TELECOMMUNICATIONS AND TRADE PROMOTION AUTHORITY: MEANINGFUL MARKET ACCESS GOALS FOR TELECOMMUNICATIONS SERVICES IN INTERNATIONAL TRADE AGREEMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND
COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

OCTOBER 9, 2002

Serial No. 107–138

Printed for the use of the Committee on Energy and Commerce

Available via the World Wide Web: http://www.access.gpo.gov/congress/house

U.S. GOVERNMENT PRINTING OFFICE

82–440PS WASHINGTON : 2002

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON ENERGY AND COMMERCE

W.J. "BILLY" TAUZIN, Louisiana, *Chairman*

MICHAEL BILIRAKIS, Florida
JOE BARTON, Texas
FRED UPTON, Michigan
CLIFF STEARNS, Florida
PAUL E. GILLMOR, Ohio
JAMES C. GREENWOOD, Pennsylvania
CHRISTOPHER COX, California
NATHAN DEAL, Georgia
RICHARD BURR, North Carolina
ED WHITFIELD, Kentucky
GREG GANSKE, Iowa
CHARLIE NORWOOD, Georgia
BARBARA CUBIN, Wyoming
JOHN SHIMKUS, Illinois
HEATHER WILSON, New Mexico
JOHN B. SHADEGG, Arizona
CHARLES "CHIP" PICKERING, Mississippi
VITO FOSSELLA, New York
ROY BLUNT, Missouri
TOM DAVIS, Virginia
ED BRYANT, Tennessee
ROBERT L. EHRLICH, Jr., Maryland
STEVE BUYER, Indiana
GEORGE RADANOVICH, California
CHARLES F. BASS, New Hampshire
JOSEPH R. PITTS, Pennsylvania
MARY BONO, California
GREG WALDEN, Oregon
LEE TERRY, Nebraska
ERNIE FLETCHER, Kentucky
JOHN D. DINGELL, Michigan
HENRY A. WAXMAN, California
EDWARD J. MARKEY, Massachusetts
RALPH M. HALL, Texas
RICK BOUCHER, Virginia
EDOLPHUS TOWNS, New York
FRANK PALLONE, Jr., New Jersey
SHERROD BROWN, Ohio
BART GORDON, Tennessee
PETER DEUTSCH, Florida
BOBBY L. RUSH, Illinois
ANNA G. ESHOO, California
BART STUPAK, Michigan
ELIOT L. ENGEL, New York
TOM SAWYER, Ohio
ALBERT R. WYNN, Maryland
GENE GREEN, Texas
KAREN MCCARTHY, Missouri
TED STRICKLAND, Ohio
DIANA DEGETTE, Colorado
THOMAS M. BARRETT, Wisconsin
BILL LUTHER, Minnesota
LOIS CAPPS, California
MICHAEL F. DOYLE, Pennsylvania
CHRISTOPHER JOHN, Louisiana
JANE HARMAN, California

DAVID V. MARVENTANO, *Staff Director*
JAMES D. BARNETTE, *General Counsel*
REID P.F. STUNTZ, *Minority Staff Director and Chief Counsel*

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

CLIFF STEARNS, Florida, *Chairman*

FRED UPTON, Michigan
NATHAN DEAL, Georgia
Vice Chairman
ED WHITFIELD, Kentucky
BARBARA CUBIN, Wyoming
JOHN SHIMKUS, Illinois
JOHN B. SHADEGG, Arizona
ED BRYANT, Tennessee
GEORGE RADANOVICH, California
CHARLES F. BASS, New Hampshire
JOSEPH R. PITTS, Pennsylvania
MARY BONO, California
GREG WALDEN, Oregon
LEE TERRY, Nebraska
ERNIE FLETCHER, Kentucky
W.J. "BILLY" TAUZIN, Louisiana
(Ex Officio)
EDOLPHUS TOWNS, New York
DIANA DEGETTE, Colorado
LOIS CAPPS, California
MICHAEL F. DOYLE, Pennsylvania
CHRISTOPHER JOHN, Louisiana
JANE HARMAN, California
HENRY A. WAXMAN, California
EDWARD J. MARKEY, Massachusetts
BART GORDON, Tennessee
PETER DEUTSCH, Florida
BOBBY L. RUSH, Illinois
ANNA G. ESHOO, California
JOHN D. DINGELL, Michigan,
(Ex Officio)

CONTENTS

TELECOMMUNICATIONS AND TRADE PROMOTION AUTHORITY: MEANINGFUL MARKET ACCESS GOALS FOR TELECOMMUNICATIONS SERVICES IN INTERNATIONAL TRADE AGREEMENTS

WEDNESDAY, OCTOBER 9, 2002

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2322, Rayburn House Office Building, Hon. Cliff Stearns (chairman) presiding.

Members present: Representatives Stearns, Shimkus, Bryant, Towns, and Rush.

Staff present: Howard Waltzman, majority counsel; Ramsen Betfarhad, policy coordinator; Hollyn Kidd, legislative clerk; Andy Levin, minority counsel; and Brendan Kelsay, minority professional staff.

Mr. STEARNS. Good morning, and welcome, all of you, to our subcommittee hearing. I welcome our distinguished witnesses to this hearing on Telecommunications and Trade Promotion Authority: Meaningful Market Access Goals for Telecommunications Services in International Trade Agreements.

On March 19, 1997, what was then the Subcommittee on Telecommunications, Trade, and Consumer Protection held a hearing entitled "The WTO Telecom Agreement Results in Next Steps." That hearing was the first one on trade since the subcommittee had been reconstructed to emphasize this committee's trade jurisdiction.

So in 1997, we held a hearing that reviewed the first major telecom agreements to come out of the WTO, and today we are reviewing how new trade agreements may create new opportunities for U.S. telecom companies abroad and how such agreements may create new obligations with respect to telecom in the United States. This subcommittee has had a strong interest in provisions affecting telecommunications and international trade agreements, and, under the recently passed Trade Act, the Energy and Commerce Committee will play an even stronger role in how those provisions are crafted.

The Trade Act provides for a substantial consultant role for Congress in trade negotiations. The legislation establishes a congres-

sional oversight group with members from the House of Representatives, to include Chairman Tauzin and Representative Dingell.

The Trade Act requires the United States Trade Representative to "consult closely and on a timely basis with and keep fully appraised of the negotiations, the congressional oversight group, and all committees of the House of Representatives and the Senate, with jurisdiction over laws that would be affected by a trade agreement resulting from the negotiations."

The President must provide written notice to Congress 90 days before initiating negotiations. The President is also required to consult with the COG before and after submitting the notice. The President must also provide written notice to Congress of the President's intention to enter into an agreement 90 days before entering into such an agreement.

In addition, before entering into such agreement, the President must consult with the COG and the committee that have jurisdiction over subject matters affected by the trade agreement. Consultation must address the nature of the agreement and the general effect of the agreement on existing laws.

As a result of the Trade Act, the Energy and Commerce Committee has an important role to play in the negotiating, drafting, and implementation of any new trade agreements. As a committee with jurisdiction over interstate and foreign communications, the Energy and Commerce Committee will provide technical expertise to USTR during upcoming trade agreements, including the pending Singapore Free Trade Agreement.

This hearing today will help us lay the groundwork for the advice that we will provide to USTR. I hope that we will be able to explore how best to craft telecommunications provisions in trade agreements. Should they be broad, leaving domestic regulatory authorities to fill in the blanks? Or should they be detailed, locking in rules now that will dictate how domestic telecommunications markets are regulated?

This hearing will explore these and other issues. I will conclude by stating that I look forward to continuing this subcommittee's oversight over trade issues, especially when those trade issues affect a topic like telecommunication that is a core jurisdictional responsibility of this committee.

At this point, the distinguished ranking member from New York, Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman. Let me begin by thanking you for holding this hearing on such an important part of our economy, particularly with many telecom companies struggling and some even going out of business.

A public official once said that principles were the most important thing to have in politics, and that his most important principle was flexibility. I am strongly in favor of securing America's interest when we enter into trade agreements. And while I have no set position on whether the regulations should be narrowly focused or have a wider scope, it would seem that flexibility is the key to success.

In 1996, I, along with the majority of my colleagues, voted for the Telecommunications Act in hopes that there would be competition in every area of the telecom industry. It is my opinion that com-

petition in the marketplace should not suffer, domestically or internationally, due to the rigidity of international agreements.

Because Congress passes laws, and we have been known from time to time to correct previously passed provisions, it would seem logical that agreements should square up with current U.S. code. Again, I look forward to hearing from the witnesses today and developing the committee's jurisdiction on this important issue of regulatory-based trade.

And I yield back the balance of my time, Mr. Chairman.

Mr. STEARNS. I thank my colleague.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. ED BRYANT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE

Mr. Chairman, the recent adoption of Trade Promotion Authority legislation sent a strong signal to the White House that Congress recognizes the need for the U.S. to be on equal footing with other nations in the process of trade negotiations.

Our approval of TPA demonstrated Congress' faith in the Administration to negotiate trade agreements that would yield maximum benefits for U.S. companies and allow them to compete fairly and squarely against any and all foreign competitors.

The TPA legislation also reaffirmed the necessity of a close, cooperative relationship between Congress and the Administration to jointly consider and develop strategic approaches to enhance U.S. trade relations, with regard to both cross-cutting, horizontal trade issues and sector-specific matters.

As the United States' highest law-making body, Congress has a clear role in ensuring that our trade obligations are fully consistent with, and supportive of, the laws of our country. The role was reaffirmed, and indeed mandated in the TPA bill.

It is with that in mind that I applaud today's hearing, which will examine an important aspect of our negotiations with Singapore-namely, the telecommunications sector.

Subcommittee members, who have carefully considered telecommunications policies that profoundly affect our domestic industry, welcome the opportunity to share our views with the Office of the U.S. Trade Representative as it proceeds in its efforts to establish mutually binding trade commitments in this most important sector.

PREPARED STATEMENT OF HON. W.J. "BILLY" TAUZIN, CHAIRMAN, COMMITTEE ON ENERGY AND COMMERCE

Thank you, Mr. Chairman. I commend you for holding this important hearing today on a topic that goes to the heart of this committee's jurisdiction.

More than five years ago, when I chaired the Subcommittee on Telecommunications, Trade, and Consumer Protection, I held a hearing on the newly adopted WTO Basic Telecommunications Agreement. We heard testimony from Ambassador Zoellick's predecessor, Charlene Barshefsky, and from former FCC Chairman Reed Hundt.

Then, as now, we examined the impact that USTR's trade negotiations were having on a subject near and dear to the heart of this committee: telecommunications.

I appreciate USTR's continued willingness to appear before this committee and educate us about telecommunications provisions in trade agreements. I am extremely disappointed, however, that the FCC failed to produce a single witness for this hearing.

When the United States negotiates market access concessions for telecommunications services, it is a double-edged sword. Successful negotiations provide greater export opportunities for U.S. service providers and manufacturers. Given the depressed state of our telecommunications sector, we could use all the help we could get.

But negotiations also have implications for domestic laws and regulations. I encourage USTR to expand export opportunities for U.S. telecommunications companies. But I would discourage USTR from entering into any agreement that locks in current FCC regulations, or adopts an otherwise prescriptive regulatory approach that undermines facilities-based deployment.

The implementation of the 1996 Telecommunications Act has been an abysmal failure. Rather than encourage investment, innovation, and facilities-based deploy-

ment, the current regulatory regime has caused companies to hold back billions of dollars of investment. That has created the slump in the telecommunications manufacturing sector that has resulted in hundreds of thousands of layoffs.

It is my hope that the FCC expeditiously changes the regulatory landscape to provide the proper incentives for investment. It should have been done already, and it better be done soon.

So it is critical that our international negotiations do not have a negative impact on our opportunity to change the regulatory landscape in the United States. Market access commitments that apply to telecommunications services should be broad enough to enable the FCC to change the current rules. The worst outcome I could imagine would involve the FCC finally getting around to changing the rules, but for the USTR to have already bound the United States to a regulatory framework that discourages facilities-based investment. That simply must not happen.

I intend to take my position on the COG and this committee's consultative role with respect to telecommunications provisions in free trade agreements very seriously. USTR has a statutory responsibility to consult with us on telecommunications matters, and I have no intention of letting a bad deal become the framework for telecommunications policy in this country.

I look forward to hearing testimony from our witnesses today regarding how telecommunications provisions in trade agreements can be crafted to achieve market access for exporters while at the same time preserving the FCC's authority to change domestic telecommunications regulations. And I once again thank the Chairman for holding this hearing.

Mr. STEARNS. And we welcome the witnesses, Ms. Florizelle Liser, the Assistant U.S. Trade Representative for Industry and Telecommunications, United States Trade Representative; Mr. Gregory Sidak, Weyerhaeuser Fellow in Law and Economics Emeritus, American Enterprise Institute; Mr. Scott Blake Harris, Managing Partner, Harris, Wiltshire & Grannis; and Mr. Larry Darby, Darby Associates; and Mr. Leonard Waverman, Professor of Economics, London Business School.

And I guess, Mr. Waverman, you have come the furthest. So is Mr. Waverman here?

Mr. WAVERMAN. He is on the phone.

Mr. STEARNS. Oh, you are doing it through telephone. Okay.

Mr. WAVERMAN. Well, it is telecom issues. So I thought I would——

Mr. STEARNS. If we had you down in our other subcommittee, we would be able to see you, but here we can't. So we welcome you and want to thank you for contributing through telephone.

So at this point, let me start with you, Madam, and we look forward to your opening statement.

