Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)	IB Docket No. 97-142
	)	
Market Entry and Regulation of Foreign-Affiliated Entities	)	IB Docket No. 95-22

REPORT AND ORDER AND ORDER ON RECONSIDERATION

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By the Commission: Chairman Kennard issuing a statement.

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I. Introduction and Executive Summary

A. Introduction

1. An efficient and cost-effective global telecommunications marketplace is essential to an emerging information economy. The substantial resources required to build a global infrastructure are unlikely to come from regulated monopolies or multilateral international organizations. In the U.S. domestic market, we have found that private sector competition dramatically lowers the cost of providing service and stimulates creation of innovative services and investment in infrastructure deployment.[1] These positive developments encouraged Congress to enact the Telecommunications Act of 1996 (the 1996 Act), with its emphasis on competition and deregulation.[2] The United States, in an effort to achieve these same benefits internationally, urged foreign governments to open their markets to competition and to adopt procompetitive, transparent regulatory policies in order to foster the growth of a global information infrastructure.

2. On February 15, 1997, 69 nations, including the United States and most of its major trading partners, took the historic step of concluding the World Trade Organization (WTO) Basic Telecommunications Agreement,[3] and committing to open their markets for basic telecommunications services. The WTO Basic Telecom Agreement seeks to replace the traditional regulatory regime of monopoly telephone service providers with procompetitive and deregulatory policies. We expect the market-opening commitments of our trading partners to bring procompetitive developments throughout the world. The 69 nations that concluded the Agreement account for more than 90 percent of worldwide telecommunications services revenues. In light of the United States' WTO market access commitments and the market-opening commitments of our trading partners, as well as our improved regulatory framework, we find that it serves the public interest to adopt rules in this *Order* to complete our goal of opening the U.S. market to competition from foreign companies, in parallel with our major trading partners. We adopt

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1 *See Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980).

2 Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amends the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq*. Hereinafter, all citations to the Communications Act will be to the relevant section of the United States Code unless otherwise noted. The Communications Act of 1934, as amended, will be referred to herein as the Communications Act or the Act.

3 As described below in Section II.B, the results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement."

an open entry standard for WTO Member country applicants that favors their participation and will enable U.S. consumers to enjoy the benefits of increased competition.

3. We also adopt today a companion order that establishes a uniform framework for foreign-licensed satellite systems that seek to serve the U.S. market.[4] The companion order adopts the same general approach we apply in this *Order* to encourage entry by foreign-licensed satellite systems into the United States to provide basic telecommunications services. Both orders are guided by the common objective of promoting competition in the U.S. market, and of achieving a more competitive global market for all basic telecommunications services.

4. Prior to the conclusion of the WTO Basic Telecom Agreement, the United States and many foreign governments had looked for ways to encourage foreign governments to open their telecommunications markets. By removing obstacles to entry to all telecommunications service markets, including our own, we believed that we could deliver tangible benefits to U.S. consumers, U.S. companies, and the world at large. At the same time, however, we sought to prevent anticompetitive harm from the leveraging of foreign market power into the U.S. market for telecommunications services. The WTO Basic Telecom Agreement helps achieve these goals by furthering the principles of open markets, private investment and competition, as well as the adoption of procompetitive regulatory principles. Under the terms of the Agreement, the United States has committed to allow foreign suppliers to provide a broad range of basic telecommunications services in the United States. We expect that entry by foreign telecommunications carriers and other investors will increase competition in the U.S. telecommunications service market, providing lower prices and increased quality of service.[5] In return, most of the world's major trading nations have made binding commitments to move from monopoly provision of basic telecommunications services to open entry and procompetitive regulation of these services. These commitments will allow U.S. companies to enter previously closed foreign markets and develop competing networks for local, long distance, wireless and international services. In most cases, these markets have been entirely closed to competition until now. The initiative to move from a world of regulated monopolies to one that is characterized by open entry policies parallels the procompetitive and deregulatory mandate of the Telecommunications Act of 1996.

5. This *Order* represents the culmination of efforts taken by the Commission to promote competition in the global market for telecommunications services. Beginning in November 1995, when only a handful of the world's telecommunications markets were open to competition by U.S. carriers, the Commission issued the *Foreign Carrier Entry Order* to encourage foreign governments to open their

[4] *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, IB Docket No. 96-111, Report and Order, FCC No. 97-399 (rel. Nov. 26, 1997) (*International Satellite Service Order*).

[5] *See International Competitive Carrier Policies*, CC Docket No. 85-107, Report and Order, 102 FCC 2d 812 (1985).

markets to competition.[6] That order adopted the effective competitive opportunities (ECO) test. The ECO test required, as a condition of foreign carrier entry into the U.S. market, that there be no legal or practical restrictions on U.S. carriers' entry into the foreign carrier's market. The ECO test was crafted to serve our three goals for regulation of international telecommunications services: to promote effective competition in the U.S. telecommunications service market; to prevent anticompetitive conduct in the provision of international services or facilities; and to encourage foreign governments to open their telecommunications markets.[7]

6. In addition, the Commission's 1996 *Flexibility Order* opened the way for carriers to engage in alternative arrangements outside of traditional settlement practices to encourage the more economically efficient routing of traffic.[8] The recent *Benchmarks Order* requires U.S. carriers to reduce the settlement rates they pay to foreign carriers and also imposes certain conditions on participation in the U.S. market that are aimed at reducing the incentives and ability of a foreign carrier to act anticompetitively to the detriment of U.S. consumers.[9] These orders, along with the market-opening commitments contained in the WTO Basic Telecom Agreement, pave the way for a new approach to foreign participation in the U.S. telecommunications market.

7. Even before the effective date of the WTO Basic Telecom Agreement, significant procompetitive changes in global telecommunications markets have been evident. In the two years since the *Foreign Carrier Entry Order* became effective in January 1996, the world has seen a significant change in the structure of international telecommunications markets. Throughout the world, markets are opening, more and more traffic is exchanged outside of the traditional settlements process, and new technologies are having a profound impact on traffic patterns. In January 1996, only 17 percent of the world's top 20 telecommunications markets were open to U.S. companies. Pursuant to the WTO Basic Telecom Agreement, 92 percent of major markets are covered by commitments to remove restrictions on competition and foreign entry by January 1, 1998. We expect that competitive forces will soon result in higher quality, lower priced, more innovative service offerings. Carriers are adopting non-traditional, more cost-efficient means of routing traffic, such as routing switched traffic over private lines and switched hubbing. Some experts predict that by 2005, the resale market will be worth ten times what it was in 1996.[10] New

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[6] *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket 95-22, Report and Order, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*), *recon pending*.

[7] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3877 ¶ 6.

[8] *Regulation of International Accounting Rates*, Phase II, CC Docket 90-337, Fourth Report and Order, 11 FCC Rcd 20,063 (1996), *recon. pending* (*Flexibility Order*).

[9] *International Settlement Rates*, IB Docket 96-261, Report and Order, FCC 97-280 (rel. Aug. 18, 1997) (*Benchmarks Order*), *recon. pending, appeal filed, Cable & Wireless et al. v. FCC,* No. 97-1612 (D.C. Cir. filed Sept. 26, 1997). Settlement rates are the per-minute rates paid by U.S. and foreign carriers to terminate international traffic.

[10] Ovum Ltd., *Resale and Callback, International Telephony: Opportunities and Threats* 17 (Nov. 1996).

technologies such as callback and Internet telephony are already putting significant pressure on international settlement rates and domestic collection rates.

8. In June 1997, the Commission issued a *Notice of Proposed Rulemaking* to create a new regulatory framework for the more open environment sparked by the WTO Basic Telecom Agreement.[11] In response to our proposed rules, we received comments from 47 parties, including 14 foreign telecommunications carriers.[12] We discuss below the issues raised in the *Notice*, as well as the responses of commenting parties. In addition, we address in this *Order* related issues raised in petitions for reconsideration of the *Foreign Carrier Entry Order*.[13]

9. With this *Order*, we remove the ECO test and replace it with an open entry standard for applicants from WTO Member countries. We find that the commitments made in the context of the WTO Basic Telecom Agreement, an increasingly competitive environment and our improved regulatory tools enable us to adopt a deregulatory approach that presumes entry is in the public interest. In light of the market-opening commitments in the WTO Basic Telecom Agreement, we expect to see a shift away from monopoly provision of telecommunications services and toward competition, open markets and transparent regulation. Instead of undertaking an in-depth review of the competitiveness of each foreign market in order to preclude potential anticompetitive conduct, we address such concerns with safeguards, while allowing more open competitive entry. We find that our own enhanced safeguards, together with those introduced by our trading partners, pursuant to their commitments to procompetitive regulatory principles, should be sufficient to reduce the danger of anticompetitive conduct resulting from foreign entry into the U.S. market.

10. We find that the market-opening approach we adopt in this *Order* will have significant benefits for consumers. First, we find that entry by foreign suppliers of telecommunications services will stimulate the U.S. market for international services, creating incentives for carriers to offer existing services at lower prices and adopt innovative new services to attract residential and small business customers. Second, we find that further opening the U.S. market to foreign carrier entry, along with U.S. carrier entry into foreign markets, will let carriers capitalize on newly found efficiencies by offering one-stop shopping. This allows customers to have a single service provider in multiple markets, thereby reducing administrative costs to users.

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11 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket 97-142, Order and Notice of Proposed Rulemaking, FCC 97-195 (rel. June 4, 1997) (*Notice*).

