter the market or whether a foreign service supplier may supply a particular service.³³ If a WTO member wishes to limit the number of suppliers, the participation of foreign capital, or the form of investment, it must include those limitations in its Schedule. The Schedule also lists national treatment commitments by sector. Any limitations on national treatment, such as foreign ownership limits, must be “scheduled” to be effective.³⁴

The U.S. Schedule of Specific Commitments includes market access and national treatment commitments in audio-visual services³⁵ and basic telecommunications services.³⁶ Under the subsector, “radio and television transmission services,” the United States inscribed the following limitation on market access and national treatment:

Radio and television licences may not be held by: a foreign government; a corporation chartered under the law of a foreign country or which has a non-US citizen as an officer or director or more than 20 per cent of the capital stock of which is owned or voted by non-US citizens; a corporation chartered under the laws of the United States that is directly or indirectly controlled by a corporation more than 25 per cent of whose capital stock is owned by non-US citizens or a

32. W120 lists “radio and television transmission services” as corresponding to CPCProv 7524, from which this description is taken. W120, *supra* note 28, at 4; *CPCProv*, *supra* note 28, at § 7-524.

33. GATS, *supra* note 26, Article XVI.

34. *Id.* at Article XVII. Measures that are inconsistent with both market access and national treatment are entered in the market access column and also provide a condition or qualification to the national treatment commitment. *Id.* at Article XX(3).

35. U.S. Schedule of Specific Commitments, GATS/SC/90 (Apr. 15, 1994) at 46-48, [hereinafter U.S. Schedule 1994] available at http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDdocuments/t/SCHD/GATS-SC/SC90.WPF. The audio-visual services commitments were made as part of the Uruguay Round negotiations, which concluded in December 1993 and entered into force on January 1, 1995.

36. U.S. Schedule of Specific Commitments, Supplement 2, GATS/SC/90/Suppl.2 (Apr. 11, 1997) [hereinafter U.S. Schedule Supp. 2], available at http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDdocuments/t/SCHD/GATS-SC/SC90S2.WPF. The commitments in basic telecommunications services were negotiated in a separate negotiation after the conclusion of the Uruguay Round and entered into force on February 5, 1998. A detailed description of the negotiations on basic telecommunications services and the results of those negotiations can be found in Laura B. Sherman, “Wildly Enthusiastic” *About the First Multilateral Agreement on Trade in Telecommunications Services*, 51 FED. COMM. L.J. 61 (1998).

foreign government or a corporation of which any officer or more than 25 per cent of the directors are non-US citizens.³⁷

Not only do the U.S. audio-visual commitments *not* change U.S. law, they give the United States the ability to bar foreign ownership in broadcast licenses. While § 310(b)(4) gives the FCC discretion to permit foreign investment above twenty-five percent in a broadcast licensee's direct or indirect controlling U.S. parent, the U.S. commitments categorically limit foreign ownership of the parent to no more than twenty-five percent. In addition, the U.S. Schedule also states that "US citizenship is required to obtain radio and television licenses."³⁸

The United States took a very different approach in the negotiations on basic telecommunications services. Negotiators aimed to achieve maximum commitments from WTO members on market access and national treatment, so as to promote the provision of telecommunications services on a competitive basis.³⁹ In order to obtain market-opening commitments from its trading partners, the United States had to make an equally market-opening commitment.⁴⁰ The major demand from its trading partners was the elimination of the foreign ownership restrictions on common carrier radio licenses.

Working with the FCC, the U.S. negotiating team crafted commitments that took advantage of the discretion granted to the FCC in § 310(b)(4). As a result, the U.S. Schedule of Specific Commitments⁴¹ prohibits *direct* ownership of a common carrier radio license by:

- (a) foreign government or the representative thereof
- (b) non-U.S. citizen or the representative of any non-U.S. citizen
- (c) any corporation not organized under the laws of the United States
or
- (d) U.S. corporation of which more than 20% of the capital stock is owned or voted by a foreign government or its representative, non-U.S. citizens or their representatives or a corporation not organized under the laws of the United States.⁴²

At the same time, the Schedule states that there are no market access or national treatment limits on indirect ownership (through holding companies) of a common carrier radio license. The United States preserves

37. U.S. Schedule 1994, *supra* note 35, at 48. Since the U.S. commitments on audio-visual services were undertaken in 1993, prior to the passage of the 1996 Act, the limitation mirrors the then-existing version of Section 310(b)(3) and (4), relating to nationality of officers and directors.