STATEMENTS OF FLORIZELLE B. LISER, ASSISTANT U.S. TRADE REPRESENTATIVE FOR INDUSTRY AND TELECOMMUNICATIONS, UNITED STATES TRADE REPRESENTATIVE; J. GREGORY SIDAK, WEYERHAEUSER FELLOW IN LAW AND ECONOMICS EMERITUS, AMERICAN ENTERPRISE INSTITUTE; LEONARD WAVERMAN, PROFESSOR OF ECONOMICS, LONDON BUSINESS SCHOOL; SCOTT BLAKE HARRIS, MANAGING PARTNER, HARRIS, WILTSHIRE & GRANNIS, LLP; AND LARRY F. DARBY, DARBY ASSOCIATES

Ms. LISER. Good morning. Thank you, Mr. Chairman and other members of the committee. My name is Flori Liser. I am the Assistant U.S. Trade Representative for Industry and Telecommunications, and I appreciate the opportunity today to testify on the market access goals——

Mr. STEARNS. Can I have you just pull your microphone up a little closer? That would be helpful. That is perfect. Thanks.

Ms. LISER. Again, I appreciate the opportunity to testify on market access goals and telecommunications and the proposed telecom provisions in the Chile and Singapore FTAs.

The telecommunications sector, as you well know, plays an important role in both the U.S. and the global economy. As many of you recognize, and Ambassador Zellik has emphasized to us, this sector has a multiplier effect. That is, openness in the telecom sector affects many other sectors.

We are not just discussing market access and competitive environment for telecom service providers but for all sectors that depend on telecom services to support their own business operations, including banking, insurance, tourism, and a broad range of goods manufacturers that trade and do business abroad.

U.S. telecom companies remain global leaders in building and operating telecommunications networks abroad, and U.S. telecom companies have invested billions in networks in every major market in every region of the globe and continue to expand. Given the importance of the telecom sector and the significant interest of the telecom companies of the United States and many other U.S. businesses, our goal, and I believe yours as well, is to support and enhance market access and competitive opportunities abroad in this important sector.

In fact, since the late 1980's, there has been broad support for opening up foreign telecommunications markets through trade agreements. In 1988, we initiated a series of bilateral value added agreements that ensured data service providers the right to serve their multinational customers in foreign markets.

In 1993, we included in NAFTA a telecom chapter that granted U.S. operators the right to provide value added services in Mexico and Canada, and in 1997 we negotiated the WTO reference paper that ensured fair treatment of telecom suppliers by foreign regulators and cost-based access to the network of dominant public telecom suppliers.

As new markets have opened up around the world, and U.S. telecom companies have entered them, these trade obligations have been instrumental in improving market access. They have also proved helpful in addressing specific problems faced by U.S. suppliers of telecom services.

In order to maximize market opportunities in Chile and Singapore, the administration last year tabled our initial telecommunications proposal. With considerable input from industry, we developed and continue to make changes in this text. USTR has worked closely with the Federal Communications Commission, the Department of Commerce, and others to develop the administration's telecom proposals. In fact, USTR does not put forward proposed text without the benefit of the FCC's review to assure its consistency with current FCC policies, as well as foreseeable changes in those policies.

The United States has the most open competitive telecom market in the world, and we believe that there is broad support for using trade agreements to open up foreign markets to U.S. telecommunications interest. I believe there is also broad support for trade

agreements that are specific and detailed enough to open up these markets in meaningful and effective ways, and to address specific problems that our companies face in those countries and those markets.

A broad spectrum of U.S. telecom interests with whom we have been working have supported the Singapore and Chile telecom texts that are most detailed and are more detailed than the WTO reference paper and that address specific market access problems that we have in those two countries.

On the other hand, there is a broad consensus that trade agreements should not be so detailed and prescriptive that they lock in any particular regulatory regime. We believe we have taken steps to prevent this, and, instead, to ensure that our trade agreements are flexible enough to accommodate changes in domestic telecommunications law, regulation, and policy.

It is important to strike the right balance. Balance is really the key here. If our trade agreements are too vague, they will be ineffective in addressing and combatting the trade barriers that our companies face. By the same token, though, if our trade agreements are too detailed and prescriptive, then we run the risk of inappropriately locking in the regulatory status quo.

The administration's goal is to have agreements in the FTAs for Chile and Singapore on telecom that are effective but flexible enough to accommodate changes in law, regulation, and policy here in the U.S., such as those that are under consideration by lawmakers and regulators here.

We would welcome the opportunity to work with you and others to explain our proposal and to make adjustments, as necessary, to assure the right balance in the Singapore and Chile text.

That concludes my opening remarks. I would ask that my entire written statement be included in the record, and would be pleased to respond to any questions you may have.

[The prepared statement of Florizelle B. Liser follows:]

PREPARED STATEMENT OF FLORIZELLE B. LISER, ASSISTANT U.S. TRADE REPRESENTATIVE FOR INDUSTRY AND TELECOMMUNICATIONS

Mr. Chairman, Members of the Subcommittee, I am pleased to testify on our market access goals in international telecommunications. I appreciate your interest in this key area of trade policy, and I look forward to working with this committee to ensure that we represent U.S. interests in the most effective manner possible.

Telecommunications is a critical part of the U.S. and global economy. Indeed, U.S. telecommunications companies have invested billions of dollars in networks in every major market and every region of the globe and they continue to look for new opportunities. Our overall telecom trade policy goal is to create an open international market where U.S. companies can compete on even terms with foreign firms. We believe this will promote global competition, help consumers, and support U.S. leadership in this area.

Our telecom market is one of the most open in the world, bolstered by a strong commitment to competition. We seek to ensure that core aspects of what foreign companies benefit from here are also made available to our companies abroad, where we have significant trade interests. We develop these goals through close consultation with other U.S. agencies. We also seek advice from the Federal Communications Commission to ensure that our proposals are consistent with current law. In doing so, we pay particular attention to ensuring that trade provisions reflect the flexibility we need to take into account our evolving domestic regime.

I'd like to provide a greater understanding of how trade policy fits into the overall development of the global telecommunications market. My testimony will focus on:

- the history of telecom trade agreements;
- the current state of play of telecommunications in our bilateral FTA's; and

• a look at the coverage of these issues in other agreements going forward.

HISTORICAL DEVELOPMENT

In the 1990's, many countries followed the U.S. lead by embracing competition in telecommunications markets by liberalizing their markets and loosening the grip of government-operated monopolies. The approach was incremental with the first area that typically opened up to competition being value-added services, where a series of bilateral agreements were signed in the late 1980's and early 1990's. These were followed by telecommunications provisions in the NAFTA in 1993 and the WTO General Agreement of Trade in Services in 1994, responding mainly to the market needs of value-added service suppliers.

These telecommunications provisions were designed to ensure that all service suppliers—banks, retailers, insurers etc—would have access to and use of the public telecommunications networks, in particular leased lines, on reasonable and non-discriminatory terms. The NAFTA went further: it required that public telecommunications services be made available at rates reflecting economic costs. In addition, for value-added services, which have flourished in a competitive environment, the NAFTA provided rules to ensure that such services would remain deregulated.

The WTO basic telecommunications negotiations, which were completed in 1997, took telecommunications trade disciplines a step further, through a series of individual commitments by 69 trading partners. These commitments came into force in February 1998. In addition to guaranteeing the right of WTO Members' telecommunications suppliers to operate in these foreign market through market access commitments, commitments by most major trading partners also included adherence to binding, detailed regulatory disciplines—the so-called WTO Reference Paper. These disciplines were designed to address typical "doing business" problems public telecommunications suppliers encountered in foreign markets—including anti-competitive practices of monopoly telecommunications providers that impeded effective market access.

In particular, these disciplines sought to ensure that foreign public telecommunications suppliers would be treated fairly by a regulator; that rules would be transparent; that allocation of scarce resources would be based on objective, non-discriminatory criteria; that interconnection with the dominant public telecommunications supplier's networks was provided on non-discriminatory, "cost-oriented" rates in an unbundled manner; and that if disputes between new entrants and the dominant supplier arose, the regulator would be in a position to arbitrate effectively. It is noteworthy that the U.S. regime served as the basis for this multilateral effort, and the disciplines in the Reference Paper closely reflect what Congress had developed for our domestic market, tracking the 1996 Telecommunications Act.

CURRENT DEVELOPMENTS

As new markets opened up around the world and U.S. telecommunications companies entered those markets, the provisions of existing trade obligations have been instrumental in improving market access for telecommunications services even in the most closed countries. We continue to use these trade tools to ensure our telecommunications suppliers enjoy effective market access despite the continued presence of dominant suppliers of public telecommunications services.

For example, these provisions have been of enormous help in addressing market access problems in markets as diverse as Mexico, Taiwan, Germany, Canada, and Japan, where U.S. carriers have invested billions of dollars. In each of these markets, we have successfully worked to increase competitive opportunities for U.S. suppliers.

- In Japan, our active intervention in getting the Japanese to more effectively regulate its dominant supplier NTT has resulted in significant reductions in interconnection rates, permitting, for the first time, local competition.
- In Canada, we opened up a lucrative international market segment to competition and helped encourage reform of a universal services program that appeared biased in favor of national operators and posed a significant burden on other U.S. carriers in Canada.
- In Taiwan, we ensured that U.S. submarine cable operators could sell network capacity freely into that market.
- In Germany, our efforts have helped U.S. companies gain faster access to leased lines from the dominant incumbent supplier to help them better serve their customers, which include business users and Internet service providers.
- In Mexico, we helped ensure that domestic long-distance interconnection rates were reduced to cost-based levels, and that Telmex could not unilaterally block local competition by refusing to interconnect with competitors.

In addition to using our trade tools to gain greater market access for our companies, if we believe that our trading partners are not abiding by their obligations, we will exercise our right to initiate dispute settlement under our trade agreements. Recently we initiated the first telecommunications case in the WTO against Mexico in the area of international services.

All these actions benefit U.S. telecommunications companies, other U.S. businesses and U.S. consumers, both here and abroad—through promoting increased choice of services and suppliers and more competitive pricing of such services. The dramatic reductions in the price of international calls for U.S. consumers and businesses is one example of the kind of benefits our efforts have helped achieve.

Despite these successes, we also have learned the limits of the trade tools we have at our disposal—preventing us from addressing pervasive bottlenecks to competition in foreign markets. For example, restricted access to rights of way, to submarine cable landing stations, and to other facilities needed by competing carriers when building networks and interconnecting with the dominant public telecommunications supplier, have delayed or hindered the network build-out by U.S. telecommunications suppliers in many countries. In many countries, government-mandated technical requirements (particularly in the wireless sector) have precluded U.S. operators and equipment suppliers from competing effectively in those markets. In country after country, lack of transparency and the ability of national champions to tilt rules and decisions in their favor put foreign competitors at an enormous disadvantage.

The experiences faced by U.S. companies in many markets have demonstrated that the problems they face are in some cases more complex than those anticipated by the WTO Reference Paper negotiators, and that further refinement of trade commitments could help address such issues. In short, many rules, procedures and practices we take for granted in the United States are simply absent in many markets. At the same time, we have fully opened up our market where a core commitment to competition and recourse to procedures for resolving such problems are readily available. In international services alone, the number of authorized carriers increased from 175 in 1997 to 1,600 in 2001,[1] and a significant percentage of these new operators were affiliated with foreign carriers. The obvious question arises: if foreign carriers are taking advantage of our open market and enjoy such treatment here, shouldn't U.S. carriers enjoy similar treatment in those foreign markets? If foreign carriers operating in the U.S. are ensured access to rights of way and bottleneck facilities controlled by dominant public telecommunications suppliers, to regulatory transparency and due process, and freedom to use technologies of their choice in providing services, shouldn't U.S. carriers enjoy similar access in foreign markets? Aren't there core disciplines we should try to seek in markets of interest to us, above and beyond what existing trade rules provide?

In proposing trade rules there is always a balance between what we seek to obtain from our trading partners and what we ourselves want to be held to: if trade commitments are too prescriptive, we may not give ourselves appropriate flexibility domestically; but if provisions are too general, they may not allow us to resolve problems in foreign markets. As a general matter, we seek to incorporate the minimum amount of detail necessary to address actual problems our companies face in foreign markets. Nevertheless, our first principle has been to ensure that nothing the U.S. proposes in a trade agreement is inconsistent with U.S. law, rule or practice. In fact, we go further, by seeking to ensure that proposals provide sufficient flexibility to take into account any foreseeable changes to U.S. laws, FCC rulemakings, and practices.

To ensure that USTR negotiates trade agreements that are consistent with U.S. law, rules, and practices, USTR consults relevant federal agencies that are part of an interagency process, as well as with the Federal Communications Commission. We do so to ensure that the FTAs build in sufficient flexibility to accommodate possible changes to U.S. laws, rules and practices so that such changes would remaining in compliance with proposed trade obligations. Current U.S. proposals are consistent with the 1996 Telecom Act and build in flexibility to provide the FCC with the necessary discretion to make alterations to its rules. The FCC provides advice to USTR to ensure that any proposals negotiated by USTR are consistent with U.S. telecommunications laws and its rules. In addition, USTR has consulted closely with U.S. industry representatives from the telecommunications sector and has engaged in extensive discussions with Bell companies, long-distance companies, and ISPs. USTR has made significant modifications to the language under negotiation in the FTAs with Chile and Singapore to take into account concerns that have been raised in this process.

---

[1] Telegeography, 2001

We have been particularly careful to ensure maximum flexibility in areas subject to legislative, regulatory, and judicial review, such as unbundling and pricing standards. We have consulted closely with industry representatives and relevant federal agencies and have sought advice from the Federal Communications Commission, to ensure that we grant ourselves the flexibility we require to accommodate a broad range of possible changes, and still remain in compliance with a trade commitment.

It is also important to recognize the self-limiting nature of some of the provisions we have proposed. Provisions that relate to a company with market power will, ideally, be made obsolete by market forces: as competition takes root, such provisions will no longer be applicable. To underscore this, we have proposed explicitly endorsing the concept of minimum regulation—as markets become competitive, economic regulation should recede.

Working with the Department of State and the Department of Commerce we have developed five core goals for the current negotiations with Singapore and Chile, which build on and expand existing telecommunications trade disciplines. We also seek advice from the Federal Communications Commission as to whether our specific proposals to achieve these goals are consistent with the Communications Act and implementing regulations. These goals include:

- ensuring that domestic and foreign users (especially other suppliers such as banks, manufacturing plants, etc.) enjoy non-discriminatory access to the public telecommunications network;
- ensuring transparency and due process in the telecommunications regulatory regime, particularly relating to rulemaking and tariffs;
- ensuring effective regulatory oversight, including meaningful sanction authority;
- ensuring meaningful access to networks of dominant providers of public telecommunications services where such providers still enjoy market power, to permit the growth of competitive networks; and
- ensuring a presumption towards deregulation, where competition obviates the need for economic regulation.