12 See Appendix A for a complete list of parties filing comments and reply comments.

13 BT North America Inc. Petition for Reconsideration (IB Docket No. 95-22) (BTNA Petition); Cable & Wireless, Inc., Petition for Reconsideration (IB Docket No. 95-22) (CWI Petition); MCI Telecommunications Corporation Petition for Reconsideration (IB Docket No. 95-22) (MCI Petition); Telefónica Larga Distancia de Puerto Rico, Inc., Petition for Reconsideration (IB Docket No. 95-22) (TLD Petition); WorldCom, Inc., Petition for Reconsideration (IB Docket No. 95-22) (WorldCom Petition); *see also* Reply Comments of NYNEX Corp., Regulation of International Accounting Rates (CC Docket No. 90-337) (NYNEX *Flexibility* Reply Comments).

11. We conclude that our new approach will better serve the original goals of our international telecommunications regulations as stated in the *Foreign Carrier Entry Order* than the approach outlined in that order.[14] First, we believe that removing barriers to entry and focusing on competitive safeguards will promote effective competition in the U.S. telecommunications services market by removing unnecessary regulation and barriers to entry that can stifle competition and deprive U.S. consumers of the benefits of lower prices, improved service quality, and service innovations. Second, we believe that our new approach will enable us to prevent anticompetitive conduct in the provision of international services or facilities by relying on more effective and targeted safeguards to ensure that entry by a foreign carrier with market power does not cause anticompetitive harm in the U.S. market. Third, we find that this approach will encourage foreign governments to implement their commitments to open their telecommunications markets by serving as an example that open markets and minimal regulation are beneficial to consumers and industry.

12. We are confident that global implementation of the WTO Basic Telecom Agreement will result in significant consumer and economic benefits. At the same time, however, we recognize that much work needs to be done to ensure that the promise of the WTO Basic Telecom Agreement is fulfilled. With this *Order* and the companion *International Satellite Service Order*, we have taken important steps to carry out the letter and spirit of the market-opening commitments made by the United States . We expect that foreign carriers will begin to enter and compete in the U.S. market soon after January 1, 1998. We also expect that U.S. carriers will likewise be able to enter and compete in previously closed foreign markets. We also plan to look carefully at market-opening steps taken by the rest of the world.

B. Executive Summary

Open Entry Policies for WTO Members

13. In this *Order* we adopt a new standard for foreign participation in the U.S. telecommunications market. Our rules will no longer require applicants from WTO Members to demonstrate that their markets offer effective competitive opportunities (ECO) in order to obtain Section 214 authority,[15] authorization to exceed the Section 310(b)(4)[16] foreign ownership benchmark, or a cable landing license.[17] Instead, we adopt an open entry standard for WTO Member applicants, which will enable U.S. consumers to enjoy the benefits of increased competition in U.S. markets. Our approach includes a presumption in favor of foreign participation by these applicants. We find the open entry policies and competitive safeguards that many WTO Members are adopting, as well as our own improved competitive safeguards, are better able to address any competitive concerns that may arise. Although we find that our safeguards will generally provide sufficient protection against anticompetitive conduct, we

[14] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3877 ¶ 6.

[15] 47 U.S.C. § 214.

[16] 47 U.S.C. § 310(b)(4).

[17] *See* 47 U.S.C. §§ 34-39.

recognize the possibility that circumstances might arise in which our safeguards might not adequately constrain the potential for anticompetitive harm in the U.S. market for telecommunications services. In such rare cases, the Commission reserves the right to attach additional conditions to a grant of authority, and in the exceptional case in which an application poses a very high risk to competition, to deny an application.

14. We apply the above policy to applicants from WTO Members for: (1) Section 214 authority to provide international facilities-based service as well as resold switched services and resold noninterconnected private line services; (2) cable landing licenses; and (3) authorizations to exceed the 25 percent foreign ownership benchmark in Section 310(b)(4) of the Act. We also find that the market-opening commitments of WTO Members, along with our recently adopted benchmark settlement rates condition, remove the need to maintain our equivalency analysis for carriers seeking to provide switched services over private lines between the United States and WTO Member countries.[18] Even where carriers on those routes do not meet our benchmark settlement rate condition, we will continue to approve applications to provide switched services over private lines where such markets meet our equivalency test.[19]

Policies toward Non-WTO Members

15. We find that the circumstances that existed when the Commission adopted the *Foreign Carrier Entry Order* have not changed sufficiently with respect to countries that are not members of the WTO. We find that competitive concerns continue to exist for carriers that possess the ability to exercise market power in such countries and that we should continue to pursue our goal of encouraging such countries to open their markets to competition. We therefore find that it continues to serve the public interest goals of our international telecommunications policy to apply the ECO and equivalency tests in the context of non-WTO Member countries.

Regulatory Issues

16. We conclude, in light of our new open entry approach, that we should revise the competitive safeguards governing foreign-affiliated carrier provision of basic telecommunications service in the U.S. market and, more broadly, U.S. carrier dealings with foreign carriers. In particular, we strengthen our rules preventing the exercise of foreign market power in the U.S. market. At the same time, we modify or eliminate other rules that could hamper competition. We accordingly adopt a more narrowly tailored

[18] The equivalency test requires that, before granting such applications, the Commission make a finding that the country at the foreign end of the private line affords U.S. carriers resale opportunities equivalent to those available under U.S. law. *See infra* Section III.B.2.

[19] In the *Benchmarks Order*, the Commission adopted a benchmark settlement rate condition for the provision of switched services over private lines. It required that carriers seeking to provide switched services over resold or facilities-based international private lines demonstrate that settlement rates for at least 50 percent of the settled, U.S.-billed traffic on the route be at or below the appropriate settlement rate benchmark. *Benchmarks Order* ¶¶ 242-259.

regulatory framework that enhances our ability to monitor and detect anticompetitive behavior in the U.S. market.

17. We narrow our "No Special Concessions" rule so that it only prohibits U.S. carriers from entering into exclusive arrangements with foreign carriers that possess sufficient market power on the foreign end of a U.S. international route to affect competition adversely in the U.S. international services market.[20] To provide greater certainty to U.S. carriers as they negotiate agreements with their foreign counterparts, we adopt a rebuttable presumption that foreign carriers with less than 50 percent market share in each relevant foreign market lack such market power. We also protect the confidentiality of competing U.S. carriers and consumers by prohibiting U.S. carriers from accepting from a foreign carrier any foreign-derived confidential carrier or U.S. customer information without appropriate U.S. carrier or customer approval.

18. In the *Benchmarks Order*, the Commission concluded that we should condition foreign-affiliated carrier authorizations to provide facilities-based switched or private line service to an affiliated market on compliance with the benchmark settlement rates. The Commission found that this authorization condition is necessary to reduce the ability of carriers serving affiliated markets to engage in price squeeze behavior. We do not revisit those conclusions here, but describe the benchmark condition in this *Order*. We also decline to apply a similar condition to the provision of resold switched services to affiliated markets because we find that the incentive to engage in a predatory price squeeze is significantly less in this context than for facilities-based service. We do adopt, however, a reporting requirement for switched resellers affiliated with a foreign carrier with market power in a foreign market in order to monitor the potential for traffic distortion on the affiliated route.

19. We also revise our dominant carrier safeguards that apply to U.S. carriers with foreign affiliates that possess sufficient market power on the foreign end of a U.S. international route to affect competition adversely in the U.S. market. We decline to adopt the two-tier framework proposed in the *Notice* which would have applied more stringent supplemental dominant carrier safeguards to carriers with foreign affiliates that do not face facilities-based competition in the foreign market. We adopt the *Notice*'s proposal to modify our tariffing requirement to remove the 14-day advance notice requirement and accept tariff filings on one day's advance notice with a presumption of lawfulness for such filings. We also remove the requirement that foreign-affiliated dominant carriers obtain prior approval for circuit additions and discontinuances on their dominant route. Instead, we will apply the prior approval requirement as a remedial measure in the event of demonstrated anticompetitive conduct. Further, we adopt a limited structural separation requirement and also require that foreign-affiliated dominant carriers file traffic and revenue reports, provisioning and maintenance reports and circuit status reports on a quarterly basis. We decline to adopt the *Notice*'s proposal to ban exclusive arrangements involving joint marketing, customer steering, or the use of foreign market telephone customer information. As with the No Special Concessions rule, we adopt a rebuttable presumption that foreign carriers with less than 50 percent market share in each relevant market on the foreign end lack sufficient market power to affect competition adversely in the U.S.

[20] The No Special Concessions rule prohibits all U.S. international carriers from agreeing to accept special concessions from any foreign carrier or administration. *See infra* Section V.B.1.

market and, as a result, their U.S. affiliates should presumptively be treated as non-dominant. Finally, we emphasize that we have authority to enforce our safeguards through fines, conditional grants of authority and the revocation of authorizations.

20. We also adopt the *Notice*'s proposal to create a presumption in favor of alternative settlement arrangements on routes serving WTO Members, in place of the ECO standard set out in the *Flexibility Order*.[21] This presumption could be rebutted with a showing that there are not multiple facilities-based competitors operating in the foreign market for international services. In the event the presumption is overcome, an applicant nonetheless may demonstrate that the proposed alternative settlement arrangement will promote market-oriented pricing and competition, while precluding the abuse of market power by the foreign correspondent. We do not otherwise alter the existing approach to flexible settlement arrangements, and we retain the safeguards and enforcement mechanism adopted in the *Flexibility Order*.

Procedures

21. We adopt our proposal to streamline review of most applications for international Section 214 authority for foreign carriers or their affiliates. We will streamline the processing of an application of any carrier that qualifies for non-dominant treatment or that certifies that it will comply with our dominant carrier safeguards. We will also streamline the Section 214 application of any applicant that seeks to serve a WTO Member country only by reselling the switched services of unaffiliated U.S. international carriers. We will, in addition, streamline any application for assignment or transfer of control of a Section 214 authorization in circumstances where an initial application by the assignee or transferee would be eligible for streamlined processing. Finally, we will streamline applications to exceed the 25 percent foreign ownership benchmark under Section 310(b)(4) of the Act that do not involve an initial application or a transfer of control. We anticipate that it will normally take approximately 35 days to reach a decision on a streamlined application. For those applications that are removed from streamlined processing, we will normally issue a decision on the application within 90 days. In addition, we will no longer require authorized international common carriers to notify the Commission before accepting investments by foreign carriers (or commonly controlled companies) unless the investment by a single foreign carrier or by multiple foreign carriers acting jointly exceeds 25 percent or results in a transfer of control. We will require an authorized carrier to notify the Commission before it or its holding company acquires a direct or indirect interest of over 25 percent or a controlling interest in a foreign carrier.