38. *Id.*

39. Sherman, *supra* note 36, at 67 (citing GATS, Negotiating Group on Basic Telecommunications, *Report of the Meeting of 6 May 1994*, TS/NGBT/1, para. 5 (June 10, 1994)).

40. The information is based on the author's participation in the WTO negotiations.

41. U.S. Schedule Supp. 2, *supra* note 36.

42. *Id.*

the right to discriminate in licensing satellite transmissions of direct-to-home and direct-broadcast television services and digital audio radio services in order to require reciprocity from trading partners with respect to those services.⁴³

VII. FCC IMPLEMENTATION OF U.S. COMMITMENTS

Ms. Cho is correct that there was a fundamental policy shift at the FCC in the mid-1990s in applying § 310,⁴⁴ but this shift only related to telecommunications licenses and did not affect broadcast licenses. The shift was not to downplay national security and put more emphasis on “public interest,” as Ms. Cho states.⁴⁵ Rather, it was to expand the reach of the public interest test to address competition concerns about foreign entry into the U.S. telecommunications market in addition to national security concerns and uneasiness about competition in the U.S. market.

Starting with the Foreign Carrier Entry Order, the FCC looked to “advance the public interest by promoting effective competition in the U.S. telecommunications services market, particularly the market for international services.”⁴⁶ The FCC concerns were focused primarily on the ability of foreign carriers with market power on the foreign end to unfairly leverage their market power on the U.S. end.⁴⁷ To do so, the FCC announced it would apply an “effective competitive opportunities” test to “all planned investment in U.S. carriers by foreign carriers above a 25 percent equity threshold, or a controlling interest at any level.”⁴⁸ This included applications for international § 214 authorizations, as well as petitions for a declaratory ruling under § 310(b)(4).

In the case of § 214 applications, the FCC also looked at other public interest factors, including the national security implications of the foreign entry.⁴⁹ With respect to foreign ownership under § 310(b)(4), the FCC stated that it would look at “other public interest factors that weigh in favor of, or against, foreign investment[.]”⁵⁰ These additional factors include “any national security, law enforcement, foreign policy and trade concerns raised by the Executive Branch.”⁵¹

43. U.S. of Am., List of Article II (MFN) Exemptions, Supplement 2, GATS/EL/90/Suppl.2 (Apr. 11 1997), available at <http://docsonline.wto.org/DDFDocuments/t/SCHD/GATS-SC/SC90S2.WPF>.

44. Cho, *supra* note 1, at 117.

45. *Id.*

46. *Foreign Carrier Entry Order*, *supra* note 7, at para. 17.

47. *Id.* at para. 29.

48. *Id.* at para. 19.

49. *Id.* at para. 56.

50. *Id.* at para. 216.

51. *Id.*

Following the conclusion of the WTO negotiations on basic telecommunications, the FCC reevaluated its competitive concerns about foreign entry into the U.S. market for telecommunications services. It concluded that these concerns had been alleviated by the market-opening commitments of WTO members.⁵² The Foreign Participation Order clearly states that the new open entry policy for service suppliers from WTO members applies to applications for international § 214 authorizations, cable landing licenses, and authorization to exceed the § 310(b)(4) foreign ownership benchmark.⁵³ In parallel, the FCC extended the new open entry policy to satellite services provided by foreign-owned satellite operators—except for Direct-to-Home (DTH), Direct Broadcast Satellite (DBS) services, and digital audio radio services—which remain subject to the effective competitive opportunities test in light of the U.S. exclusion of these services from its WTO commitments.⁵⁴

The new open market entry policy was not a “critical blow to the national security concern,” as Ms. Cho states.⁵⁵ Both the Foreign Participation Order and the Amendment to the Commission’s Regulatory Policies regarding domestic and international satellite services (DISCO II) emphasize that the FCC will continue to look at all other facets of the public interest test, including any national security, law enforcement, foreign policy, and trade concerns raised by the Executive Branch.⁵⁶ In practice, where foreign ownership is present, the FCC sends all applications for § 214 authorizations, cable landing licenses, and all petitions for a declaratory ruling under § 310(b)(4) to the Executive Branch for review and does not act on the application or petition until the Executive Branch responds. The Executive Branch often requests that the FCC include, as a condition to a license or authorization, a requirement that the licensee abide by any agreement reached with the Executive Branch to assuage national security and law enforcement concerns, a request which the FCC routinely grants.⁵⁷

52. *Foreign Participation Order*, *supra* note 10, at paras. 13-14.