Singapore is becoming a communications hub for Asia, and a wide range of U.S. telecommunications suppliers have existing or planned investments there. Chile is also home to significant U.S. investment. We see our FTA telecommunications proposals as enhancing U.S. companies' ability to invest and compete in these markets, bringing benefits to phone companies, U.S. consumers, and U.S. business, both here and in those markets. We are confident that the provisions we are negotiating are consistent with U.S. laws and regulations and provide adequate flexibility to take into account any foreseeable changes to U.S. law and FCC regulations.

FUTURE TRADE AGREEMENTS

While the above-mentioned goals are applicable to the bilateral FTAs now under negotiation, let me underscore that we are committed to evaluating appropriate trade disciplines in a bilateral context on a case-by-case basis, taking into account the nature of each market and our economic interests at stake. We do not expect that telecommunications provisions tailored for one market will be exported wholesale to other markets, or to regional or multilateral agreements. What is appropriate for relatively well-developed markets like Chile and Singapore may not be appropriate for another economy. We have not yet developed proposals for use in broader regional and multilateral fora. Rest assured that we are committed to a thorough consultative process as we move forward. Our goal is to provide opportunities abroad similar to those that foreign companies enjoy here, and to provide both us and our trading partners the flexibility we both need to develop effective telecommunications regulatory regimes.

We look forward to working with the Committee—directly and as part of the Congressional Oversight Group (COG) that was established in the Trade Act of 2002—to develop trade policy as it relates to telecommunications. We welcome a strong collaborative role for this committee and others to ensure that trade agreements submitted to Congress will enjoy the broadest possible support.

Mr. STEARNS. I thank you. And by unanimous consent, so ordered.

Mr. Sidak?

STATEMENT OF J. GREGORY SIDAK

Mr. SIDAK. Thank you, Mr. Chairman. It is hard to comment definitively on the process by which the Office of the U.S. Trade Representative sets trade policy concerning telecommunications serv-

ices. The reason is that the process is opaque. Through comments from various carriers, I have a vague notion of how the USTR process works. My understanding is incomplete, and so sometimes it is more appropriate for me to pose questions to the committee rather than speculating.

But, first, why is the USTR's process so secret? There is not, in that process, something like the notice and comment process at the FCC. There aren't ex parte rules. And so there is a kind of absence of transparency there that invites questions in terms of who does have input in the process of policy formulation at USTR?

I think there is also a concern based on things I have heard from carriers that the trade representative and his deputies are not engaged in the process by which their subordinates are turning international trade negotiations into detailed demands about the pricing of unbundled network elements and that sort of thing.

In my view, it is not appropriate for the Trade Representative and his deputies to give subordinates who were never nominated by the President and confirmed by the Senate the discretion to dictate important trade policies with Japan, Mexico, and to formulate the template bilateral trade agreement in the Singapore negotiations that presumably will be used with other countries as well.

I doubt that the telecom policy of the Bush Administration and Chairman Powell in 2002 is the same policy of the Clinton Administration and Chairman Hundt in 1996. And so I do not understand why the White House and the Department of Commerce and the FCC failed to give USTR clear instructions or advice on what constitutes appropriate telecommunications regulatory principles for the United States to demand of its trading partners.

In my view, silence is the abdication of responsibility. Senior administration officials and Chairman Powell should be concerned that USTR is advancing an interpretation of American telecommunications regulation that ignores the current policy direction of the FCC as well as the reversal of certain local competition rules by the Federal Courts of Appeals.

I wonder whether USTR is aware that from 1996 through 2001 the FCC Record averaged 23,838 pages per year. I question how much expertise resides within USTR, given the sheer complexity and volume of telecom regulation that we have seen.

Turning to the substance of USTR policy, I think that it has a competitor welfare orientation rather than a consumer welfare orientation, and that probably reflects the fact that they are interested in helping companies. But I think in the specific case of the kinds of regulations that USTR has been trying to export to other countries, it is not really going to achieve that purpose.

No American carrier will want to invest building a network in another country, in a less developed country, if it knows that it will immediately have to share that network at prices based on long-run average and incremental cost. So it will hold back from making the investment. That doesn't help American producers of telecommunications equipment. It certainly doesn't help the companies that were hoping to build those networks. And it certainly doesn't help the people in that less developed country get wired up to the global telecommunications network.

So what is the agenda at USTR? And here I have to speculate. But I would say that it looks like there may be a boomerang effect that is intended here.

Section 252(i) of the Communications Act provides, "A local exchange carrier shall make available any interconnection service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

On the basis of this language, U.S. long distance carriers may argue that the new bilateral treaty obligations in something like the Singapore Round also apply to local exchange carriers in the U.S. So if USTR can insert what would be, in my view, uncompensatory pricing policies for unbundled network elements in the bilateral agreement with Singapore, it can later come back and claim that the FCC and the State regulators here are treaty bound to impose the same terms on the Bell companies in the United States.

And so the result is that a career bureaucrat somewhere below the secretarial or sub-secretarial level in USTR has had an influence on telecommunications policy domestically, and in that sense overrides the FCC, Congress, and the Federal courts.

Let me conclude by saying that I think there are several recommendations that Congress may want to consider. First, I think it should ask the U.S. Trade Representative himself to explain the process by which his office has come to impose detailed telecommunications regulations on our trading partners.

Next, I think Congress should consider insisting that Presidential appointees in the executive branch regain control of that process rather than delegating important policy decisions to subordinates.

Finally, I think Congress is entitled to expect that the Chairman of the FCC and the Assistant Secretary at NTIA not be bystanders in this process and say, implausibly in my view, that they must defer to USTR's expertise on telecommunications policy.

Finally, the President should request the advice of his various Presidential appointees, Senate-confirmed appointees, on the appropriate substance of U.S. trade policy concerning telecom services. And then he should direct the U.S. Trade Representative to make a decision based on that record.

Thank you.

[The prepared statement of J. Gregory Sidak follows:]

PREPARED STATEMENT OF J. GREGORY SIDAK, AMERICAN ENTERPRISE INSTITUTE

Thank you, Mr. Chairman, for the invitation to testify before your committee. I am testifying on my own behalf, and not on behalf of the American Enterprise Institute, which does not take institutional positions on specific legislative, executive, judicial, or regulatory matters. I am also not testifying as a consultant to any entity, public or private.

I offer for submission into the record a copy of an article that Dr. Jeffrey Rohlfs and I wrote, which is entitled, "Exporting Telecommunications Regulation: The United States-Japan Negotiations on Interconnection Pricing," published this summer in the *Harvard International Law Journal.* In my remarks today, however, I will address a number of issues not discussed in that article.

It is hard to comment definitively on the process by which the Office of the U.S. Trade Representative sets trade policy concerning telecommunications services. The process is opaque. Through comments from various carriers, I have a vague notion

of how the USTR process works. But because my understanding is incomplete, it is sometimes more appropriate for me to pose questions for the Committee's consideration.

Why is USTR's process so secret? USTR does not have something akin to the notice and comment process at the FCC when soliciting input from companies that have economic interests that are antagonistic to one another. It does not have ex parte rules like those at the FCC. Given this lack of transparency, it is worth asking why USTR has gained a reputation for being solicitous to the advice of interexchange carriers but not that of incumbent local exchange carriers.

There is also concern that the Trade Representative and his deputies are not engaged in the process by which their subordinates have turned international trade negotiations into detailed demands about the pricing of unbundled network elements and the like. It is inappropriate for the Trade Representative and his deputies to give subordinates who were never nominated by the President and confirmed by the Senate the leeway to dictate important trade policies with Japan and Mexico, and the formation of a template bilateral trade agreement with Singapore.

I doubt that the telecommunications regulatory policy of the Bush Administration and Chairman Powell in 2002 is the same as that of the Clinton Administration and Chairman Hundt in 1996. And so, I do not understand why the White House, the Department of Commerce, and the FCC fail to give USTR clear instructions or advice on what constitute appropriate telecommunications regulatory principles for the United States to demand of its trading partners. Silence is the abdication of responsibility. Senior Administration officials and Chairman Powell should be concerned that USTR is advancing an interpretation of American telecommunications regulations that ignores the current policy direction of the FCC as well as the reversal of certain local competition rules by the federal courts of appeal.

I wonder whether USTR is aware that, from 1996 through 2002, the *FCC Record* averaged 23,838 pages per year. I wonder how many persons at USTR have read the FCC's August 1996 order on interconnection pricing and unbundling. If, as I suspect, USTR is out of its depth on local telecommunications regulation, then one must wonder, How and from whom does USTR supplement its own expertise? For example, to what extent has USTR relied on the representations made by telecommunications carriers whose senior executives have pled guilty to securities fraud?

Moving from process to substance, the USTR's negotiating positions implicitly espouse a competitor-welfare approach to telecommunications regulation rather than a consumer-welfare approach. It is understandable that USTR would want to promote the interests of American companies. But in this case, it is promoting the interests of a subset of American carriers while ignoring the interests of other American telecommunications carriers as well as American producers of telecommunications equipment.

No American carrier will want to invest in building a network in a less-developed country if it knows that it will immediately have to lease unbundled network elements to a competitor at a price calculated, after considerable debate, on the basis of long-run average incremental cost. The disincentive to investment will not produce any sales of telecommunications equipment by American producers. How is that outcome a good trade policy for *any* constituency in the United States? And it certainly does not help consumers in the less-developed country.

Congress, the Administration, and the FCC should beware of the USTR boomerang. Section 252(i) of the Communications Act provides: "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." It will surely be argued, on the basis of section 252(i), that treaty obligations that the United States undertakes pursuant to a bilateral agreement' such as the template agreement now being negotiated with Singapore—apply to domestic carriers as well. In other words, uncompensatory pricing policies for unbundled network elements that USTR succeeds in imposing on Singapore will become the new standard that U.S. competitive local exchange carriers seek to have imposed by domestic regulators on U.S. incumbent local exchange carriers. Suddenly, a career bureaucrat in USTR will have overridden Congress and the FCC and the federal courts. To make matters worse, judicial review of USTR actions seems difficult if not impossible under D.C. Circuit precedent.

I doubt that Congress intends to relinquish its ability to legislate domestic telecommunications policy. Even if it did, there would be constitutional questions concerning separation of powers and bicameralism if domestic telecommunications policy were made this way by the Executive. Congress must not permit this usurpation of its authority to continue.

Last week, I met with European regulators in Brussels and London. They do not regard the Telecommunications Act of 1996 as a success, and they do not want to emulate it. To the contrary, the Europeans have embarked on a new model of telecommunications regulation that is motivated by competition law principles. In theory at least, that approach will maximize the welfare of consumers rather than competitors. Has USTR considered how its current approach to telecommunications policy will affect our relations with our European trading partners?

Let me conclude with several recommendations. Congress should ask the U.S. Trade Representative to explain the process by which his office has come to impose detailed telecommunications regulation on America's trading partners. Congress should insist that presidential appointees in the Executive Branch regain control of that process rather than delegating important policy decisions to subordinates. Finally, Congress is entitled to expect the Chairman of the FCC and the Assistant Secretary at NTIA not to be bystanders in this matter, saying implausibly that they must defer to USTR's expertise on telecommunications policy. The President should request their advice on the substance of appropriate U.S. trade policy concerning telecommunications services, and then he should direct the U.S. Trade Representative to make an informed decision.

Mr. STEARNS. I thank the gentleman.

Mr. Waverman, can you hear me?

Mr. WAVERMAN. I certainly can.

Mr. STEARNS. Mr. Waverman, and I say to the other witnesses, we have four votes on the floor, and it seems as though we have probably about 6, 7 minutes before the first vote is over, and then we have three 5-minute votes. So, Mr. Waverman, I would like you to give your opening statement.

And then, Mr. Harris and Mr. Darby, unfortunately, I am going to have to ask you to wait. This is sort of the impertinence of Congress by allowing us to go.

But, Mr. Waverman, do you mind going with your opening statement?

STATEMENT OF LEONARD WAVERMAN

Mr. WAVERMAN. Not at all. I would be delighted, and I thank you for allowing me to do this and to do it via telecommunications.

Mr. STEARNS. Can you do it in 5 minutes?

Mr. WAVERMAN. I certainly can.

Mr. STEARNS. Okay. Thank you.

Mr. WAVERMAN. I wanted to begin by reminding us all of the WTO agreement and what that accomplished in February 1997—69 countries at that point, and now 84, who account for over 90 percent of world telecom revenue have signed an annex to the general agreement on trade services.

This annex commits countries to transparent information——

Mr. STEARNS. Mr. Waverman, can you bring the mike a little closer? We are having—we can hear you, but it is a little garbled, and I don't——

Mr. WAVERMAN. Okay. Actually, it is right against my mouth, so I can't get any closer.

Mr. STEARNS. Okay. All right. Well, sorry. You are doing a good job. Thanks.

Mr. WAVERMAN. Okay. This annex commits for interconnection at reasonable and non-discriminatory terms. Countries also agree to an independent regulator and the prevention of anti-competitive practices.

Market access to many of the services needed by foreign users of telecoms is enshrined in the annex. Each country has specific coun-

try commitments which vary. I remind you that the U.S., in its commitment, has a number of exemptions. For example, no radio license is available if the operator is more than 20 percent foreign owned.

In addition, the U.S. submitted a most favored Nation exemption for one-way satellite transmission of DTH and DBS television services and digital audio services. And so the U.S., while it may view itself as using open market access, does have its own particular view on what market access is.

Now, going forward, should more specific telecom market opening objectives be included in trade agreements outside the WTO, as we are discussing in Chile and Singapore? And to what extent should current U.S. telecom regulation be embedded in such multilateral agreements?