II. Background

A. *Foreign Carrier Entry Order*

22. The Commission adopted the *Foreign Carrier Entry Order* to promote its procompetitive goals in regulating international telecommunications services. In that order, the Commission adopted the ECO test as part of an overall public interest analysis for both international Section 214 authorizations and

[21] 11 FCC Rcd 20,063 (1996).

indirect foreign ownership of common carrier radio licensees under Section 310(b)(4). Prior to adopting the ECO test, the Commission evaluated foreign carrier applications to provide service in the U.S. market on an *ad hoc*, case-by-case basis. Under the *Foreign Carrier Entry Order*, we apply the ECO test to applications for international facilities-based, switched resale, and non-interconnected private line resale under Section 214 only in circumstances where an applicant seeks authority to provide the service between the United States and a destination market in which an affiliated foreign carrier has market power in a relevant market.[22] We also apply the ECO test to common carrier radio applicants or licensees that seek to exceed the 25 percent indirect foreign ownership benchmark contained in Section 310(b)(4).

23. In applying our ECO test, we first examine first the legal, or *de jure*, ability of U.S. carriers to enter the foreign destination market and provide the relevant service. If there are no legal barriers to entry, we consider the practical ability for U.S. carriers to compete in those markets. This analysis focuses on the actual conditions of entry, *i.e*., terms and conditions of interconnection, competitive safeguards, and the regulatory framework.[23]

24. The *Foreign Carrier Entry Order* also delineated additional public interest factors that we consider in determining whether to grant a foreign-affiliated carrier's application. We consider these factors in addition to the ECO analysis, and they may weigh in favor of or against grant of a particular application. These include the general significance of the proposed entry on competition in the U.S. telecommunications services market, the presence of cost-based accounting rates (under Section 214), as well as national security, law enforcement issues, foreign policy and trade concerns brought to our attention by the Executive Branch.[24] Finally, the Commission stated that it would amend its rules if the Executive Branch were to succeed in negotiating greater market access for U.S. carriers.[25]

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22 In general, for purposes of applying our ECO test under Section 214 of the Act, we consider an applicant to be affiliated with a foreign carrier when a foreign carrier owns a greater than 25 percent interest in, or controls, the applicant. 47 C.F.R. § 63.18(h)(1)(i); *Foreign Carrier Entry Order*, 11 FCC Rcd at 3900-02, 3966-69 ¶¶ 73-78, 248-251; *see also id.* at 3902-06 ¶¶ 88-92 (scrutiny of foreign carrier investments of 25 percent or less; aggregation of multiple carrier interests).

23 *Foreign Carrier Entry Order*, 11 FCC Rcd at 3890-94 ¶¶ 42-53 (we examine "whether there exist reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services . . . [and whether there are] adequate means to monitor and enforce these conditions"); (competitive safeguards we examine include: "(1) existence of cost-allocation rules to prevent cross-subsidization; (2) timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities; and (3) protection of carrier and customer proprietary information"); (in examining the regulatory framework in the destination country, our focus is on "whether there is separation between the foreign regulator and the operator of international facilities-based services, and whether there are fair and transparent regulatory procedures in the destination market").

24 *Id.* at 3896-3899 ¶¶ 61-65.

25 *Id.* at 3964-65 ¶¶ 239-244.

B. WTO Basic Telecom Agreement

25. The WTO Basic Telecom Agreement was concluded under the framework established by the General Agreement on Trade in Services (GATS), which is one of the agreements negotiated in conjunction with the creation of the WTO.[26] For the first time, the GATS brought trade in services within the international trading regime established for trade in goods by the General Agreement on Tariffs and Trade after the Second World War. The GATS consists of general obligations and specific sectoral commitments contained in individual Member schedules.[27]

26. At the conclusion of the negotiations creating the WTO in April 1994, the United States and other WTO Members made commitments to allow market access for a broad range of services — including such diverse industries as construction services, professional services (such as legal and medical services), distribution services, and value added (or enhanced) telecommunications services.[28] Basic telecommunications, however, was one of a limited number of service sectors for which negotiations were extended beyond the April 1994.[29] WTO Members recognized the economic importance of basic telecommunications services and established a separate, sector-specific negotiation for these services, which were scheduled to conclude by April 30, 1996. Because the negotiations had made insufficient progress by that date, the WTO agreed to extend the deadline for concluding the negotiations to February 15, 1997.

27. As a result of the WTO Basic Telecom Agreement, 44 WTO Members (representing 99 percent of WTO Members' total basic telecommunications services revenues) will permit foreign ownership or control of all telecommunications services and facilities, while an additional 12 WTO Members will permit foreign ownership of some telecommunications services. Fifty-two WTO Members (covering 88 percent of WTO Members' international services revenues) will provide market access for the provision of international services and another five will provide market access for limited international services. Forty-nine WTO Members (accounting for more than 80 percent of WTO Members' total satellite services revenues) also guaranteed market access for the provision of satellite services. In addition, 55 WTO

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[26] The WTO came into being on January 1, 1995, pursuant to the Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1125 (1994) (the "Marrakesh Agreement"). The Marrakesh Agreement consists of multilateral agreements on trade in goods, services, intellectual property and dispute settlement. The General Agreement on Trade in Services is Annex 1B of the Marrakesh Agreement, 33 I.L.M. 1167 (1994). There are currently about 130 members of the WTO.

[27] *See infra* Section VII for a fuller description of the GATS.

[28] The United States adopted the Commission's definition of enhanced services for purposes of its GATS obligations, that is, services offered over common carrier transmission facilities which employ computer processing applications that 1) act on the format, content code, protocol or similar aspects of the subscriber's transmitted information; or 2) provide the subscriber additional, different or restructured information; or 3) involve subscriber interaction with stored information. *See* 47 C.F.R. § 64.702.

[29] The other sectors were financial services and maritime services.

Members agreed to adopt the Reference Paper, which sets out pro-competitive regulatory principles (Reference Paper),[30] and another ten WTO Members agreed to adopt these regulatory principles in part or at a future date. These regulatory principles are consistent with the requirements of the Communications Act and the Telecommunications Act of 1996 passed by Congress in February 1996.[31] The WTO Basic Telecom Agreement is scheduled to enter into force on January 1, 1998.[32]

28. The commitments of the 69 countries that participated in the WTO Basic Telecom Agreement can be enforced through WTO dispute settlement process.[33] If a WTO Member fails to give a U.S. carrier market access consistent with that WTO Member's commitments or fails to implement the Reference Paper regulatory principles, the United States may enforce those commitments through the dispute settlement process at the WTO. The remedies available if the United States prevails include, first, an obligation by the losing WTO Member to fulfill its market access commitments or implement the necessary regulatory principles. If the losing WTO Member fails to do so, it is required to compensate the United States in trade terms or else the United States may take compensatory trade action, first in the services sector, but if sufficient compensatory trade action is not available in the services sectors, then the United States would be authorized to take compensatory action in the goods sector. Thus, if a WTO Member that has committed to allow market access to provide international service denied a license to a U.S. carrier on the grounds of its nationality, the United States would have the right to take a dispute against that WTO Member in the WTO. Similarly, if a dominant carrier provided interconnection to U.S. carriers on less favorable terms than it provides to its own affiliates or to carriers from a third country, the United States could take to the WTO a dispute against the dominant carrier's government for failing to maintain measures to ensure nondiscriminatory interconnection. While companies from the defendant WTO Member might not be interested in entering the U.S. telecommunications market, its industry likely would have substantial volumes of trade with the United States in a variety of other goods and services sectors. Thus, if the United States prevailed in a dispute, the losing WTO Member would most likely agree to fulfill its market access or regulatory principles commitments rather than provide trade compensation in other services or goods sectors.

III. Open Entry Policies toward WTO Member Countries

A. General Standard for Foreign Participation

29. We adopt in this *Report and Order* a new standard for foreign participation in the U.S. telecommunications market. We will no longer require applicants from WTO Members to demonstrate that their markets offer effective competitive opportunities in order to obtain Section 214 authority,

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30 The regulatory principles embodied in the Reference Paper are described below in Section VII, *infra*.

31 Pub. L. No. 104-104, 110 Stat. 56.

32 *See* ¶ 3 of the Fourth Protocol to the GATS.

33 GATS Article XXII provides that any WTO Member may initiate a dispute settlement if it believes that another Member has failed to carry out its obligations and commitments.

authorization to exceed the Section 310(b)(4) foreign ownership benchmark, or a cable landing license. We find here, as discussed below, that the binding commitments made by 69 WTO Members to open their telecommunications markets to competition, along with the increased pressure to lower settlement rates and the emergence of new technologies and routing configurations, will bring dramatic changes to the competitive landscape for global telecommunications services. In anticipation of these changes, we adopt an open entry standard for WTO Member applicants. From the effective date of this *Order* forward, the Commission will expeditiously grant the vast majority of applications filed by foreign telecommunications carriers and investors. We find it will no longer be necessary or appropriate to engage in the detailed, in-depth analysis of foreign markets that the ECO test required.