53. *Id.*

54. Amendment of the Commission’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Services in the United States, *Report and Order*, 12 F.C.C.R. 24094, para. 13 (1997) [hereinafter *DISCO II*].

55. Cho, *supra* note 1, at 119.

56. *Foreign Participation Order*, *supra* note 10, at para. 61; *DISCO II*, *supra* note 52, at para. 178.

57. See, e.g., International Authorizations Granted, *Public Notice*, FCC DA No. 08-1905 (Aug. 14, 2008) (granting a transfer of control application for Helio LLC, subject to the condition that the transferee abide by the commitments made by Helio in a January 10, 2006 letter to the Department of Justice, Federal Bureau of Investigation and the Department of Homeland Security).

As demonstrated above, the FCC's policy toward foreign ownership of broadcast licenses did not change in the Foreign Carrier Entry Order or Foreign Participation Order. In the Foreign Carrier Entry Order, the FCC specifically addressed the issue of whether an effective market access test should apply in the broadcast context. The FCC stated that "[f]oreign ownership of broadcast licenses presents different questions than for other types of radio spectrum licenses."⁵⁸ Citing support from the Executive Branch and Congress, the FCC concluded that, "the time has [not] yet come to ease restrictions on alien ownership of broadcast licenses to the extent that would result from the implementation of an effective competitive opportunities test in the broadcast context."⁵⁹

Other FCC actions confirm that it has not changed its broadcast policy. As evidenced by the title alone, the Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses,⁶⁰ which Ms. Cho cites as evidence that the FCC has an open entry policy for broadcast licenses,⁶¹ refers only to common carrier and aeronautical radio licenses. Moreover, the text of the Foreign Ownership Guidelines states: "These Guidelines are intended to apply to two categories of radio licenses: (1) common carrier and (2) aeronautical en route or aeronautical fixed (hereinafter, 'aeronautical') licenses."⁶²

The other evidence that Ms. Cho cites to support her conclusion that the FCC has changed its policy on broadcast licenses is not an FCC action at all.⁶³ It is a recommendation by a subcommittee of the FCC Advisory Committee on Diversity.⁶⁴ In fact, the FCC rejected the recommendation, stating that: "[w]e are not convinced, on the basis of the record before us, that taking the extraordinary step of relaxing our foreign ownership rules would advance our interest in promoting diversification among broadcast licensees, including women and minorities."⁶⁵

58. *Foreign Carrier Entry Order*, *supra* note 7, at para. 192.

59. *Id.* at para. 194.

60. FCC INT'L BUREAU, FOREIGN OWNERSHIP GUIDELINES FOR FCC COMMON CARRIER AND AERONAUTICAL RADIO LICENSES (2004) [hereinafter FOREIGN OWNERSHIP GUIDELINES], available at http://www.fcc.gov/ib/Foreign_Ownership_Guidelines_Erratum.pdf.

61. Cho, *supra* note 1, at 117.

62. FOREIGN OWNERSHIP GUIDELINES, *supra* note 60, at 4.

63. Cho, *supra* note 1, at 133.

64. ADVISORY COMMITTEE ON DIVERSITY FOR COMMUNICATIONS IN THE DIGITAL AGE, RECOMMENDATION TO THE FCC: ADOPTION OF A DECLARATORY RULING ON SECTION 310(B)(4) WAIVERS (2004), available at http://www.fcc.gov/DiversityFAC/041210/foreign_ownership_rule.pdf.

65. Promoting Diversification of Ownership in the Broadcasting Industry, *Report and Order and Third Further Notice of Proposed Rulemaking*, 23 F.C.C.R. 5922, para. 77 (2008).

VIII. CONCLUSION

The United States did not undertake any obligations to open the U.S. market for radio or television broadcasting to foreign entry in either NAFTA or the WTO. In fact, in both negotiations, the United States preserved its ability to discriminate against foreign investors in the broadcasting market. In contrast, the United States made significant market-opening commitments for telecommunications services in the WTO. This dichotomy between a closed market for broadcast services and an open market for telecommunications services has been reflected in FCC policies and orders since the WTO negotiations on basic telecommunications concluded in 1997.