The answer from my perspective as a foreign telecom expert is simple: they should not be. That is, it should be broad and not detailed. Let me explain why. First, other instruments have been used to open telecom markets for U.S. telecom carriers. I refer to numerous market opening decisions of the SEC over the last 15 years.

Second, many countries have allowed foreign ownership even when continuing to manage access for users—that is, the market for ownership of firms largely liberalized. For example, take Brazil.

Finally, to enshrine current U.S. regulatory issues in a multilateral trade agreement is, in my view, both foolish and dangerous. I remind you that the U.S. 1996 Telecom Act has as its core element regulatory control over RBOC access to long distance markets as an inducement to encourage entry into local service provision.

Most other countries do not have the 1984 U.S. consent decree, do not have the split of intra- versus inter-LATA traffic, and do not and should not have the same regulatory problems as the U.S. telecoms industry. That is, without debating the impact of the 1996 Telecom Act, we can agree that it rests on a certain structure of the industry that other countries do not have. Nor should they necessarily have this structure. It would be foolish to impose this structure on others.

Finally, in following Mr. Sidak's intervention, it would be dangerous for the U.S. to embed its regulatory regime in multilateral agreements making domestic telecom regulation in the U.S. difficult to change. Some countries enter into multilateral trade agreements in order to prevent future domestic politicians from eroding domestic liberalization. I cannot conceive of any reason in the U.S. to tie one's domestic telecom hands in this way.

Thank you.

[The prepared statement of Leonard Waverman follows:]

PREPARED STATEMENT OF LEONARD WAVERMAN, PROFESSOR OF ECONOMICS, LONDON BUSINESS SCHOOL

In February 1997, 69 countries (as of 2002, 84 countries) accounting for over 90% of world telecom revenue signed a "Telecoms Services" Annex to the General Agreement on Trade in Services. This Annex, now under the World Trade Organisation commits these countries to transparent information on public telecom, as well as access including interconnection at reasonable and non-discriminatory terms and conditions. Countries also agree to basic principles such as an independent regulator, and the prevention of anti-competitive practices in telecommunications.

Market access to many of the services needed by foreign users of telecoms is enshrined in the Annex. Specific country commitments enable access by foreign firms wishing to sell such services in each country. These commitments vary. The US, for example, in its' commitments allows "unrestricted access to a communications carrier radio license for all operators that are indirectly foreign owned". No such radio license is available if the operator is more than 20 per cent foreign owned. The US also submitted a most favoured nation exemption for one-way satellite transmission of DTH and DBS television services and digital audio services.

Going forward, should more specific telecoms market-opening objectives be included in trade agreements outside the WTO, and if so, to what extent should current US telecoms regulation be embedded in such multi-lateral agreements?

The answer from my perspective as a "foreign" telecoms expert is simple—no, my reasoning is as follows.

First, other instruments have been used to open telecoms markets for US telecoms carriers. I refer to numerous market opening decisions of the FCC over the last 15 years!

Second, many countries have allowed foreign ownership even when continuing to manage access for users. That is the market for firms ownership is largely liberalized.

Finally, to enshrine current US regulatory issues in a multi-lateral trade agreement is both foolish and dangerous. The US 1996 Telecommunications Act has as its core element regulatory control over RBOC access to long distance markets as an inducement to encourage entry into local service provision. Most other countries do not have the 1984 US Consent Decree, do not have the split of intra- versus inter-LATA traffic and do not, and should not, have the same regulatory problems as the US telecoms industry. That is, without debating the impact of the 1996 Telecoms Act, we can agree that it rests on a certain structure of the industry that other countries do not have. Nor should they have this structure. It would be foolish to impose this structure on others.

It would be dangerous for the US to embed its' regulatory regime in a multi-lateral agreement making domestic telecoms regulation difficult to change. Some countries enter into multi-lateral trade agreements in order to prevent future domestic politicians from eroding domestic liberalization. I cannot conceive of any reason to tie one's domestic telecom hands in this way.

Mr. STEARNS. Thank you, Mr. Waverman.

We are going to take—recess the subcommittee and come back after the votes.

And I hope, Mr. Waverman, that you will be available when we get back.

Mr. WAVERMAN. Okay.

Mr. STEARNS. And Mr. Harris and Mr. Darby, we will have yours when we return.

[Brief recess.]

Mr. STEARNS. The hearing will come to order, and we will continue with our witnesses.

Mr. Harris, thank you for your patience, and we look forward to your opening statement.

STATEMENT OF SCOTT BLAKE HARRIS

Mr. HARRIS. Mr. Chairman, committee members, my name is Scott Blake Harris. Thank you for inviting me to address you this morning.

I served as first chief of the International Bureau at the Federal Communications Commission from 1994 to 1996. While I was at the Commission, the FCC worked closely with USTR, other executive branch agencies, and this committee, in a coordinated effort to open closed foreign telecom markets for U.S. competitors. That effort culminated with the signing of the WTO agreement on basic telecommunications in 1997.

Simply put, from 1994 to 1997, the centerpiece of the FCC's international policy was working with USTR and with the Congress to open foreign telecom markets. The reason for that was simple: closed foreign markets were costing the U.S. economy billions of dollars annually. Every U.S. carrier that handled traffic to or from a foreign market, every consumer that made an international phone call, and every commercial enterprise of any kind in the United States that sent voice or data traffic overseas was being ripped off.

U.S. companies who had employees travel overseas, U.S. companies with foreign operations, and U.S. citizens on vacation overseas, were also being ripped off. And all of that is wholly apart from the lost opportunity costs for American carriers that were artificially barred from foreign markets, and importantly for the U.S. hardware manufacturers who would have sold equipment to those U.S. telecom companies had they the opportunity to do so.

But USTR, the FCC, and this committee recognize that in the telecom sector at least it is not simply enough for another government to agree to open its market. Without regulatory safeguards and effective regulators, market access commitments by many foreign governments would have been meaningless. Without regulatory safeguards, we would have opened our markets in good faith, as we have, but not all of our trading partners would, and that wasn't good enough.

But figuring out how to craft regulatory safeguards was no more easy then than it is today. We had no doubt that the more specific a regulatory obligation the easier it would be to enforce if a U.S. carrier was in fact denied entry to a foreign market.

But equally we had no doubt that the more specific a regulatory obligation was the easier—the more difficult, rather, it would be for the U.S. to change its own laws or its own regulations to take into account our successes and our failures and changes in technology and changes in market conditions, which we surely knew were coming.

The simple truth is this: there is an inherent tension between the need for specificity and the need for flexibility when negotiating telecom trade agreements. And anyone who tells you otherwise is simply wrong.

This tension, I might add, was particularly acute during the WTO negotiations. As you no doubt remember, during part of those negotiations, the legislation that became the Telecom Act was being debated. During part of the negotiations, the FCC was working to implement the Act. How could anyone craft regulatory safeguards while Congress was debating the legislation and the FCC was debating how to implement that legislation?

The answer was this: this committee, its staff, the executive branch agencies, the FCC, worked together day by day in a coordinated fashion so that the U.S. negotiating position both reflected existing U.S. policy, existing U.S. law, and took into account the changes that seemed to be on the horizon. There would have been no other way to do it and to be coherent.

In my view, the safeguards embedded into the WTO agreement struck precisely the right balance between specificity and flexibility. The reference paper which contains those safeguards is three

pages long. My daughter in fourth grade submits longer written assignments to her teacher. It shouldn't look like the Telecom Act. It shouldn't look like the FCC regulations. Trade agreements ought to look like trade agreements.

And they need not be overly specific, because regulators work with each other to fill in some of the details after the fact, as the FCC has worked with foreign regulators since 1997 to work out the details of the commitments that currently exist.

As highly as I think of the 1997 agreement and the reference paper, though, it need not be the last word in telecom agreements. We have learned a lot. U.S. industry has learned a lot. The U.S. Government has learned a lot about how other markets work, how they can manipulate markets to keep U.S. carriers, keep U.S. equipment manufacturers out. We don't need to tolerate that. We can do better. We should do better.

It is always going to be difficult to come out with the right balance of specificity and flexibility. The only way to deal with that, frankly, is on an issue-by-issue basis and through close coordination between the executive branch, the Congress, and the FCC. It is not easy, it will never be easy, but it is worth the effort.

Thank you, sir.

[The prepared statement of Scott Blake Harris follows:]

PREPARED STATEMENT OF SCOTT BLAKE HARRIS, MANAGING PARTNER, HARRIS, WILTSHIRE & GRANNIS LLP

Good morning, Mr. Chairman and other distinguished members of the House Subcommittee on Commerce, Trade, and Consumer Protection. Thank you for inviting me here to address market access goals in telecommunications trade agreements. My name is Scott Blake Harris. I am Managing Partner of Harris, Wiltshire & Grannis LLP in Washington, D.C., and I practice extensively in the area of international telecommunications law.

From 1994 to 1996, I served as the first Chief of the FCC's International Bureau, where—at the direction of the Commission—my staff and I worked closely with USTR, other Executive Branch agencies and the staff and members of this Subcommittee, to lay the groundwork for the 1997 WTO Basic Telecom Agreement. I am here today to discuss the importance of telecommunications trade agreements, and the need to strike the difficult and sometimes uneasy balance between specificity with the flexibility. I am speaking for myself, and not on behalf of any clients of Harris, Wiltshire & Grannis.

U.S. Companies and Consumers Have Benefited Greatly from Telecommunications Trade Liberalization. At the outset, I would like to review the importance of well-crafted telecommunications-trade agreements and the pro-competitive and market access principles they may include—a history in which this Subcommittee has played an important role. Just five or so years ago, the world's telecommunications markets looked radically different than they do today. Before 1997, most of the world's telephone companies were not just government-owned, but fused with the postal monopolies and the government ministries charged with regulating them. And carriers provided international communications services to one another under a "tit-for-tat" basis that kept prices high and innovation low. In 2002, things look very different. U.S. consumers and commercial enterprises now face a greater array of choices, more innovative products and services, and substantially lower international calling rates—which ca be as low as 10 to 20 cents per minute on the most competitive routes. With this liberalization, U.S. companies have made significant investments abroad in dozens of countries ranging from South Africa to Japan, from Denmark to Brazil. They have also greatly expanded their international service offerings, and also equipment sales, which reached a record $28 billion in 2001. It was unsurprising, then, that shortly before the conclusion of the WTO Basic Telecom Agreement in February 1997, U.S. industry representatives greeted the U.S. negotiating team with signs and t-shirts emblazoned with the phrase "wildly enthusiastic." While we all know that the telecommunications sector today is hardly as robust as we would like, it would surely be weaker were U.S. service providers and equipment manufacturers artificially barred from foreign markets.

The WTO Reference Paper Was the Right Approach. In my view, the key to the success of the WTO Telecom agreement was the "Reference Paper" of regulatory principles. Without such a principles, the market access commitments made by many other nations would have been hollow, even as we opened our markets to new entrants from overseas. U.S. companies would have continued to face closed markets abroad, even as the U.S. opened markets at home.

Some have criticized the Reference Paper as being a misguided attempt to export the Telecommunications Act of 1996. Whatever one thinks of the Act six years after its enactment, it seems to me it is the criticism that is misguided. First, one cannot criticize our trade negotiators for attempting to negotiate agreements that open foreign markets by applying to them the same basic principles that apply to the U.S. market. Foreign competitors will have access to the U.S. market under those basic principles. Should not U.S. competitors have access, if possible, to foreign markets on those basic principles? Second, the criticism is simply wrong as a matter of fact. Negotiators began discussions on, and drafting of, what would become the WTO Reference Paper well before there was a Telecommunications Act of 1996. Second, the WTO Reference Paper was drafted several years by a working group including, initially, Australia, New Zealand, Japan, Korea, and the European Union, and joined later by Brazil, Singapore, Chile, Mexico, and the Philippines. Japan served as the informal chair of the working group. The WTO Reference Paper should therefore be viewed as a negotiating victory, as it achieved U.S. negotiating objectives. But it was also a collaborative effort, meaning that it was never simply an effort by U.S. negotiators to impose U.S.-centric regulations on other countries.

The United States Should Advocate Comprehensive, But Not Excessively Detailed, Principles. With this background in mind, I believe that as a general rule of thumb, telecommunications trade agreements—both bilateral and multilateral—must strive to incorporate a comprehensive set of pro-competitive and market access principles. At the same time, they should not read like FCC regulations. And there are many reasons not to negotiate for the equivalent of a regulatory scheme.

First, FCC regulations are appropriately tailored to the particular policy objectives and competitive circumstances of the United States. The policy objectives may, and the market circumstances surely will, be somewhat different overseas. Second, as the Subcommittee well knows, FCC regulations can change over time. When the Commission is operating at its best, it is learning what works and what does not work, and making changes accordingly. In addition, even the best regulations can become outmoded as technology changes. But trade agreements, unlike FCC regulations, cannot easily be revised. WTO Members must wait for a new round of negotiations—at 7- to 10-year intervals—and even then there is no guarantee that a document such as the Reference Paper will be revised, or even supplemented. Thus too much specificity can both give short shrift to market conditions elsewhere, or lock in unsuccessful or outmoded regulation. Like the WTO Basic Telecom Agreement and its Reference Paper, other agreements should seek to establish a general and comprehensive framework to ensure three things: (1) a stable and open investment climate; (2) a level playing field for new entrants; and (3) basic rules permitting competition. These agreements should also establish a common terminology to allow governments and carriers to engage more effectively and efficiently with each other.

The WTO Reference Paper and the GATS Annex on Telecommunications Struck An Appropriate Balance. The WTO Reference Paper and the Annex on Telecommunications—part of the 1994 General Agreement on Trade in Services—do an admirable job of balancing the need to be comprehensive with the need to avoid excessive specificity. And it did so at a time when our own basic telecommunications laws and regulations were in a state of flux.

Congress was debating what became the Telecommunications Act of 1996 during much of the WTO telecom negotiations. The FCC was working to implement the Act during much of the rest of the negotiations. This left the negotiators with the difficult task of creating a document that would open foreign markets in a meaningful way, yet would not be inconsistent with the yet to enacted statute, and the yet to be adopted regulations. A close collaboration among USTR, other Executive Branch agencies, the FCC, and Congress allowed the negotiators to complete this task successfully.