1. Removing ECO

Background

30. In the *Notice*, the Commission tentatively concluded that it should remove the ECO test. It stated that the WTO commitments of 68 other governments would substantially achieve the goals we articulated in the *Foreign Carrier Entry Order*[34] and would promote effective competition in the U.S. international services market. This tentative conclusion was based, in part, on the Commission's finding that the commitments of WTO Members on basic telecommunications services would, when fulfilled, substantially open foreign markets and reduce foreign carriers' ability to engage in anticompetitive conduct when they enter the U.S. market to provide international services.[35] The Commission also tentatively concluded that eliminating the ECO test would significantly reduce the time and regulatory burden associated with foreign carrier entry into the U.S. market.[36] The Commission therefore proposed to eliminate the ECO test from its public interest analysis of pending and future applications filed by applicants from WTO Members for Section 214 authority, cable landing licenses and requests to exceed the 25 percent indirect foreign ownership benchmark for common carrier radio licenses.[37]

Positions of the Parties

31. Most commenters strongly support removal of the ECO test.[38] These parties generally agree that, in light of the competitive changes expected to result from commitments of 68 other WTO Members

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[34] *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*).

[35] *See Notice* ¶ 29.

[36] *Id.* ¶ 34.

[37] *Id.* ¶¶ 55, 62, 73.

[38] *See, e.g.*, C&W Comments at 3 (stating that elimination of the ECO test will prompt foreign-affiliated carriers to participate more fully in the U.S. market, thereby promoting competition and its intended benefits); *see also* Telmex Comments at 4; Sprint Comments at 3.

to open their telecommunications markets, it is no longer necessary to maintain the ECO test. Such commenters state that by eliminating the ECO test, the Commission and carriers can save valuable time and resources by not engaging in a detailed and particularized ECO analysis.[39] Commenters also contend that removing the ECO test will promote entry by foreign carriers and thus stimulate competition in the U.S. market.[40] Several commenters urge the Commission to remove the ECO test in order to set an example for other WTO Members to follow as they open their own markets.[41] A number of carriers argue that GATS principles compel the removal of the ECO test and that the Commission should acknowledge that the agreement requires that it take the proposed action.[42]

32. AT&T and Ameritech argue that we should retain an entry standard that evaluates the extent to which the applicant's country provides unrestricted market access, allows a controlling foreign ownership interest, and satisfies the Reference Paper. These commenters argue that several WTO Members have made weak commitments, which are inadequate to ensure that they will be unable to act anticompetitively, and others have made no commitments at all.[43] Several carriers object to AT&T's proposed standard on the basis that it is inconsistent with GATS principles.[44]

Discussion

33. We find that the Commission need no longer require applicants from WTO Member seeking to enter the U.S. market to demonstrate that their markets offer effective competitive opportunities. The WTO commitments of our trading partners require that they open their markets to competition and promote the introduction of procompetitive regulatory principles. These changes, along with our improved competitive safeguards and major changes in technology and traffic routing, remove the need for the Commission to engage in an ECO analysis for applicants from WTO Members. Two years ago, the goals of our international telecommunications policy were best served by the ECO test. These goals remain constant, but we conclude that they will henceforth be largely fulfilled by the emerging market changes resulting from the open markets for telecommunications services in combination with our improved safeguards. We therefore conclude that we can remove the ECO test from our public interest analysis and adopt an open entry policy as discussed below.

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[39] FT Comments at 13-14; Telmex Comments at 4.

[40] Telmex Comments at 4; C&W Comments at 3.

[41] Telmex Comments at 4 (stating that, by promptly eliminating the ECO test, the Commission will set an example for other countries preparing to implement their own WTO commitments, further ensuring that those countries take their WTO commitments seriously); GTE Comments at 29-30; FT Comments at 4-5.

[42] GTE Reply Comments at 4-5; DT Comments at 19; KDD Comments at 3; Sprint Comments at 4.

[43] AT&T Comments at 18-19; Ameritech Comments at 7; *see also* WorldCom Comments at 4-5.

[44] *See, e.g.*, KDD Reply Comments at 2-3; TLD Reply at 4-6.

34. We find that our revised dominant carrier safeguards, together with our "No Special Concessions" requirement, discussed below, will sufficiently address competitive concerns resulting from foreign participation in U.S. telecommunications markets.[45] Further, we conclude that our settlement rate benchmarks conditions will provide an effective regulatory tool in removing incentives and reducing the ability of foreign carriers to engage in anticompetitive behavior in the U.S. international services market.[46] In addition, the Commission has various tools at its disposal to deter anticompetitive conduct. It possesses the power to impose fines and forfeitures and to condition authorizations where necessary to ensure compliance with our rules and policies.[47] Enforcement of antitrust laws is also available to remedy anticompetitive conduct or effects. We find that, as a result of increased competition and the development of effective regulatory regimes in foreign countries, foreign telecommunications carriers will possess far less market power than they did when the ECO test was adopted in 1995. We therefore find that we can rely on our competitive safeguards, instead of our existing ECO framework, to address concerns of anticompetitive behavior.

35. We also find that there are significant public interest benefits from removing the ECO test. As we stated in the *Notice*, eliminating the ECO test will significantly reduce the time and regulatory burden associated with foreign entry into the U.S. market. Application of the ECO analysis has required substantial commitments of time and resources by applicants and the Commission. We also find that entry by foreign carriers will stimulate competition in the U.S. market for international services, increasing pressure on existing carriers to lower prices and improve quality of service. We therefore find that eliminating the ECO test will result in significant benefits to consumers and industry.

36. AT&T opposes our proposal to remove the ECO test. It argues that the WTO Basic Telecom Agreement does little to constrain the market power of carriers from a majority of WTO Member.[48] It states that countries that have made limited commitments or no commitments will continue to pose a significant threat of anticompetitive conduct and that the WTO Basic Telecom Agreement does not justify removing restrictions for these countries. It also argues that, regardless of a country's commitment, competitive dangers continue to exist until WTO commitments are fully and adequately fulfilled.[49] Rather than removing the ECO test, it urges the Commission to adopt a modified ECO test that focuses on "the

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[45] Our No Special Concessions requirement prohibits a U.S. licensed carrier from agreeing to accept directly or indirectly, special concessions from any foreign carrier or administration. We modify this condition below. *See infra* Section V.B.

[46] The benchmark settlement rates condition requires that the foreign affiliate of a U.S. international carrier agree to accept no more than a benchmark settlement rate from all U.S. correspondents on the affiliated route. *See Benchmarks Order* ¶¶ 195-231; *see also infra* Section V.C.1.

[47] 47 U.S.C. §§ 214, 502, 503.

[48] AT&T Comments at 18; *see also* Ameritech Comments at 3-8.

[49] AT&T Comments at 6.

extent to which an applicant's ability to abuse its market power is limited by effective competition."[50] AT&T bases its concern on its statement that only "25 countries would meet the ECO requirements by 2000, and 39 countries would do so in total by the time all WTO commitments are effective in 2013".[51] Other parties generally oppose considering the extent to which a country has implemented its commitment in determining whether to grant entry to a foreign applicant.[52]

37. We do not find it necessary or appropriate to retain the ECO test or examine the extent to which a WTO Member has made a market opening commitment or the extent to which that commitment has been implemented in determining whether a carrier from that country should enter the U.S. market. For the reasons discussed below, the likelihood of harm from carriers with market power in countries that have not adopted a commitment to open their markets is reduced as a result of the WTO Basic Telecom Agreement. We also find that treating carriers differently from countries that have made limited or no commitments could be viewed as inconsistent with our international obligations.

38. We believe that increased competition in global markets will increase pressure on all WTO Members to liberalize their telecommunications markets, including those that have made no commitments or limited commitments. After January 1, 1998, the largest telecommunications markets in the world will be open to competition, and we expect that new international carriers will develop in many of those markets. Those carriers and their governments will likely pressure foreign governments that have not liberalized not to tolerate anticompetitive abuses. We also expect that, as members of the global trading regime, WTO Members will be subject to this pressure to a greater degree than non-WTO countries. A key consideration is that, as countries that have not made commitments begin to liberalize, the GATS obligations that apply to all WTO Members will require WTO Members to treat foreign carriers from different countries in the same manner.[53] We also find that the threat of harm from carriers from countries that have made limited or no commitments may not justify retaining the ECO test. The countries that AT&T identifies as not committing to offer effective competitive opportunities in the near future account for less than 5 percent of the telecommunications revenue of WTO Member.

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50 AT&T Comments at 18.

51 AT&T Comments at 9-11; *see also* WorldCom Comments at 4. We also note that AT&T and MCI argued in our *Benchmarks* proceeding that if the Commission did not require that carriers providing service on an affiliated route to settle traffic at total service long-run incremental cost (TSLRIC) based rates, then it should retain the ECO test. As discussed in the *Benchmarks Order*, we do not find that requiring foreign carriers entering the U.S. market to adopt TSLRIC-based settlement rates is in the public interest at this time. Also, for the reasons discussed below, we decline to retain the ECO test. *See Benchmarks Order* ¶¶ 221-223.

52 Telefónica Internacional Comments at 16; FaciliCom Comments at 4, 6; Sprint Comments at 10-11; *see also Notice* ¶ 47.

53 All countries that are party to the GATS have agreed, under the MFN obligation, not to discriminate among suppliers from other WTO Members, regardless of whether the service supplier's country has made a market-opening commitment in that particular service sector. *See infra* ¶¶ 336-338.

39. Moreover, we find that the potential for harm from carriers from countries that have not implemented their market-opening commitments to allow competition in their telecommunications markets does not justify imposing the strict limitations on entry that AT&T proposes. We note that USTR plans to monitor other Members' compliance with their WTO obligations and to pursue consultation and dispute settlement where noncompliance is found.[54] Where a WTO Member fails to implement its commitment, the United States has the ability to enforce a Member's commitment.[55] Second, we find that it is in the interest of our trading partners implementing their commitments to engage in similar oversight, along with the United States, over third countries.