The WTO Reference Paper totaled a mere three pages in length, but it articulates general principles in six substantive areas:

- First, it requires the WTO Members adopting it to implement competitive safeguards, including prevention of anticompetitive conduct, a ban on cross-subsidization, and a ban on abuse of competitively sensitive information by carriers with market power. Yet the Reference Paper provides WTO Members with the flexibility to implement such safeguards under communications-specific laws and regulations, or under more traditional antitrust and competition laws.

- Second, the Reference Paper requires the WTO Members adopting it to ensure timely, nondiscriminatory, cost-oriented, unbundled, and transparent interconnection between carriers with market power and other carriers, and to do so pursuant to publicly available procedures. Yet WTO Members were allowed to condition their acceptance of the Reference Paper to meet their particular market requirements. For example, in its adoption of the Reference Paper, the United States exempted rural carriers from certain interconnection obligations (consistent with the Telecommunications Act of 1996), and South Africa allowed for differential pricing in certain of its regions.
- Third, the Reference Paper allows WTO Members adopting it to define their own universal service obligations, requiring only that they be administered in a transparent, non-discriminatory, competitively neutral, and no-more-burdensome-than-necessary manner. The Reference Paper also specifies that universal service obligations will not be regarded as anticompetitive per se.
- Fourth, the Reference Paper requires the WTO Members adopting it to ensure public availability of licensing criteria. But it does not specify whether those licenses must be issued on an individual, case-by-case basis, or with "class licenses" for entire classes of carriers.
- Fifth, the Reference Paper requires the WTO Members adopting it to establish an independent regulator. But it does not specify whether that regulator be a government ministry or an independent commission.
- Sixth, the Reference Paper requires the WTO Members adopting it to allocate scarce resources—such as radio spectrum, numbers, and rights of way—in an objective, timely, transparent, and non-discriminatory manner. But it does not, for example, specify whether WTO Members should use auctions, lotteries, or beauty contests to allocate spectrum.Beyond substantive principles, the WTO Reference Paper also established a common terminology, enabling more effective discussions about the meaning and implementation of the Reference Paper. Simply put, I believe these principles provided the critical basis for opening foreign markets without restricting in any material way the FCC's flexibility in adopting, or changing, regulations implementing the Telecommunications Act of 1996.

Likewise, the GATS Annex on Telecommunications ensures use of public telecommunications transport networks and services on reasonable and nondiscriminatory terms and conditions. Essentially, the Annex allows for other services—such as research databases, retail catalogue phone orders, private communications within a multinational corporation, and even Internet services—to be offered over the telecommunications networks of a WTO Member. While the Annex totals three and a half pages in length, it requires transparency, network access, and technical cooperation. But the Annex leaves to the individual WTO Member decisions about how these obligations are to be implemented, and even in what form.

How the Reference Paper Helps: the Mexico Case. To see how the reference paper can work, I would like to note the critical role it has played in the United States' dispute with Mexico on the opening of its telecommunications market. Although the North American Free Trade Agreement was signed in 1992 and came into force in 1994, it contains only rudimentary provisions regarding telecommunications services. NAFTA did little to spur growth in cross-border telecommunications services and investment between the United States and Mexico. It was not until the WTO Basic Telecom Agreement came into force that U.S. investors were able to enter the Mexican telecommunications market, and it was only then that calling prices on the U.S.-Mexico route really started to drop. Yet Mexico's incumbent, Telmex, continues to wield enormous market power, and the Mexican Government's regulatory oversight has been incomplete. The Reference Paper, however, forms a critical basis for the U.S. case against Mexico, currently pending before the WTO Dispute Settlement Body. The United States has alleged that the Mexican Government has violated its WTO obligations by: (1) retaining international traffic rules that favor Telmex and inflate rates to the detriment of foreign and competitive carriers; (2) failing to rein in Telmex's anticompetitive practices or ensure timely resolution of interconnection disputes; and (3) failed to address other interconnection and access obligations, such as timely resolution of interconnection disputes. Without the WTO Reference Paper's provisions on safeguards and interconnection, it would be substantially more difficult, if not impossible, for the United States to enforce its rights under the WTO Basic Telecom Agreement.

The WTO Reference Paper and Annex on Telecommunications Should Not be the Last Word. For all its virtues, the WTO Basic Telecom Agreement should not be the last word on opening telecommunications markets to U.S. competitors. Since the GATS and the WTO Basic Telecom Agreement were concluded, the relevant markets and technologies have changed substantially. And the United States—both the U.S.

Government and the carriers and equipment manufacturers—have gained experience in applying and taking advantage of telecommunications trade commitments. Thus, there may be new commitments which the government and private sector believe necessary to make sure foreign markets remain open. Moreover, with certain bilateral agreements, there may be a desire or need for more extensive provisions based on the interrelationships between the United States and a particular trading partner.

Coordination and Oversight Are Critical. Even as new trade agreements may be needed, the inherent tension between specificity and flexibility will remain. The more specific the commitments, the easier it is to make a case if U.S. competitors remain frozen out of foreign markets. But, as noted, specificity carries the risk of rigidity. To maintain the right balance, there is—as there was during the WTO negotiations—a critical need for coordination among USTR, other Executive Branch agencies, the FCC and Congress. But to do their jobs well, trade negotiators must know what the law and regulations of today say—and what they may say tomorrow. If they do not, they can inadvertently draft agreements that limit flexibility. The FCC has expertise and experience as the U.S. regulator and also consults extensively with foreign regulators. But it is only through close consultation with Congress that will allow USTR to ensure compatibility of trade initiatives with prior legislation and anticipated changes in legislation, and to ensure consistency with Congress' mandate for various governmental agencies.

Thank you. I would be happy to answer any questions this Subcommittee may have.

Mr. STEARNS. I thank the gentleman.

Mr. Darby, welcome. Your opening statement?

STATEMENT OF LARRY F. DARBY

Mr. DARBY. Thank you, Mr. Chairman, Mr. Bryant. Thank you for inviting me. I look forward to discussing the questions you sent to me. They raise a variety of issues, and in the interest of economy and efficiency I think I will address a few common themes raised in them.

You first asked me about the detail to be sought in telecom trade agreements and whether negotiations with our trading partners should be general, focusing on broad goals and results, or very specific and reflecting the unique circumstances of our experience here in the United States.

The second theme focuses on the role of the congressional oversight group in the overall trade negotiation process. My response to the first set of questions is to urge you to promote a results-oriented perspective by emphasizing goals rather than processes, objectives rather than rules, ends rather than means. As others have indicated, some balancing is required, and, of course, we are not indifferent to the means for achieving a particular end.

I believe our interests are not served by exporting to others the highly circumstantial and detailed U.S. rules—rules whose impacts are even more being vigorously debated and reconsidered here in the United States. You asked about the extent to which the U.S. Trade Representative should be able to memorialize U.S. telecom law and regulations in multilateral or bilateral agreements.

Let me emphasize we should not try to export the details of our regulatory approach or our specific rules, nor should we develop negotiating strategies that tilt in that direction. Let me explain why.

The 1996 Act reflects a unique—our unique telecommunications regulatory history. It addresses the one-of-a-kind structure and evolution of U.S. markets. It is a uniquely American instrument, even though its goals—investment, universal service, competition, and less regulation—are being adopted worldwide. FCC and State

rules implementing the Act are even more specifically tailored to the U.S. institutional context. This uniqueness applies with most force to the enormous mass of regulations now driving and constraining investment and competition in local telecom markets.

My point is simple: to be effective, regulatory prescriptions must be tailored to the unique circumstances to which they apply. Applying our tailored to U.S. market rules in other national environments would serve no clear and good purpose. More fundamentally, there is no way a priori for Congress or trade negotiators to predict confidently the effects of our rules were they to be applied in other nations. "One size, one kind; our size, our kind" does not and cannot fit all.

As you know, the Telecom Act and the rules implementing it are now being reevaluated by policymakers. Congress is considering insulating certain markets from the application of the Act. The Commission is undertaking a major reevaluation of its interconnection rules and competition investment policy. Part of the 1996 Act are still being litigated. My conclusion I think is inescapable. It is premature to attempt to embed these regulations in international agreement at a time when their meaning and impact are still being debated here.

Ongoing policy reviews and debates bespeak a lack of clarity about the meaning of the Act and its impact on competition, on investment, and on the overall public interest. There is, then, no principled basis for asking our trading partners to follow our lead into this unsatisfactory and ephemeral state—a state Business Week called recently "the telecom mess."

If we cannot clearly warrant and confidently abide the results here, we should not attempt to transplant them elsewhere. We should work, instead, to incorporate broad market opening objectives, to insist that rules be non-discriminatory with respect to competitors' national origins, insist on transparent rules, on less government involvement in markets, and press for independent regulatory bodies and for open regulatory processes.

As Scott and others have pointed out, these have to be spelled out with a modest degree of detail. You asked me how we could ensure proper implementation and enforcement by other governments of detailed regulatory schemes incorporated in trade agreements. The short answer is: we can't. The prospect of an international institution enforcing detailed trade agreements is not a happy one and summons visions to me of endless dispute and costly delay.

We should not, by the way, naively assume that we would be free of pressure to adopt rules foreign to us but favored by our trading partners. Such a quid pro quo would require us to import foreign rules that fit our institutions and markets as poorly as ours fit theirs.

Finally, grafting U.S. regulations onto international agreements would lock us into rules that we otherwise would want to change. It would, indeed, be ironic and destructive if we were to find ourselves bound by agreements incorporating old U.S. laws and outdated rules, and because of that we were prevented from tailoring and adapting our policies to new market and technological realities.

Thank you again for the opportunity to give my views on these issues, and I will be happy to answer your questions.

[The prepared statement of Larry F. Darby follows:]

PREPARED STATEMENT OF LARRY F. DARBY, DARBY ASSOCIATES

Good morning Mr. Chairman and members of the Subcommittee. I appreciate the opportunity to be here and look forward to sharing my views with you.

You asked me to address eight questions pertaining to *Telecommunications and Trade Promotion Authority: Meaningful Market Access Goals for Telecommunications Services in International Trade Agreements* and to do so in a short period of time. Fortunately your questions raise a few core issues and in the interest of economy and efficiency, I will address the common themes among them.

The questions relate first to the level of detail or specificity to be sought in negotiating international agreements for opening up markets for telecommunications services with our trading partners. You solicited my views on whether the agreements should be general, focusing on broad goals and results; or whether they should be very specific, reflecting the unique circumstances of U.S. markets, history and experience.

The second theme focuses on the role of Congress and specifically the Congressional Oversight Group in the overall process—goal setting, determination of negotiating strategies and development of specific telecommunications provisions in particular trade agreements. I will address those in order.

The title of the hearing makes clear your overall focus—the inclusion in trade agreements of meaningful telecommunications services market access goals. Consistent with that title, I strongly encourage you and the Subcommittee to adopt and promote a general results-oriented perspective by emphasizing goals, rather than processes; objectives, rather than rules; and ends, rather than means. Of course some balancing is always required; and, we are not indifferent to means for achieving particular ends. But, our interests are not served by exporting to other economies with different institutional frameworks and market environments, highly circumstantial, quickly changing and unbearably detailed US rules—rules whose U.S. impacts even now being vigorously debated.

My preference for focusing on ends rather than means can best be explained by reference to your question about the extent to which the U.S. Trade Representative should be able to memorialize current U.S. telecommunications law or current U.S. telecommunications regulations in international agreements.

Let me be clear. We should not try to export the details of our regulatory approach or its rules, nor should we develop negotiating strategies that would tilt in that direction. There are several reasons for not doing so.

The Telecommunications Act of 1996 reflects our unique telecommunications regulatory history. It was driven by and relates to the very specific structure and evolution of U.S. markets and to the technological and commercial environment in the U.S. as it existed and was understood by Congress leading up to February 1996. Each provision of the 1996 Act has a legislative history borne of over twenty years of debate in the context of the technological and commercial evolution of U.S. industry and markets. The Act is a uniquely American instrument, even though its goals—high levels of investment, universal service, competition and no more regulation than necessary—are coming to be adopted worldwide. There are numerous acceptable ways to pursue those goals and different administrations will quite understandably want to adopt means tailored to their markets.

Rules implementing the 1996 Act created by the Federal Communications Commission, other federal agencies and fifty state regulatory bodies are even more specifically tailored to the unique regulatory, jurisdictional and judicial context—historical and prospective—within which they were intended and do now apply. This "uniqueness" applies especially to the enormous mass of regulations now governing the way in which competition is being enabled and encouraged in local telecommunications markets. Those regulations reflect the structure of the US market at a single point in time and would no doubt have been very different had the market structure and forces on it have been different. As a routine matter even now they are evolving in response to changing needs, forces and our understanding of how markets are working.

My point is that regulatory prescriptions should reflect the circumstances to which they apply and that the best rules those that are specifically tailored to do so.

Attempting to apply these very specialized, tailored-to-U.S.-market rules in other national regulatory, policy and commercial environments would serve no clear and good purpose. But, more to the point, there is simply no way *a priori* for Congress or trade negotiators to predict confidently what overall or specific impact that U.S. rules and regulations would have should they or similar ones be implemented in the

highly differentiated circumstances prevailing in other countries. One size/one kind, our size/our kind, does not and cannot fit all.

Moreover, both the Telecom Act itself and the FCC rules implementing it are now being reconsidered by the Congress and the FCC. Congress is considering whether to insulate certain markets from the application of the Act, while the FCC is undertaking a major reevaluation of several of the rules—particularly the local interconnection rules—it adopted following passage of the Act. The meaning of parts of the Act are still being litigated. It would be premature to attempt to memorialize U.S. regulations in international agreements at a time when their meaning and impact are still being questioned and debated here.

In the light of recent experience and data, we are reconsidering the effect of the rules on sustainable market competition, on investment, on universal service and on our ability, at some point, to have the government disengage from heavy hands-on regulation of intercarrier relations and detailed specification of rates and service offerings.

Current policy reviews, uncertainties and debates bespeak a lack of clarity about both the meaning of the Act and its impact on sustainable competitive processes, investment and the overall public interest. Under such circumstances there is no principled basis for insisting that our trading partners follow our lead into the current unsatisfactory and ephemeral state. If we cannot warrant and abide the results here, we cannot and should not attempt to transplant them in the economies of our trading partners.

The fact is that both the Act of 1996 and the rules implementing it have had unanticipated and unwanted consequences in US markets. While there is a furious debate over what those are, there is no disagreement over their existence. Applying the Act and those rules in other markets overseas would almost certainly have such consequences. Further, there are good reasons to expect that the results would be even less satisfactory, since the rules would be applied in countries with starkly different telecommunications environments than those in this country.

Rather than try to incorporate in trade agreements and thereby export specific rules, we should instead work to incorporate broader more general market opening objectives. For example, we should insist that rules be nondiscriminatory as to national origins of firms in the market; we should insist on transparency of rules and rulemaking processes; we should insist on less, not more governmental involvement; and, we should press for independent regulatory bodies and open regulatory processes. These are the kinds of standards we should to pursue.

The subcommittee has raised an important question about how the U.S. could ensure that detailed regulatory schemes and obligations, should they be incorporated in trade agreements, would be properly implemented and enforced by other governments. The short answer is that we could not. The prospect of establishing a regime, similar to the FCC, to enforce detailed agreements is not a happy one and summons forth visions of endless, and costly, litigation and delay.

Nor, should we naively assume that we would be free of pressure, as a quid pro quo, to import some regulations from our trading partners—regulations that fit our institutions and markets as poorly as ours fit theirs.

Finally, memorializing current U.S. regulations into international agreements risks locking us into rules that in the long run will not contribute to healthy competition and growth in our very important telecommunications sector. It would indeed be ironic if we were to find ourselves bound by trade agreements incorporating old U.S. laws and rules and thereby prevented from changing our rules in response to either a better understanding of their effects, or in response to changing market and technological conditions. The risk of such a "lock-in" is real and serious and, by itself, sufficient to offset any conceivable advantage.

Turning quickly to the role of Congress, I will make a couple of observations. Consistent with my preference for incorporating broad goals rather than detailed regulatory provisions in the agreements, it seems to me that Congress, and the Congressional Oversight Group in particular, should limit its activities to formulation of general objectives to be incorporated in the agreements and to leave negotiating strategies and tactics to U.S. trade negotiators. The nature of these negotiations does not allow for effective hands-on participation by Congress. That said, there is a clear statutory mandate for Congress to engage in on-going consultations with the USTR as trade agreements are being negotiated. Given Congress' role as the primary lawmaker, it is appropriate and necessary for members to have a voice in U.S. efforts to develop stronger trade relations throughout the world.

Thank you again for the opportunity give my views on this important set of questions. I will be happy to answer your questions.

Mr. STEARNS. I thank you.

And just before we go, Mr. Waverman, are you also there?

Mr. WAVERMAN. I am here.

Mr. STEARNS. Okay. What I hear from all of you are some nuances of difference here. Some of the questions that come to mind are the implementation, in a trade agreement, some of the regulatory process in the United States, and how far do you go on that.

And, Mr. Waverman, what would be dangerous about embedding the FCC's current regulatory regime in a multilateral agreement?

Mr. WAVERMAN. Well, I think the dangers are twofold for other countries that do not wish to have structural separation in that way between long distance and local. I think there would be dangers for them to implement some of those.

Second, I think it is dangerous for the U.S. in the future, because once this becomes embedded in international agreements, I think as Mr. Sidak points out as well, it is very difficult for the U.S. to then change domestic law.

Depending if there is—if there is a great deal of detail in, let us say, the Chile or Singapore agreement, mimicking the 1996 Telecom Act and sections of it, for example, on how to price unbundled network elements, then that trade agreement becomes kind of an albatross around the neck of yourselves if you wish to change that act. And I think that's an albatross you don't want.

Mr. STEARNS. Okay. Ms. Liser, but you indicated in your written testimony that, "Current U.S. proposals are consistent with the 1996 Telecom Act and build in flexibility to provide the FCC with the necessary discretion to make alterations to its rules."

In light of I think what he is talking about and what some of the panelists are mentioning, just elaborate on how current U.S. proposals provide the FCC with the necessary discretion to change its rules. And in light of the fact that—how does new technology come into play here? Some of the rules that you set down for an international agreement have to have some flexibility for these new technologies. So hopefully you can just address how you would—elaborate on how the U.S. proposal would provide FCC this flexibility.

Ms. LISER. We think that essentially, again, we are striking a careful balance. Obviously, we are looking at the laws that are now in place. We have made every effort to make sure that what we have drafted in terms of the text for the Singapore and Chile FTA telecom text does, in fact, reflect our laws that are there now.

But, again, we have also drafted, with regard to some of the elements that are being discussed domestically, provisions that we believe provide a fair amount of discretion to each of the parties involved, whether it is the U.S. in terms of the FCC and how it regulates, as well as Singapore and its authority or Chile and its authority, to be able to look at the circumstances and determine.

One example would be, for example, on unbundling. This is something where, obviously, there's a lot of domestic discussion about this now. But we have drafted a provision that essentially says that it is up to the domestic authority to decide what elements will be unbundled and to whom those unbundled elements will be provided.

So, again, we are trying to in some senses hold the bar on the standard at a particular level, but at the same time give enough

room to the domestic authorities to determine how they want to do it. And we have a number of examples that are like that.

In terms of the technologies that are evolving, and the kinds of decisions that people are making, we think that, again, there is a fair amount of room to allow for the technologies to evolve and develop, holding the base commitments there while allowing the industry to go forward. We are not choosing any particular business models as we go forward.

Mr. STEARNS. The difficulty about this hearing is what we need is specific examples. It would be great—I mean, what—we are speaking in sort of general principles here, but it would be nice to take a specific example.

Mr. Sidak, let me see if I can give you a specific example. Let us say in Singapore you have a telecommunications company that is heavily subsidized by the government there. And they are basically a monopoly, and they want to provide services in the United States. And the way they are set up is they don't comply with the FCC—of our FCC regulatory body.

How do you allow a telecommunications company like that to come in and compete, if they don't ostensibly comply with the FCC bar and they are sort of subsidized by the Federal—by the Singapore government and they are a monopoly?

I am sort of stretching here an example just to try and put you folks on the spot to see if we can get some specific examples how you would go from general principles to specifics, and how you would either incorporate the Telecom Act of 1996, or you would—or not.

Mr. SIDAK. Okay.

Mr. STEARNS. And I am struggling here. So if it doesn't make complete sense, I am just trying to get you folks specifically on record on a specific example. I mean, we could go to a number of bills, whether it is cross-ownership of—or spectrum or dealing with caps, media caps, or you could go into the Tauzin-Dingell bill.

I mean, there are lots of things here that we could talk about, and I am sure the hearing would take forever if we did it. But I would like to have some—if my example is not good, you might be able to give me a better one.

Mr. SIDAK. Well, let me take that in pieces.

Mr. STEARNS. Yes.

Mr. SIDAK. On the question of a subsidy from the foreign government, I do think that that is a concern under traditional competition law principles.

Now, in the United States, we don't have a lot of experience of companies receiving government subsidies, and by virtue of that subsidy acting anti-competitively against firms that don't receive the subsidy. But there is a very developed body of law in the European community on subsidies. It is part of the EC Treaty.

Mr. STEARNS. But the Singapore is not in the EU.

Mr. SIDAK. Well, that may be. Of course, that is true, but my point is there are principles out——

Mr. STEARNS. Just existing Federal Trade Commission and laws that would apply separate from the agreement, which could be used by American companies.

Mr. SIDAK. Well, under NAFTA, there are provisions right now. Chapter 11 of NAFTA provides a monetary remedy for an American company that is harmed if it wants to do business in Mexico or Canada because the government of Canada or Mexico is favoring some domestic company through either privileges and immunities that are granted to that company, or explicit subsidies.

So to the extent that the trade package with Singapore would model NAFTA, that would be one way of addressing the question of subsidies.

Mr. STEARNS. Would anyone else like to comment? Sure. Mr. Harris?

Mr. HARRIS. I would. A couple of things. First, on your Singapore example. The FCC, under its current rules, has the ability to condition the entrance into the United States market of any foreign carrier on competition grounds. If that entrance——

Mr. STEARNS. Even if we have a bilateral agreement?

Mr. HARRIS. Under existing rules and under the——

Mr. STEARNS. So the President negotiates a trade promotional agreement——

Mr. HARRIS. [continuing] it takes into account——

Mr. STEARNS. And it trumps it.

Mr. HARRIS. What it says is under those agreements, current agreements, including the WTO—and they were crafted specifically this way—it allows the FCC to impose conditions to ensure that the entrance into the U.S. market of a foreign carrier is not anticompetitive.

No. 2, the WTO safeguards themselves contain a ban on cross subsidization. There is one other issue, though, that you need to deal with, which is not just the foreign carrier entering the U.S. market, what about U.S. carriers and the equipment manufacturers they tend to take with them when they go overseas that wants to get into the Singapore market?

Without some degree of precision, you are not going to break open the Singapore market. It is not going to be enough for Singapore to say, "Okay. We will be good boys; our market is open. Now deal with SingTel." That won't do it. You need something more.

I don't think anybody up here disagrees with the fundamental proposition it is not wise for the U.S. Trade Representative to impose, you know, CFR, Title 47, on foreign governments. I don't know what is going on over at USTR today. That is for other people to speak to. But in the old days at least, no one thought that was a good idea, and there was no risk of that.

As I said, the reference paper is three pages long. Hard to make a case that is exporting the Telecom Act. It is hard to make a case it is exporting the FCC regulatory regime. What it was exporting, as it should have been, is U.S. basic principles on competition.

Mr. STEARNS. We are going to give each member 10 minutes, and I am almost all done.

Ms. Liser, an agreement—a Federal trade—a fast track agreement with Singapore, would that allow FCC to trump it? In other words, if we found—the FCC found that there was uncompetitive behavior, would the FCC be able to step in? Is that your understanding of what the agreement with Singapore would allow?

Ms. LISER. Well, I think that, as in all trade agreements, obviously, where returning to Congress we want to make sure that you are clear about anything that is in there. And our goal is, obviously, to have agreements that are acceptable to you.

Mr. STEARNS. Yes. But I am just saying, would the FCC, like Mr. Harris is saying, would that be able to trump a non-competitive entry into the United States? Would it be negotiated that way, so that the FCC could trump the agreement? Just yes or no. If you don't know, I mean, we can find out.

Does that make sense? Do you understand my question? Would they be able to condition the entry into our markets? I guess that is—maybe "trump" is not the right word. But would they be able to condition the entry of this non-competitive group into our market?

Ms. LISER. I think there are a number of—in terms of, for example, a carrier that is subsidized in Singapore entering the U.S. market, we have provisions that address those anti-competitive issues.

Mr. STEARNS. Okay.

Ms. LISER. And so I think that the answer is yes.

Mr. STEARNS. Okay. I am going to let my ranking member ask questions. I would just say that, you know, having seen NAFTA and how it operated in Florida, a lot of our agriculture interests were unable to handle the dumping, and a lot of them went out of business.

And there doesn't seem to be any enforcement if a non-competitor enters the market and for the U.S. people who are—must comply with the FCC and the Federal Trade Commission and everything, what are they to do? And I think that's probably one of the key elements.

So my—the gentleman from New York.

Mr. TOWNS. Thank you very much, Mr. Chairman. I can understand, in terms of your struggling, because it is a very difficult issue. When I think about 1996 when we did the Telecommunications Act, I remember in terms of how we had difficulty because things were moving so fast, and finally we just said, "We are going to do it and move on and see what happens here." And that is what occurred.

So I would like to sort of ask the question this way. What should the Congress do to sort of straighten out this? Let me start with you, Mr. Sidak.

Mr. SIDAK. This gets back to the general principles that the chairman was talking about.

Mr. TOWNS. But you mentioned some things before that were not really in our jurisdiction. You know,it is the President, I mean, in some instances, but the point is that I would like to know some specific things you feel that the Congress might be able to do.

Mr. SIDAK. Sure. I think that the reason that the implementation of the Telecom Act has been so controversial here, and why it is controversial when we try to encourage other countries to emulate it, is that it is fundamentally in conflict with the way we approach competition policy. In antitrust law, we have a consumer welfare standard. Everything goes to the question of: will the consumer have lower prices, more higher quality goods, more innovation, and the like?

But the Telecom Act of 1996, because it focuses so much on the question of, can a firm enter this market, we have developed what I would call a competitor welfare orientation at the FCC, certainly, in its interpretation. The Europeans have rejected that approach. They have decided that they want to go back and start over with telecom regulation and make clear that it should be informed by competition law policies. And then, if it is determined that particular markets are such that competition law is not sufficient to regulate them, then sector-specific regulation will be adopted.

Now, let me give you a specific example of how this plays out. Right now, the FCC has back on remand from the D.C. Circuit the question of what the impairment standard means. And that is the second time the FCC has had this question on remand. It got it on remand in 1999 when the Supreme Court sent the case back.

In the past, the FCC has had standards that did not have any explicit consideration of the effect on consumer welfare of deciding whether to mandate that a particular unbundled network element has to be offered to competitors, and the subtext is "at a regulated price."

I think that if the FCC simply said, "Okay. We are going to use an antitrust-style analysis," and ask whether or not it will harm consumer welfare if this particular element is not made available at a regulated price, you would get much clearer answers that would be much more coherent. Part of the problem with the Telecom Act is that it is such an involved statute that it is difficult to back up and just reason from first principles, because you are constantly reconciling different sections of the statute.

So that would be my first recommendation—focus on giving the FCC the message that a consumer welfare orientation is what ought to be reflected in unbundling policies.

Mr. TOWNS. Thank you very much, Mr. Sidak.

Mr. Harris?