40. We also find that discriminating among foreign applicants based on the quality of their WTO commitment or the extent of the implementation of their commitment could raise serious GATS concerns. Adopting such a policy could damage relations with our trading partners and serve as a poor example to other countries also implementing their market opening commitments. As discussed below, Article II of the GATS requires WTO Members to accord "service and service suppliers of any other Member treatment no less favorable treatment than that it accords to like services and service suppliers of any other country."[56] Adopting a policy that limits access to the U.S. market by telecommunications carriers purely based on the existence or quality of a country's commitment would be viewed by many WTO Members as a violation of the GATS. In contrast to our policy that considers the competitive impact of a firm's entry into the U.S. market, a policy of discrimination among carriers based on their WTO commitment alone could be interpreted by other WTO Members as discriminating among "like" service suppliers based solely on foreign market conditions.[57] This could be perceived as a violation of Article II of the GATS. Regardless of whether AT&T's proposal that we retain the ECO test is consistent with U.S. GATS obligations, we find that the example the United States sets to other WTO Members would be undermined by adoption of AT&T's proposal. The success of the WTO Basic Telecom Agreement depends on implementation of the market-opening commitments of our trading partners. The United States must lead the way in prompt, effective implementation of our commitments.[58] If the United States is perceived as failing to implement its commitment, other countries would likely limit implementation of their own commitments. We find such a result would deny the benefits of open global markets and increased competition to U.S. carriers and consumers, and is not in the public interest.

41. We also find that our revised safeguards will prove to be powerful tools against anticompetitive conduct. We are confident that our benchmarks condition and regulatory safeguards will

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[54] USTR Reply Comments at 8-9.

[55] *See supra* ¶ 28.

[56] GATS art. II; *see infra* ¶ 336; *see also* USTR Reply Comments at 10-12.

[57] *See infra* ¶ 357; *see also* USTR Reply Comments at 10-11.

[58] USTR Comments at 2.

be effective at addressing most cases of anticompetitive conduct.[59] As discussed below, our revised reporting, No Special Concessions, and separate affiliate requirements will improve our ability to monitor carriers with the ability to exercise foreign market power.[60] We also find that our enforcement mechanism for detecting market distortions by a foreign-affiliated telecommunications carrier will be effective at deterring anticompetitive conduct. In the *Benchmarks Order*, the Commission adopted a trigger to determine when a market distortion has occurred, at which time enforcement action will be taken.[61] In addition, the Commission may condition grants of authority for carriers found likely to engage in anticompetitive conduct or impose sanctions on carriers failing to comply with Commission rules.[62]

42. We therefore find little justification for imposing a strict entry standard such as AT&T advocates. Further, adopting AT&T's proposal would require that we engage in an in-depth, fact-intensive analysis of the applicant's market that would be an unnecessary burden on the applicant and a drain on the scarce resources of the Commission. Such a standard would also set a poor example to those countries that the U.S. government has urged to open their markets and could damage U.S. relations with our trading partners by creating a perceived barrier to entry. More importantly, AT&T's entry standard would significantly restrict access to the U.S. market, denying U.S. consumers the competitive benefits of foreign carrier entry.

43. We find that the goals underlying the ECO test will largely be achieved by implementation of the WTO Basic Telecom Agreement, and that new technologies, alternative traffic routing options, and settlement rate reform further increase the pressure to liberalize and support competition. We therefore find that it is no longer necessary to include the ECO analysis as a part of our overall public interest finding for Section 214 applications, common carrier radio license applications to exceed the 25 percent indirect foreign ownership benchmark in Section 310(b)(4) and applications for cable landing licenses. Because we are removing the ECO test, there is no need to address the issue of whether it is GATS consistent.[63] We find that removing the ECO test is also likely to have the effect of providing a positive example to foreign countries that have committed to open their markets to competition. It is our expectation that the market-opening measures we take here to implement United States' WTO commitments will serve as an example for other countries that are implementing their commitments as well.

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59 *See infra* Section V.

60 *See infra* Sections V.B.1, V.C.2.b.(iv)-(vi).

61 *Benchmarks Order* ¶¶ 224-227. The trigger the Commission adopted in the *Benchmarks Order* is a rebuttable presumption that a market distortion has occurred where any of a foreign affiliated carrier's tariffed collection rates on an affiliated route are less than the carrier's average variable cost on the route. Enforcement action can include requiring a carrier to lower its settlement rates on an affiliated route to the level of our best practice rate ($.08) or revoking its authorization to provide service on the affiliated route.

62 *See, e.g.*, *Sprint Corp.*, Declaratory Ruling and Order, 11 FCC Rcd 1850 (1996) (*Sprint Order*).

63 *See* GTE Reply Comments at 4-5.

2. Public Interest Analysis

44. The Commission is under a statutory obligation to ensure that grant of Section 214 authority is consistent with the public convenience and necessity[64] and that grant of a Section 310(b)(4) application to exceed the 25 percent indirect foreign ownership benchmark is consistent with the public interest.[65] In both cases, the Commission has considered the overall impact of the grant of authority on the public interest. The Commission has made this determination with respect to all applications, from both foreign and domestic applicants, since the Communications Act was passed in 1934.

45. Prior to adoption of the *Foreign Carrier Entry Order*, the Commission evaluated foreign ownership in U.S. telecommunications carriers and radio licensees on an *ad hoc*, case-by-case basis. Each application from a foreign entity was evaluated under our public interest analysis. For carriers seeking authority to provide facilities-based or resold telecommunications services, the Commission balanced its policy in favor of open market entry against the potential for undue discrimination by the foreign parent against unaffiliated U.S. carriers.[66] For applicants seeking authority to exceed the 25 percent indirect foreign ownership benchmark in a common carrier radio licensee under Section 310(b)(4) of the Act, the Commission considered national security issues, the extent of alien participation, the type of radio license and the extent to which the investment would further the Commission's policies.[67] At that time, the Commission also engaged in a similar analysis for cable landing licenses.[68]

46. In the *Foreign Carrier Entry Order*, the Commission adopted the ECO test as an important part of the Commission's public interest analysis governing grant of a Section 214 or 310(b)(4) application. The Commission also articulated additional public interest factors that it would consider relevant to either the grant or denial of foreign carrier applications. These factors include the general significance of the proposed entry to the promotion of competition in the U.S. communications market, the presence of cost-based accounting rates, and any national security, law enforcement, foreign policy or trade concerns raised

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[64] 47 U.S.C. § 214(a).

[65] 47 U.S.C § 310(b)(4).

[66] *See, e.g., Telefónica Larga Distancia de Puerto Rico*, 8 FCC Rcd 106, 111-113 (1992); *Americatel Corp.*, 9 FCC Rcd 3993 (1994); *BT/MCI Declaratory Ruling*, 9 FCC Rcd 3960 (1994). *See generally Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket 95-22, Notice of Proposed Rulemaking, 10 FCC Rcd 4849-4853 ¶¶ 10-19 (1995) (*Foreign Carrier NPRM*).

[67] *See, e.g., GRC Cablevision, Inc.*, 47 FCC 2d 467, 468 (1974); *BT/MCI Declaratory Ruling*, 9 FCC Rcd at 3964; *Teleport Transmission Holdings, Inc.*, 8 FCC Rcd 3063 (Com. Car. Bur. 1991). *See generally Foreign Carrier NPRM*, 10 FCC Rcd at 4851-4853 ¶¶ 15-19.

[68] *See Telefónica Larga Distancia de Puerto Rico, Inc*., FCC 97-127, SCL-93-001, ¶ 26 & n.35 (rel. May 2, 1997) (*TLD Order*); *see also Optel Communications Inc.*, 8 FCC Rcd 2267 (1993).

by the Executive Branch.[69] Although we find that we should no longer engage in the ECO analysis, for the reasons detailed below, we are statutorily obligated to evaluate all applications to ensure that they are consistent with the public interest.

a. Presumption in Favor of Entry

Background

47. In the *Foreign Carrier Entry Order*, the Commission found that the ECO analysis should serve as an important element in the Commission's public interest analysis. In the *Notice,* the Commission tentatively concluded that the commitments of 68 other governments will, when fulfilled, significantly reduce the risk of anticompetitive effects of entry by a foreign applicant, and that post-entry safeguards will be able to protect competition in the U.S. telecommunications market.[70] The Commission proposed to remove the ECO test from our existing public interest analysis and replace it with a rebuttable presumption in favor of entry for applicants from WTO Members. The Commission tentatively concluded that the dominant carrier safeguards and conditions on grant of authority would normally be sufficient to address competitive concerns. If an application posed a very high risk to competition, the Commission proposed that it would reserve the right to condition a grant of authority or, in exceptional cases, deny an application.[71]

Positions of the Parties

48. The reaction of commenters to our proposal to adopt a rebuttable presumption in favor of entry was divided. Sprint, BT North America, and others favor adoption of the proposed presumption.[72] Sprint states, however, that the standard should be rebuttable "only in exceptional circumstances" and may be irrebuttable in fact.[73] AT&T and WorldCom argue that we should not adopt a presumption in favor of entry but should instead maintain a case-by-case public interest analysis with no presumption.[74] Others, however, oppose our proposal on the grounds that there is no basis for any restrictions on foreign entry for applicants from WTO countries.[75] For instance, Deutsche Telekom argues that if regulatory safeguards are

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69 *See, e.g.*, *Foreign Carrier Entry Order*, 11 FCC Rcd at 3894-97 ¶¶ 56-62.

70 *Notice* ¶¶ 29-42.

71 *See id.* ¶¶ 39-43, 63, 64, 75.