Mr. HARRIS. I don't know whether or not you all should rip up the Telecom Act. I don't know whether you all should give direction to the FCC to rip up its implementation of the Act. The question, it seems to me today, is: what do you tell these people at the end of the table who have to try to open foreign markets? Should they implement French telecom policy? Japanese telecom policy? Chinese telecom policy? That doesn't sound right to me.

What sounds right to me is that they ought to be implementing U.S. policy at the principal level to open foreign markets. And I am not willing to trust the regulators in the EU to open their markets to U.S. competitors. I am willing to trust our government to make sure that happens.

Now, how do they do it in a way that makes sense? And what is your role in that? When you are drafting these trade agreements, you have to keep in mind the principle everyone has pointed out, which is that these agreements can constrain what you are doing in the future. Not that they are prohibited. U.S. law trumps a trade agreement. But you may have to pay a price, and that price is, indeed, a constraint.

So you want to draft the trade agreements so they take into account not only what the law is today, but what is reasonably foreseeable. And you can't do better than that. It would be nice if we

were omniscient, but we are not. And the only way they can know what is reasonably foreseeable is through oversight from you all, and from working with you all. And that is the way it was done. And if that isn't happening now, the process has broken down and you need to fix it. And if it is happening, then the problem may be not as great as it seems.

Mr. TOWNS. Let me just make certain I understand that. You are saying keep the Telecommunications Act. I am sorry. Are you saying keep the Telecommunications Act?

Mr. HARRIS. I am not addressing the question at all. I would have to stop practicing law in Washington if I did.

Mr. TOWNS. Let me ask you that question.

Mr. HARRIS. I might as well hand you my bar card.

Mr. TOWNS. Yes or no.

Mr. HARRIS. By and large, I think the Telecom Act has gone in the right direction. A lot of consequences were unanticipated. Whether or not it has been implemented in exactly the right way is an entirely different question. But would I rip up the Telecom Act and start from scratch? Would I say all we care about is competition law, antitrust law, if you will? No, I think that would be the next thing to insane.

Mr. TOWNS. Okay. Thank you very much, Mr. Harris.

Mr. Darby?

Mr. DARBY. I would like just to put in two cents worth on the Act. I think the Act could, in principle, be fine tuned and put us on a different trajectory. But as a practical matter, seeing what is required in the Congress to agree on those principles of fine tuning and that trajectory, I am not, you know, terribly optimistic. You can agree on that.

I think the FCC has significant discretion and probably enough discretion to get it right. I believe it got it wrong the first time, and in large measure for reasons that Mr. Sidak emphasized, in particular the misinterpretation of the congressional intent to create competition by creating competitors and protecting competitors, rather than creating sustainable competitive processes where competitors could grow in a healthy fashion.

And we basically are now reaping, it seems to me, the harvest of trying to create a group of competitors and to prop them up. And the market simply will not sustain, you know, dozens of competitors in major cities. And I think this Commission is undergoing a review of those policies, and certainly has the discretion under the law, you know, to change that. And I am hopeful they will.

If they don't, it seems to me—and we continue the path that was created in 1996 and 1997, it seems to me there is a clear case for congressional—reintroduction of congressional authority there.

Mr. TOWNS. All right. Let me thank you for that.

Let me just ask—a comment was made by Mr. Sidak—is it Liser?

Ms. LISER. Liser. That is correct.

Mr. TOWNS. Liser. Thank you. Which, you know, it sort of hit me. I think you said something to the effect that the USTR procedures, you know, are so secret. I mean, you know, what is your response to that? I mean, I think that is what he said.

Ms. LISER. Well, I mean, obviously, we believe that we have a process that is very open, and we have a lot of procedures in place.

We know, for example, that there was a Federal Register notice that was put out about the Singapore FTA negotiations back in I believe it was November or December of 2000, seeking the views of industry and others who may have had views about it.

And we believe that we have sat down with an incredible number of industry interests on all sides of the issue in a very open fashion, anyone who has wanted to meet. We have gone through the—what is sort of the cleared advisor's process, so we have advisors who tell us and give us their views on what we should and shouldn't do. And so we believe that we have consulted fully, and we have not had a process that is secretive. I am fairly certain of that.

Mr. TOWNS. So you actually feel that you have consulted with the telecommunications folks throughout and gave them——

Ms. LISER. Oh, absolutely.

Mr. TOWNS. [continuing] an opportunity to——

Ms. LISER. There is no question. There are probably any number of people in the room right now who could stand up and tell you about many numerous meetings that they have had with us as we have gone forward.

And let me just say this much. As we continue to move forward, we are very open to working with you, other Members of Congress, the COG, and to continue to work with industry to fine tune the text as we move forward.

Mr. TOWNS. All right. Let me ask I guess any of you this I guess. What would happen if the United States telecom laws or regulations were substantially modified after a specific trade agreement was entered into? You know, how would, you know, results and inconsistencies between U.S. law and its trade commitments be resolved from a legal standpoint? Or would binding specific provisions in the agreement tie the hands of the United States policymakers, the FCC, and everybody else?

I mean, I would like to get a response to that. Do I have time for that, Mr. Chairman?

Mr. STEARNS. Sure.

Mr. TOWNS. Yes, okay.

Mr. HARRIS. Let me answer that question a couple of ways. Let us assume for the sake of argument a clear inconsistency between U.S. law and its international obligations. It is beyond question, can't be argued the other way, it just is. In that case, U.S. telecommunications law determines what happens in the United States, full stop.

Now, a foreign government can file a trade case against the United States and perhaps win a penalty against the United States through the World Trade Organization to compensate it for our violation through our new law of its—our international obligations.

Having said that, again, talking about the telecom sector now, and talking about the agreements I have seen so far—and I have not been working on the Singapore agreement or the other one you are all talking about today—those obligations, in my view, while specific enough to allow us to be pushing to open foreign markets, are also flexible enough that I haven't heard about any changes in our laws that it would occur to me would violate our WTO obligations today.

There is nothing that I know the FCC to be discussing now, or this Congress to be discussing now, that would, if implemented, put us in violation of our WTO obligations.

And by the way, that is not an accident. When those things were drafted, when those things were negotiated, no one assumed our law or our regulations would be inflexible. We all knew change was coming at some point, and so folks tried to draft the language so that one could fairly argue that wherever we went it would be okay.

We knew we weren't going to monopolize our markets. We knew we weren't going to have State-owned telephone companies. We knew we weren't going to do any of the things that were common around the world. And so the regime that was crafted was to change that, and I think we have done a hell of a good job doing it, if you want to know the truth.

Mr. SIDAK. I have a slightly different take on that question. I think that whether or not U.S. law would be trumped by the agreement would depend on what Congress does after the agreement has been negotiated. If the Senate ratifies it by two-thirds, there is a—I am sure there is an answer to that legal question. I have never looked into it, but whether a statute is trumped by the treaty or the treaty is trumped by the statute, there has got to be an answer to that.

If it is some—if the treaty is somehow approved by bicameral action of Congress that is sent to the President, then I think you might have a different answer, because then if there is a—if there is the clear inconsistency that Mr. Harris was hypothesizing, then I think you may actually have one of the rarer cases where there has been a repeal by implication, that the subsequent statute repeals the earlier one to the contrary.

And if there isn't any explicit congressional action after the treaty has been negotiated, if it is just done by some kind of executive order, you might get a different answer, and I am not sure what the answer to that is.

Mr. TOWNS. I was thinking suppose there is a change in the FCC law. What would happen if there is a change in the FCC law?

Mr. HARRIS. Do you mean if the FCC changed its regulation subsequent——

Mr. TOWNS. Right, yes.

Mr. HARRIS. [continuing] to——

Mr. TOWNS. Yes.

Mr. HARRIS. [continuing] and those regulations were clearly inconsistent with the trade agreement?

Mr. TOWNS. Right.

Mr. HARRIS. The FCC regulations would determine what happens in the United States market again. If they violated our international obligations, the U.S. could be hauled before the WTO—again, if it is a WTO obligation, or whatever is set up in an individual bilateral agreement, it could have to pay compensation. But if after the fact U.S. law changes and U.S. implementation of law changes by the FCC, that governs.

Ms. LISER. U.S. law is never trumped by a trade agreement. It is never trumped by a trade agreement. It could be that, as Mr. Harris was saying, at some point if there was an inconsistency you

would have to address it. But it is never trumped by a trade agreement.

And if I could just—on the point of FCC regulation changing, for example, right now the FCC is considering how to define or classify broadband services as to whether or not it is telecommunication services or information services. And basically, the trade agreements that we are talking about or the provisions we are looking at would not constrain them in terms of how they do that.

Mr. TOWNS. Right. Mr. Waverman?

Mr. WAVERMAN. Yes, sir.

Mr. TOWNS. Could you hear that?

Mr. WAVERMAN. I did.

Mr. TOWNS. Could you respond to that as well, please?

Mr. WAVERMAN. Well, I mean, I think legally—I am not a lawyer, so I will bow to the lawyers.

Mr. TOWNS. We really want to hear your answer.

Mr. WAVERMAN. But, I mean, but let us look at the actual process that would occur. All right? That is, the threat of being taken before the WTO I am sure would constrain future policymakers in the U.S. from changing things. I mean, it is—you know, as a foreigner, to hear, you know, people in the room saying, "Well, no matter what we do in trade agreements, sure, we can be taken before the WTO and fined, but it really doesn't matter because we can change our domestic law in the future."

I am sure there is—I know this is being webcast, so you may get some questions tomorrow on that. But, certainly, I think it is really legalistic to say that that does not constrain U.S. policy, because obviously the agreement and the threats of sanctions will force people to think about how you change the law and whether you should.

Mr. TOWNS. Thank you very much, Mr. Waverman.

Thank you very much, Mr. Chairman. You have been very generous.

Mr. STEARNS. Thank you.

Mr. Shimkus?

Mr. SHIMKUS. Thank you, Mr. Chairman.

And maybe I can get my colleague's help. What is the corporate tax law that we keep having to rewrite because it is not in compliance with the WTO? Do you know what that is?

Mr. STEARNS. Well, let us see. The corporate tax, it must be a foreign services tax that——

Ms. LISER. This is the FISC issue.

Mr. STEARNS. FISC that applies.

Mr. SHIMKUS. So it is not correct to say that our laws are, I don't know how you put it, Ms. Liser—that our laws would never be overturned by Federal—I mean, the WTO.

Mr. TOWNS. Would never be trumped.

Mr. SHIMKUS. Would never be trumped. Isn't that correct? Our laws are trumped when we go into——

Ms. LISER. I think in this particular case we made a choice to change our law, and basically as we——

Mr. SHIMKUS. Because WTO would come in and say we are not in compliance, and then their rulings and tariffs and all that other stuff would roll in. And the threat of retaliation based upon a WTO

agreement and asked for us to change—is forcing us to change the law.

Ms. LISER. I think that that is true to some extent, but I think that the value that you have—again, this balance that we are trying to strike, you have the U.S. laws. Much of what we are doing in our trade agreements in the WTO are consistent with our laws as they stand.

Mr. SHIMKUS. But this is an example where the WTO has forced us to change our laws. I mean, we debate it all the time. We have to bring it up on the floor. And so I just wanted to clarify that, because trade is a great debate. I am a trader. I think it creates jobs, it creates wealth, and it—but we have to go through a lot of gyrations to get there.

In your testimony, Ms.—is it Liser? I am sorry. I was——

Ms. LISER. That is okay. It is Liser.

Mr. SHIMKUS. Liser. I was fighting prescription drugs downstairs, so I ran up here. You mentioned that our telecom market is one of the most open in the world. And, of course, in the world trade debate, we do have a very open market. So when we went through trade negotiations, we tried to get lower tariffs so that we can get our goods into foreign countries. And the argument is they can get here, but we can't get there.

So if our market is one of the most open in the world, whose telecom markets are more or as equally open as the United States, or more open than the United States?

Ms. LISER. You are asking as we go forward in terms of——

Mr. SHIMKUS. No, right now, even before we go into the negotiations. Is there any markets that are more open than our market today? Is there any place we can go right now without a trade agreement that has as open a market as the United States?

Ms. LISER. We think that by virtue of having the trade agreements that we have in place that there are a number of countries around the world where we have addressed a lot of the market access issues that existed prior to those trade agreements. So in terms of what we did on the NAFTA, we have created more open markets in Canada and Mexico. By virtue of the WTO reference paper, we have pushed the envelope and those 60 or 70 countries that signed on to it now are more open markets than they had been previously.

So the environment is one that we are continuously pushing to be more open. We think that what we are doing in Singapore and Chile will take that a step further.

Mr. SHIMKUS. But right now, we have probably the most open market——

Ms. LISER. We do.

Mr. SHIMKUS. [continuing] for this industry.

Ms. LISER. I would say we do.

Mr. SHIMKUS. So the argument for trade is to make more competitive markets overseas for our products.

Ms. LISER. Right. To create a more competitive environment, not only for our telecom service providers but for all of those who depend on those—on effective and efficient telecommunications services in doing their own business.

Mr. SHIMKUS. What does "cost-oriented rates" mean?

Ms. LISER. Well, I think that cost-oriented is the provision of certain elements of the network at prices that we consider to be competitive. And we, though, are leaving the actual methodology for how Singapore or Chile calculates cost-oriented up to the authorities there, as we are still able to do here.

Mr. SHIMKUS. Does that make it difficult to evaluate market entry opportunities by not being able to understand how you calculate cost-oriented rates?

Ms. LISER. Here again, you know, we want to have it so that cost-oriented is a basic principle. But at the same time, we want to provide essential flexibility to the authorities in those markets where they know how the market works, they know how telecom services have evolved in those markets, to determine what is the best methodology for calculating what is, in fact, cost-oriented.

Mr. SHIMKUS. For commodities and for manufacturers, because we actually look at—you know, tariffs are really the defining issue, I think, and maybe it is because I am simplistic. Is tariffs in the communication realm? Is that the holy grail to reduce tariffs? Or what other factors could be in there that may—could make this competitive?