72 Sprint Comments at 6-7; BTNA Comments at 2-3; FaciliCom Comments at 1, 5; SOSCo Comments at 1.

73 Sprint Comments at 6-7.

74 AT&T Comments at 22; WorldCom Comments at 2-4.

75 *See, e.g.*, DT Comments at 16, 19; FT Comments at 4-6; NTT Comments at 2; Japan Comments at 3.

sufficient to allow the Commission to eliminate ECO, then they are sufficient to allow the Commission to adopt an unrestricted open entry policy.[76]

49. Reaction to our proposal to reserve the right to deny an application that poses a "very high risk to competition" was mixed. Foreign carriers in general argue that the standard is vague and that our proposal accords too much discretion to the Commission.[77] The European Commission expresses its concern that foreign companies seeking to enter the U.S. market "would be subject to challenges from their competitors based on unclear conditions and criteria."[78] GTE argues that we should rely on countries' commitments to adopt the Reference Paper to prevent anticompetitive conduct and is concerned that denying entry for competitive reasons may serve as a poor example to other countries that have yet to implement their WTO commitments.[79] NTIA agrees with our proposal.[80] A number of parties argue that our proposals are inconsistent with U.S. GATS obligations.[81] AT&T and WorldCom object to our proposal as well, but on the alternative ground that the "very high risk to competition" standard, as articulated in the *Notice*, is not sufficient to protect existing U.S. competitors.[82] Both carriers support a standard that would deny applications from carriers that present "substantial" competitive harm, rather than the proposed "very high risk to competition" standard.

Discussion

50. We find that adopting the Commission's proposal to replace the ECO test with a presumption in favor of entry will best balance the concerns articulated by the parties. The changes resulting from implementation of WTO Members' commitments, along with new technologies and routing configurations, will open foreign markets and increase competition in the global telecommunications service market. Further, settlement rate reform and our improved safeguards will more adequately protect against anticompetitive conduct. We thus find that a presumption in favor of entry will best advance the public interest. We therefore adopt, as a factor in our public interest analysis, a rebuttable presumption that applications for Section 214 authority from carriers from WTO Members do not pose concerns that would

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76 DT Comments at 19-20.

77 *See, e.g.*, Telefónica Internacional Reply Comments at 5; DT Comments at 14-16; FT Comments at 6; European Commission Comments at 2; NTT Reply Comments at 2.

78 European Commission Comments at 4.

79 GTE Comments at 2-4, 11-13.

80 Letter from Larry Irving, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, to William E. Kennard, Chairman, FCC, at 2 (Nov. 5, 1997).

81 *See, e.g.*, DT Comments at 9-13; KDD Comments at 5; ETNO Reply Comments at 2-3.

82 AT&T Comments at 20-21; WorldCom Comments at 4-5.

justify denial of an application on competition grounds. We also adopt a rebuttable presumption that such competitive concerns are not raised by applications to land and operate submarine cables from WTO Members or by indirect ownership by entities from WTO Members of common carrier and aeronautical radio licensees under Section 310(b)(4) of the Act. Because we expect that other public interest issues similarly will be raised only in very rare circumstances, we find that adopting a rebuttable presumption in favor of entry will allow the Commission to grant the vast majority of applications swiftly, while maintaining the oversight necessary to ensure that entry by an applicant from a WTO Member is consistent with the public interest.

51. Nevertheless, in exceptional circumstances, entry into the U.S. market by an applicant affiliated with a foreign telecommunications carrier from a WTO Member may pose competitive risks by virtue of the applicant's ability to exercise market power in a relevant foreign market. As discussed in the *Notice*, an applicant seeking to enter the U.S. market that is affiliated with a telecommunications carrier that possesses the ability to exercise market power in the foreign market for facilities and services necessary for the provision of U.S. international services may have the ability to discriminate in favor of its U.S. affiliate to the detriment of unaffiliated U.S. carriers. The foreign carrier could raise the costs of its U.S. affiliate's rivals through discriminatory pricing or by discriminating in provisioning and maintenance intervals or quality of service.[83] We find that our safeguards will be adequate to detect and deter such conduct in virtually all circumstances.[84] We cannot rule out the possibility, however, that these measures would be ineffective at preventing anticompetitive conduct in a particular context, *and* that as a result a carrier would be able to raise the costs of its rivals to the degree that end-user customers would be injured. In such circumstances, we could find it necessary to impose certain conditions on the grant of authority. Such conditions could entail additional reporting requirements, prior approval for circuit additions, or other measures designed to ensure that a carrier with the ability to exercise market power in a relevant foreign market does not use that power to harm consumers in the U.S. market. In addition, in the exceptional case where an application poses a very high risk to competition in the U.S. market, where our safeguards and conditions would be ineffective, we reserve the right to deny an application. We therefore will presume that an application does not pose a risk of competitive harm that would justify denial unless it is shown that granting the application would pose such a very high risk to competition.

52. In order to pose a risk to competition in the U.S. market that cannot be addressed by our safeguards or conditions, and would therefore warrant denial of a license, an applicant must possess the ability to harm competition in the U.S. market in addition to the ability to exercise its foreign market power. For instance, we find it highly unlikely that acquisition of less than a controlling interest in a U.S.

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[83] *See Merger of MCI Communications Corporation and British Telecommunications plc,* GN Docket No. 96-245, FCC 97-302, ¶¶ 156-161 (*BT/MCI Merger Order*); *see also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price,* 96 Yale L.J. 209 (1986); *infra* Section V.A.

[84] *See infra* Section V.C.2.

carrier by a foreign carrier would pose a competitive risk that we could not address.[85] Moreover, we find it highly unlikely that a carrier from a WTO Member country that has open, competitive markets and a procompetitive regulatory regime in place could pose a very high risk to competition.[86] We also do not expect that an applicant would be denied entry "based solely on market share."[87] We would, however, as stated in the *Notice*, find that entry poses a very high risk to competition that would justify denial of an authorization where a carrier would have the ability upon entry, or shortly thereafter, to raise prices by restricting output.[88]

53. We are also concerned with the impact of granting an authorization to an applicant that is unlikely to abide by the Commission's rules and policies. The past behavior of an applicant may indicate that it would fail to comply with the Commission's competitive safeguards and other rules and whose behavior, as a result, could damage competition in the U.S. market and otherwise negatively impact the public interest. The public interest may therefore require, in a particular case, that we deny the application of a carrier that has engaged in adjudicated violations of Commission rules, U.S. antitrust or other competition laws, or in demonstrated fraudulent or other criminal conduct.[89] This approach is consistent with our treatment of domestic applicants.[90] We find that such conduct demonstrates that a carrier is likely to evade our safeguards and thus may pose a very high risk to competition.

54. We note some commenters' concerns that reserving the right to deny a license where we are otherwise unable to address a risk of anticompetitive harm might not provide applicants with the certainty

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85 An acquisition of a controlling interest would be reviewed under our merger analysis that examines in detail the competitive impact of the proposed merger. *See BT/MCI Merger Order*; *see also Application of NYNEX Corp. Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, FCC 97-286 (rel. Aug. 14, 1997) (*Bell Atlantic/NYNEX Order*).

86 *See* GTE Comments at 10 ("[F]oreign carriers from WTO Member countries that are in compliance with the GBT Agreement and the Reference Paper should not be deemed a 'very high risk' to competition and should not be denied access to the United States on that basis.").

87 *Id.* at 13. Although we adopt a market share threshold to determine whether a carrier possesses market power in a foreign market, we find that there must be additional indications that foreign entry could harm competition in the U.S. market to find that we could not address potential competitive harm other than by denial of a license. *See infra* Section V.B.1.

88 *Notice* ¶ 18.

89 *See id.* ¶¶ 40, 41.

90 *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1195-97, 1200-03 (1986) (*Character Qualifications*), *modified*, 5 FCC Rcd 3252 (1990) (*Character Qualifications Modification*); *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515 n.14 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context).

they desire, and could create the potential for petitions to deny that could delay the granting of applications.[91] We recognize that certainty and predictability are vitally important for telecommunications businesses. In fact, as discussed below, we will place most international Section 214 applications and Section 310(b)(4) requests on streamlined processing and will normally resolve petitions to deny within 90 days.[92] We therefore expect that, except in unusual circumstances, all applications filed by foreign-affiliated entities will be expeditiously granted within a specific time frame. We also find that adopting a presumption in favor of entry will have significant public interest benefits. This approach will free the Commission and parties from engaging in a detailed, fact-intensive analysis that is time consuming and a drain on resources. The resulting swift processing of applications will therefore speed entry of new competitors into the U.S. market, thus stimulating competition and benefitting U.S. consumers. We also find that, by expediting foreign entry, we will give applicants greater certainty regarding their ability to enter into U.S. markets. Nonetheless, we are unwilling to foreclose entirely the possibility, that in exceptional circumstances, we may have to attach additional conditions to (or even deny) a particular application.

55. We disagree with those parties who advocate an unrestricted entry approach. Under the approach urged by Deutsche Telekom, Telefónica Internacional, and others, risk to competition in the U.S. market and potential harm to consumers should play no role in our analysis.[93] Deutsche Telekom's argument that safeguards are sufficient to eliminate all oversight over foreign carrier affiliation is without merit. Adopting the position that an applicant's entry could never pose a risk to competition in the U.S. market, or that we would ignore other potential impacts on the public interest, would be contrary to our statutory mandate to ensure that provision of service by any applicant, foreign or domestic, is consistent with the public interest, convenience and necessity.[94]

56. We are not, on the other hand, persuaded by the comments of some U.S. carriers that we should decline to adopt a presumption in favor of entry into the U.S. market.[95] As discussed above, AT&T and WorldCom argue that we should instead deny applications from carriers that present a likelihood of "substantial harm."[96] Ameritech contends that our proposed standard would have a "chilling effect" on petitions to deny, as it sets such a high standard.[97] These parties assert that the WTO Basic Telecom

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91 *See, e.g.*, Government of Japan Comments at 12; KDD Comments at 5.

92 *See infra* Section VI.A.

93 DT Comments at 6; Telefónica Internacional Comments at 3; NTT Comments at 2.

94 *See* 47 U.S.C. §§ 35, 214(a), 310(b)(4).

95 *See* AT&T Comments at 22; Worldcom Comments at 2-4.

96 AT&T Comments at 20-21; WorldCom Comments at 4-5. Although both parties propose the same standard, neither articulates what showing would be required to satisfy the standard.

97 Ameritech Comments at 6-7.

Agreement does not remove the potential for anticompetitive conduct from a large number of carriers from WTO Members. As discussed above, we find that the procompetitive changes in global telecommunications markets resulting from the WTO accord substantially reduce the need to engage in a detailed analysis of the competitive conditions of an applicant's market.[98] The worldwide simultaneous opening of telecommunications markets, coupled with the privatization and reform of telecommunications carriers that are currently government-owned, promises to alter dramatically the global market for telecommunications services. We also believe that our improved safeguards will help reduce the potential for anticompetitive conduct. Moreover, we find that adopting the proposed "substantial harm" standard could undercut the commitments made under the GATS and WTO Basic Telecom Agreement. We therefore decline to adopt the proposal of AT&T and WorldCom that we deny applications of carriers that pose a "substantial" risk to competition. Indeed, we seek to avoid protracted, fact-specific investigations that may accompany petitions to deny that would have the effect of limiting entry to the U.S. market by applicants subject to such petitions.

57. We also find no merit to WorldCom's argument that our presumption would treat foreign carriers more favorably than U.S. carriers.[99] WorldCom apparently reads our proposal to adopt a presumption in favor of entry to mean that we would presume that foreign applicants may enter the U.S. market without additional scrutiny, while U.S. carriers would be subject to a case-by-case analysis under our public interest standard. This is not the case. We clarify here that foreign carriers are subject to the same public interest standard as U.S. carriers. Our presumption in favor of entry for foreign participation applies only to competition concerns that may arise because of a foreign carrier's market power in a foreign market. We presume that foreign entry will not pose competitive concerns absent a showing that, in an exceptional case, our safeguards and potential conditions attached to the grant of authority are not sufficient to prevent a carrier from creating competitive harms in our market. We are concerned about the potential for the misuse of market power in both the foreign and domestic contexts. The measures we apply to protect against such harm may differ, however, based on the source and potential impact of the harm.[100] Nevertheless, our approach here favors neither foreign nor domestic applicants.

58. Finally, we find no merit to BellSouth's argument that we should not apply a different standard to foreign applicants seeking to enter the U.S. market than we apply to Bell Operating Companies (BOCs) seeking to enter the domestic in-region interLATA services market.[101] BellSouth contends that it would be "irrational" for the Commission to adopt a presumption that foreign applicants may enter the U.S. international services market based on the likelihood of open markets "while continuing to deny the Bell

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98 *See supra* ¶¶ 33-43.

99 WorldCom Comments at 5.

100 For instance, we apply different safeguards domestically to BOC, independent LEC and competitive LEC provision of in-region interexchange service. *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-149, Second Report and Order, FCC 97-142 ¶¶ 81-213 (Rel. April 18, 1997) (*LEC Regulatory Treatment Order*).

101 *See* BellSouth Comments at 1-11; *see also* SBC Comments at 7.

companies a chance to enter the interexchange market when their markets are in fact open."[102] We find nothing irrational about applying different entry standards to address different risks of competitive harm. We find that allowing an applicant from a WTO Member to the enter the U.S. international services market poses neither the same likelihood nor potential degree of harm that entry by a BOC into the market for in-region interLATA service poses. For example, we found in the *BT/MCI Merger Order* that BT is unlikely to become among the most significant market participants in the U.S.-U.K. outbound international services market, while BOCs possess the capability and incentive, upon authorization, to become among the most significant market participants in this market.[103] Moreover, the BOCs are subject to a detailed statutory regime that governs their entry into in-region interLATA service under Section 271 of the Act.[104] In considering entry by a foreign applicant into the U.S. international services market, on the other hand, the Commission is required to ensure that such entry is consistent with the public convenience and necessity.[105] Although entry by both types of carriers into new markets may be analogous in a general sense, we do not find that there are sufficient similarities between BOCs and foreign carriers to warrant identical treatment.

b. Other Public Interest Factors

Background

59. The Commission has traditionally considered other public interest factors in evaluating applications from parties affiliated with foreign entities. In the *Foreign Carrier Entry Order*, the Commission stated that it would consider other public interest factors relevant to foreign carrier applications under Section 214 and Section 310(b)(4). Those factors include the general significance of the proposed entry to the promotion of competition in the U.S. communications market, the presence of cost-based accounting rates, and any national security, law enforcement, foreign policy and trade policy concerns brought to our attention by the Executive Branch.[106] In general, the Commission has worked closely with Executive Branch agencies to ensure that our actions and policies affecting international telecommunications do not impede or thwart the policies of the Executive Branch.[107] The Commission proposed in the *Notice* that we would continue to consider any national security, law enforcement, foreign

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[102] BellSouth Comments at 3.

[103] *BT-MCI Merger Order* ¶ 128 (finding that BT lacks any of the capabilities, operational infrastructure, brand name recognition, and reputation among U.S. customers and existing customer relationships to attract large numbers of customers quickly).

[104] 47 U.S.C. § 271.

[105] *See* 47 U.S.C. § 214(a).

[106] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3888, 3897, 3955-56 ¶¶ 38, 62, 216-219.

[107] For example, the Commission worked closely with the Office of the United States Trade Representative in negotiating the WTO Basic Telecom Agreement.

policy, and trade concerns raised by the Executive Branch in determining whether to grant or deny an application.[108]

Positions of the Parties

60. Commenters were sharply divided over whether the Commission should consider other public interest factors, including national security, law enforcement, foreign policy and trade concerns, in evaluating applications. In general, U.S. government agencies strongly urged the Commission to maintain its existing policy regarding Executive Branch input. DOD and the FBI argue that no presumption should be applied to national security issues. They argue that every application should be reviewed on its own facts, issues should be affirmatively resolved, and the FCC should defer to the Executive Branch's findings on national security issues.[109] USTR states that we should continue to accord deference to appropriate Executive Branch agencies on the issues of national security, law enforcement, foreign policy, and trade policy.[110] Foreign carriers, however, object to the denial of a license based on foreign policy and trade concerns, but generally accept the need for the Commission to accord deference to the Executive Branch on national security and law enforcement issues.[111] Deutsche Telekom, however objects to any consideration of national security, law enforcement, foreign policy, and trade policy grounds outside of the narrowly defined national security exceptions contained in Article XIV of the GATS.[112]

Discussion

61. We conclude we should continue to find national security, law enforcement, foreign policy and trade policy concerns relevant to our decision to grant or deny Section 214 and 310(b)(4) applications

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[108] *Notice* ¶¶ 43, 74.

[109] DOD Comments at 4-9; FBI Comments at 7-9.

[110] USTR Comments at 4.

[111] *See, e.g.*, NTT Comments at 2; FT Comments at 5; *see also* GTE Comments at 16.

[112] DT Comments at 18.

from applicants from WTO Member.[113] As we found in the *Foreign Carrier Entry Order*, our public interest analysis would benefit from input by the Executive Branch addressing these issues.[114]

62. We recognize that other federal agencies have specific expertise in matters that may be relevant in particular cases. In any given case, an application by a foreign applicant may raise questions, for example, about this country's international treaty obligations. In addition, we realize that foreign participation in the U.S. telecommunications market may implicate significant national security or law enforcement issues uniquely within the expertise of the Executive Branch. The Commission will consider any such legitimate concerns as we undertake our own independent analyses of whether grant of a particular authorization is in the public interest.

63. We emphasize, however, that we expect national security, law enforcement, foreign policy and trade policy concerns to be raised only in very rare circumstances. Contrary to the fears of some commenters, the scope of concerns that the Executive Branch will raise in the context of applications for Section 214 authority, cable landing licenses and applications to exceed the 25 percent indirect foreign ownership benchmark in Section 310(b)(4) of the Act is narrow and well defined. National security and law enforcement concerns have long been treated as important public interest factors by this Commission.[115] We note that, during our two years' experience in administering the *Foreign Carrier Entry Order*, with approximately 140 authorizations granted to carriers with foreign ownership, the Executive Branch has never asked the Commission to deny an application on national security or law enforcement grounds. Similarly, we note that the Executive Branch, during the last two years, has never informed us that a foreign policy concern dictated that a Section 214 or 310(b)(4) application be denied. We expect this pattern to continue, such that the circumstances in which the Executive Branch would advise us that a pending matter affects national security, law enforcement, or obligations arising from international agreements to which the United States is a party will be quite rare. Any such input would, however, be important to our public interest analysis of a particular application. We thus will continue to accord deference to the expertise of Executive Branch agencies in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy that are relevant to an application pending before us.

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[113] We note that the Commission is obliged to obtain approval from the State Department and to seek advice from other Executive Branch agencies before granting a cable landing license. *See* Exec. Order No. 10,530, *reprinted as amended in* 3 U.S.C. § 301 app. at 459-60 (1994); *see also infra* Section III.C. The State Department has, on one occasion in the past two years, asked the Commission to deny a submarine cable landing license based on the criteria in the Submarine Cable Landing License Act. *See* Letter from Ambassador Vonya McCann, U.S. Coordinator, International Communications and Information Policy, Department of State, to Donald H. Gips, Chief, International Bureau, FCC (Aug. 9, 1996) (available in the International Bureau Reference Center, File No. SCL-93-001).

[114] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3888, 3897, 3955-56 ¶¶ 38, 62, 216-219.