Ms. LISER. Well, we think pricing, obviously, is an important issue. But often what we find as a barrier is whether or not companies that want to do resale actually have access to the facilities of the incumbent and whether or not they can get those and provide them again to their customers. So often what we are dealing with is not just the pricing issue but the access issues as well.

Mr. SHIMKUS. And if I may, chairman, my last question—I wanted to ask Mr.—is it Sidak?

Mr. SIDAK. Sidak.

Mr. SHIMKUS. The cost-oriented question also.

Mr. SIDAK. Well, this is a question that takes 6½ years to answer. I don't think we have that much time.

It is too late now.

Mr. SHIMKUS. That is right.

Mr. SIDAK. No. That is the question that the Supreme Court decided in the Verizon case this year, and it literally has been debated since August 8—well, even before August 8, 1996. So I think that it is very hard to get agreement on that. I mean, I have my own views about what a cost-oriented rate means, but somebody else will disagree with me.

Mr. SHIMKUS. It looks like I pushed a hot button here, Mr. Chairman.

Mr. Harris, you would like to respond?

Mr. HARRIS. Yes. The current WTO reference paper includes the obligation for cost-oriented interconnection. At the time, cost-oriented meant the foreigners couldn't make it up to keep U.S. companies out of their markets. It didn't mean a lot more than that.

At the time that language was adopted, the FCC hadn't even begun to address the question what U.S. law meant on a phrase similar to that. And that is precisely how it was drafted. We chose a provision that would allow the FCC the flexibility—right or wrong, because this was trade, this was not domestic policy—to fill in the blanks. It allows foreign regulators to do the same thing, and it doesn't have to be what the FCC does.

By using the phrase, though, it gives our trade negotiators the ability to go to Mexico and say, "Define cost-oriented however you like, but this number is made up. This number is designed to keep TelMex a monopoly and not to let U.S. carriers compete." And that is what you—if you do that kind of thing, you give your negotiators something to argue from, you create a base point but give yourself flexibility, then you have accomplished something in the trade agreement.

And what the Supreme Court says about cost-oriented in the United States doesn't really matter. It matters for domestic policy. It does not matter for what we say in Mexico, in France, Japan, or what have you.

Mr. SHIMKUS. Mr. Darby?

Mr. DARBY. There is good news and bad news in sort of requiring cost-oriented rates. The good news I think is what Scott said is that it takes out sort of blatant discrimination and monopoly gouging, and so forth. Okay. And it gives the trade negotiators, you know, some pre, some pri, on which they can lean.

The bad news is—and I think this is what Mr. Sidak is saying—is that, you know, we economists have been debating that for 30 years, on what is the appropriate cost standard, I mean, going all the way back to when MCI came in and threatened AT&T, the issue then was, what is the appropriate cost standard for these rates?

And we are still debating that, and I suspect we will continue to debate it. So as you tend to narrow, you know, in very fine terms, you are going to find a substantial amount of disagreement on the precise cost measure or the precise rate. All the while you will find a substantial amount of agreement on the fact that it is better to have cost-based rates than having them willy nilly, monopoly based, and discriminatory to gouge somebody.

Mr. SHIMKUS. Right. And I will end with this. I want to thank you, because we always hear the moniker "free and fair trade." It seems like fairness is debating this cost-based issue. What is the fair cost-based analysis? And open and clear disclosure shine the line on day, and how we do this really is antiseptic and—but we don't get that a lot of times.

And if we keep it vague, I am afraid that we will continue to fight the same debates we fight in other trade deals, that it is not fair because we have this vague cost-based issue which is being—protecting an incumbent and not allowing market access. So I would respectfully hope that we look at how we do this. I know it is a difficult thing to do.

Thank you, Mr. Chairman. I yield back.

Mr. STEARNS. I thank you.

Mr. Rush, we welcome your questions.

Mr. RUSH. Thank you, Mr. Chairman. Mr. Chairman, I have a question for Ms. Liser.

Ms. LISER. It is Liser. That is fine.

Mr. RUSH. Liser. I am sorry.

Ms. LISER. That is okay.

Mr. RUSH. Ms. Liser, the Telecommunications Act of 1996 generally requires that incumbent telephone companies lease certain elements of their networks on an unbundled basis, provided that

it is technically feasible to do so. However, the Congress specifically limited the unbundling requirement to those network elements that meet a certain standard, the so-called necessary and impair standard.

And my understanding is that the current Singapore text requires unbundling of elements at "any technically feasible point" in the network, without regard to the necessary and impair standard currently established in U.S. law. Is that correct?

Ms. LISER. No, that actually isn't correct.

Mr. RUSH. It is not.

Ms. LISER. It is not at any technically feasible point. And in addition, one of the things that is most important—and I might have mentioned it before, but I think it is worth emphasizing again—is that we have drafted a provision that also says that it is subject to the discretion of the regulatory authorities of each party as to which elements are unbundled and who has access to those unbundled elements.

So it is totally at the discretion of Singapore as well as the U.S. in determining what gets unbundled and who gets it. And we think that that is key as an element in terms of the flexibility that we have drafted into the agreement.

Mr. RUSH. So is there an understanding, though, between the two parties—the U.S. and Singapore—in terms of all unbundling? I am saying if there is—my point is, if there is more networks, elements that will be unbundled in one sector than another sector, is there—is there a process to work that out, to make sure that is even and balanced between——

Ms. LISER. I think that the basic principle of unbundling is there. It is something that we already have in our own law here. It is in the WTO, and it is something that we certainly would want to see Singapore abide to. In fact, they are already committed to the WTO principle of bundling and providing at cost-oriented rates.

But the point is that we wanted to make sure, given sort of the debate that we see happening here, that there was a certain amount of flexibility. And we don't know that it will be the same elements that will be unbundled. In fact, that is really not the key for us. It is a matter of making sure that, as a general principle, SingTel will be required to provide unbundled elements.

Mr. RUSH. Mr. Chairman, I have no further questions.

Mr. STEARNS. All right.

Mr. RUSH. Thank you so much. I yield back.

Mr. STEARNS. Any additional questions? Let me just close. Ms. Liser, let me ask you, can you tell us, will the FTA, the Singapore FTA, serve sort of as a template for other bilateral agreements? Or is this just one of a kind? And how about multilateral agreements?

Ms. LISER. Well, I think that is obviously an important question a lot of people are asking us, and I think that we want to assure folks that Singapore is a particular market. It has evolved in a particular way. Chile is the same way. In this particular FTA, the Singapore one as well as the Chile, we are definitely trying to respond to specific issues that we have seen and specific market access issues that our companies have raised with us.

So we will not be taking them wholesale and applying them to any other agreements. The basic principles that we have there are

principles that we are building on from the WTO and which we are already ourselves committed to. But in terms of the specifics, which I think is the major issue that people are concerned about, no, we will not be exporting those wholesale.

Mr. STEARNS. So you are saying, no, this will not be a template for either bilateral or multilateral agreement.

Ms. LISER. That is correct.

Mr. STEARNS. Okay. You know, Singapore is a city-state, I don't know, of about 6 million people. And I understand, for example, in the area of third generation telephone services they have a spectrum moratorium, and there is only two companies. And, obviously, if those two companies came to the United States, the question is—and they bid for the spectrum with our competitors, our companies here in the United States—that is going to be interesting, how to work that out so that they would be competing and what would be a fair, level playing field for them. I guess——

Ms. LISER. Right.

Mr. STEARNS. [continuing] my final question is what—I am trying to be specific in this hearing, and that is the difficulty here. What would you do to address the perceived—the unbalance between maybe these companies in Singapore that the government has put a moratorium and there is just two, and then they come in here to compete, a third generation, how would you address that?

Ms. LISER. I think that that is one of the areas where we are looking at in terms of the standards that are being used and trying to make sure that they are obligated to provide as much choice as possible in terms of the standards that are——

Mr. STEARNS. "They" being whom?

Ms. LISER. On the Singapore side. That they are committed to providing as much choice as is possible with regard to the selection of the standards that would be used for wireless telecommunications systems.

Mr. STEARNS. Well, to conclude, Mr. Waverman, we will let you have the last word from London, if there is anything you would like to add.

Mr. WAVERMAN. Let me just add in the issues of things like subsidies, we shouldn't lose sight of the fact that in general trade agreements there are subsidies across multiple sectors potentially, and that we do have subsidy and countervail as part of agreements, and that I think we should not get too specific in a sector like telecom and try to handle every potential issue, because think of the thousands of sectors of the economy. If each of them acted like a detailed examination of that sector, the trade agreements would be billions of pages long.

So I think we should try to look at the specific issues of telecoms that are unique to telecom and leave some of the more general issues to what the trade agreement does overall.

Mr. STEARNS. All right. I thank you, and thank you for joining us from London. I want to thank our witnesses and also for your patience while we left to vote. And we will need to keep the record open for additional questions that might occur.

And with that, the subcommittee is adjourned.

[Whereupon, at 12:04 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

PREPARED STATEMENT OF DONALD ABELSON, CHIEF, INTERNATIONAL BUREAU, FEDERAL COMMUNICATIONS COMMISSION

Thank you for the opportunity to discuss issues that have been raised regarding the interaction between domestic telecommunications policy and U.S. trade policy.

ROLE OF THE FCC WITH RESPECT TO TELECOMMUNICATIONS TRADE POLICY

The Federal Communications Commission's (FCC or Commission) charge as mandated by Congress is to implement the Communications Act. Consistent with the Act's purpose of providing all people of the United States world-wide communication service at reasonable charges, 47 U.S.C. sec. 151, the Commission's work around international telecommunications is extensive and multi-faceted. For example, we seek to serve the public interest by developing policies that foster U.S. consumer access to a wide range of international telecommunications services at reasonable prices. Encouraging adoption of pro-competitive regulatory practices in foreign countries is an important element of these policies. The FCC works in many ways to encourage the development of pro-competitive policy in foreign markets. Our own rules for international calling policies, our dialogues with foreign regulators, and our provision of technical expertise to Executive Branch agencies such as the Department of State, the Department of Commerce, and the U.S Trade Representative (USTR) all serve this purpose.

Because our mandate is solely to implement the Communications Act, the Commission's work only intersects with telecommunications trade policy in a very narrow way: We do not develop or implement trade policy; we do, however, provide technical advice to U.S. trade officials regarding domestic statutory and regulatory policy. In this regard, one of the functions of the Commission's International Bureau is to "provide advice and technical assistance to U.S. trade officials in the negotiation and implementation of telecommunications trade agreements, and consult with other bureaus and offices as appropriate." 47 C.F.R. sec. 0.51(h). Pursuant to this charge, upon request, we provide technical advice about existing communications law and regulations.

By law, USTR sets trade policy through an Executive Branch interagency mechanism; as an independent federal regulatory agency, the FCC is not included in that mechanism. The trade policy mechanism includes the staff-level Trade Policy Subcommittee (TPSC) and the high-level Trade Policy Review Group (TPRG), which are comprised of representatives from various Executive Branch agencies. The Departments of Commerce and State, both of which are included in the mechanism, speak respectively to domestic and international telecommunications policy, rather than the FCC. Indeed, the Commission's rules for licensing foreign carriers make clear that it accords deference to the Executive Branch on matters of trade policy (as well as national security, foreign policy, and law enforcement).

USTR is in the process of negotiating bilateral Free Trade Agreements (FTAs) with Singapore and Chile. These agreements are expected to include chapters on telecommunications. USTR has sought technical advice from the Commission with respect to whether USTR's proposals would be consistent with current law, *i.e.*, the Communications Act and our implementing regulations. This is the same type of technical advice about the nature and extent of communications law and our regulations that FCC staff has provided for other telecommunications trade agreements (such as the Telecoms Annex to the WTO Services Agreement, the North America Free Trade Agreement, and the WTO Basic Telecom Agreement). The FCC does not decide what will be in an agreement and what will be excluded. Nor is USTR under any obligation to follow the technical advice provided by the FCC. Thus, decisions about telecommunications trade policy goals and specific proposals to achieve these goals rest with USTR and with the other Executive Branch agencies.

FCC TECHNICAL EXPERTISE

In the case of the Singapore and Chile FTAs, USTR has requested two types of technical advice: First, the USTR General Counsel requested numerous federal agencies to assist in the identification of areas to be reviewed for possible conflicts with general trade principles of market access and most favored nation treatment. Agencies were asked to identify provisions in existing law or regulations for which USTR would decide whether it should propose "reservations" that would carve out such areas from the trade obligations.

Second, USTR staff has been consulting with FCC staff about the USTR proposals for the telecommunications chapters. These consultations ensure that the USTR

does not unintentionally "over commit" by seeking obligations in FTAs that, when applied in the United States, would establish obligations that go beyond existing law.

CONCLUSION

The Commission has consistently supported enhancing the competitive prospects of U.S. carriers abroad through its promotion of pro-competitive regulatory practices. Commission policies recognize that an efficient and cost-effective global telecommunications marketplace is essential to a global information economy and will serve the public interest and benefit consumers. As noted at the outset of these comments, the FCC has actively engaged in efforts to promote competition in the global market for telecommunications services.

The decision about which specific market-opening objectives should be reflected in trade agreements is a matter of trade policy that falls within the authority and expertise of U.S. trade officials. Thus, the Executive Branch decides what level of specificity is necessary to achieve trade objectives. The Commission's objective is that any proposals contemplated by USTR be informed by the FCC's technical expertise regarding existing domestic law and policy. If USTR elects to pursue detailed agreements, it should seek policy guidance from Executive Branch agencies including those with technical expertise such as the Department of Commerce (as well as from the FCC) to ensure USTR is fully informed about the relationship between the detailed proposals and existing law.

The Commission's role has been to make clear what domestic obligations are contained respectively in the Communications Act and in the Commission's rules. Congress in its judgment and expertise has the authority to adopt changes in domestic telecommunications law. To the extent that Congress approves any changes in the Communications Act, the Commission will continue to implement faithfully our governing statute.

Thank you again for the opportunity to present views on the relationship between trade policy and domestic telecommunications policy. We are, of course, available to provide the Subcommittee with any additional information it may deem useful in addressing these complex issues.