[115] *See id.*

64. USTR has asked, after coordination with other Executive Branch agencies, the Commission on four occasions during the last two years not to act on certain applications because of trade concerns.[116] We note that all these requests occurred before the effective date of the WTO Basic Telecom Agreement. The Agreement changes the U.S. Government's trade obligations affecting basic telecommunications services. USTR has indicated that it expects any Executive Branch concerns communicated to the Commission under our new rules to be fully consistent with U.S. law and international obligations, including the WTO Basic Telecom Agreement. USTR has also specified the scope of its authority to communicate trade policy concerns to the Commission in its reply comments.[117] In light of the WTO Basic Telecom Agreement, we expect to receive input from USTR on specific applications far less often than we have in the past. We will continue to evaluate any such input as part of our public interest determination, consistent with U.S. law and U.S. international obligations, including the WTO Basic Telecom Agreement.

65. In general, objections to the Commission considering issues raised by the Executive Branch regarding national security, law enforcement, foreign policy and trade concerns have focused on the consistency of this approach with the GATS. As discussed below, taking these concerns into account is consistent with the GATS.[118] The Department of Defense and FBI express concern that the proposed entry standard would require them to overcome a presumption in favor of granting an application.[119] As discussed above, we presume that an application from a WTO Member applicant does not pose a risk of anticompetitive harm that would justify denial.[120] We do not, however, presume that an application poses no national security, law enforcement, foreign policy or trade concerns. We will continue to consider these concerns independent of our competition analysis.

66. We emphasize that the Commission will make an independent decision on applications to be considered and will evaluate concerns raised by the Executive Branch agencies in light of all the issues raised (and comments in response) in the context of a particular application. We expect that the Executive

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[116] Letter from Jeffrey M. Lang, Deputy United States Trade Representative, to Roderick K. Porter, Deputy Chief, International Bureau, Federal Communications Commission (Aug. 8, 1996); Letter from Donald S. Abelson, Chief Negotiator, Communications and Information, United States Trade Representative, to Roderick K. Porter, Deputy Chief, International Bureau, Federal Communications Commission (Oct. 3, 1996); Letter from Donald S. Abelson, Chief Negotiator, Communications and Information, United States Trade Representative, to Roderick K. Porter, Deputy Chief, International Bureau, Federal Communications Commission (Oct. 31, 1996); Letter from Larry Irving, Assistant Secretary, National Telecommunication and Information Administration, Department of Commerce, Jeffrey M. Lang, Deputy United States Trade Representative, and Ambassador Vonya McCann, U.S. Coordinator, International Communications and Information Policy, Department of State, to Reed Hundt, Chairman, Federal Communications Commission (Mar. 7, 1997).

[117] USTR Reply Comments at 6 n.11.

[118] *See infra* Section VII.

[119] DOD Comments at 4-11; FBI Comments at 6-10.

[120] *See supra* ¶¶ 50-58.

Branch will advise us of concerns relating to national security, law enforcement, foreign policy, and trade concerns only in very rare circumstances. Any such advice must occur only after appropriate coordination among Executive Branch agencies, must be communicated in writing, and will be part of the public file in the relevant proceeding.[121]

B. Section 214 Entry Standard

1. Facilities-Based, Resold Switched and Resold Non-interconnected Private Lines

Background

67. In the *Foreign Carrier Entry Order*, we applied the ECO analysis to foreign carrier applicants for Section 214 authority that seek to provide facilities-based service as well as service via switched resale and the resale of non-interconnected private lines to destination markets in which they have market power. The Commission has also applied the ECO test to all planned investment in U.S. carriers by foreign carriers above a 25 percent threshold, or at a controlling interest at any level.[122] The Commission tentatively concluded in the *Notice* that changes in global telecommunications markets resulting from the WTO commitments made by 68 other governments would substantially achieve our goals in adopting the ECO analysis, and that it was no longer necessary. Instead, the Commission tentatively concluded that it should apply its public interest analysis and presume that an application does not pose competitive risks.[123]

Positions of the Parties

68. Most parties agree that we should no longer apply the ECO test to applications from foreign carriers from WTO Members seeking Section 214 authority to provide facilities-based, switched resale, or resold non-interconnected private line service.[124] As discussed generally above, there is significant disagreement regarding our public interest analysis and our proposed rebuttable presumption in favor of entry.[125]

Discussion

[121] To the extent the Executive Branch must share classified information with Commission staff, such information is not subject to public disclosure.

[122] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3881-88 ¶¶ 10-39.

[123] *See Notice* ¶¶ 39-44.

[124] *See, e.g.*, FT Comments at 14; Telmex Comments at 4; Sprint Comments at 3; C&W Comments at 3; ETNO Reply Comments at 1-2. *Contra* AT&T Comments at 18; AT&T Reply Comments at 18; TRA Reply Comments at 6.

[125] *See, e.g.*, Sprint Comments at 7; *cf.* AT&T Reply Comments at 20; European Commission Comments at 2-3.

69. We find that it is no longer necessary or appropriate to retain the ECO analysis for foreign carriers from WTO Members seeking authority to provide facilities-based service, resale of switched services, or resale of non-interconnected private lines. As discussed above, we find that the open markets that will result from implementation of the WTO Basic Telecom Agreement, along with changes in technology and our improved regulatory safeguards, remove the need for the ECO test. Instead, foreign carriers from WTO Member countries seeking such authority will be subject to the same public interest standard we apply to all U.S. carriers. We also apply, as discussed above, a presumption in favor of entry, which presumes that a carrier's foreign ownership does not pose competitive concerns.[126] Although we are cognizant of the danger that foreign carriers with market power may be able to leverage their foreign market power into the U.S. market, we find that increased competition in global markets, together with the safeguards we adopt below, will generally prevent such anticompetitive conduct. In addition, the Commission possesses a variety of sanctions it will apply to carriers found engaging in anticompetitive conduct.[127] Thus, absent serious concerns raised by the Executive Branch regarding national security, law enforcement, foreign policy or trade issues or, in the exceptional case where a carrier's entry presents a very high risk to competition as discussed above, we will grant such applications expeditiously.[128]

70. We also conclude that our entry policy, discussed above, should apply equally to U.S. carrier investments in foreign carriers as well as foreign carrier investments in U.S. carriers. The Commission previously found in the *Foreign Carrier Entry Order* that it was unnecessary and contrary to the goals of that proceeding to apply the ECO test to U.S carrier investments in foreign carriers. The Commission determined that it had greater ability to redress anticompetitive harm by the U.S. carrier through its licenses and certifications in the United States. It also found that the ECO test would frustrate U.S. policy of encouraging foreign investment by U.S. companies.[129] Our experience indicates that there is a likelihood of competitive harm from an international carrier operating in the U.S. market that possesses sufficient foreign market power in a market for services necessary for the provision of U.S. international services to adversely affect competition on the U.S. end of the route, regardless of whether the entity is U.S. or foreign owned.[130] Indeed, we have on several occasions scrutinized U.S. carrier investments in foreign carriers to ensure that they would not use their control of foreign facilities and services to discriminate against unaffiliated U.S. international carriers.[131] We find that our new entry standard will rarely, if ever, prohibit

126 *See supra* Section III.A.2.

127 *See, e.g.*, 47 U.S.C. §§ 206-209.

128 *See supra* ¶ 51.

129 *Foreign Carrier Entry Order*, 11 FCC Rcd at 3912-14 ¶¶ 103-106.

130 *See infra* ¶ 140.

131 *See Atlantic Tele-Network, Inc.*, 8 FCC Rcd 4776 (1993), *pet. for review denied sub nom. Atlantic Tele-Network Inc. v. FCC*, 59 F.3d 1384 (D.C. Cir. 1995); *see also GTE Telecom Incorporated*, Order, Authorization and Certificate, DA 96-1546 (Int'l Bur. rel. Sept. 16, 1996); *GTE Mobilnet Incorporated, on Behalf of Itself and Certain of its Corporate Affiliates*, 11 FCC Rcd 12,835 (Int'l Bur. 1996).

a U.S. carrier from making a greater than 25 percent investment in a foreign carrier, and therefore applying the entry standard in this manner will not run counter to U.S. policy of encouraging investment in foreign countries. We also find that continuing to treat foreign carrier investments in U.S. carriers differently from U.S. carrier investments in foreign carriers could be viewed as inconsistent with U.S. GATS obligations.[132]

71. We also seek to respond to two specific issues raised by Sprint. Sprint notes that, as a result of the Commission's decision in the *Sprint Order*,[133] Sprint remains subject to the conditions imposed as a result of the investments of Deutsche Telekom and France Telecom. We clarify that some of these conditions are, or have been, addressed in a separate proceeding.[134] To the extent that conditions imposed in the *Sprint Order* are not addressed in those proceedings Sprint may seek removal of the remaining conditions by filing a request with the Commission. Sprint also argues that, in light of this *Order*, Deutsche Telekom and France Telecom should be free to acquire up to a non-controlling interest in Sprint without prior Commission approval. Sprint is subject to the rules we adopt here like any other applicant and must seek prior approval for an increase in its foreign ownership.[135]

2. Provision of Switched Services over Private Lines

Background

72. The Commission has applied an "equivalency" analysis since 1991 to applications from all carriers that seek to provide switched, basic telecommunications services using resold international private lines (also known as international simple resale or ISR).[136] The equivalency test requires that, before granting such applications, the Commission make a finding that the country at the foreign end of the private line affords U.S. carriers resale opportunities equivalent to those available under U.S. law. The *Foreign Carrier Entry Order* extended this test, with limited exception, to carriers using their authorized facilities-

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[132] *See infra* Section VII.

[133] *Sprint Order*, 11 FCC Rcd 1850.

[134] *See Sprint Corp., Application to Operate Additional Facilities on the U.S.-Germany Route Pursuant to Section 214 of the Communications Act*, File No. ITC-97-075, DA 97-1342 (Int'l Bur. June 26, 1997); *see also Sprint Corp., Application to Operate Additional Facilities on the U.S.-France Route Pursuant to Section 214 of the Communications Act*, File No. ITC-97-636 (Application pending); *Public Notice*, Report Tel 111-B (rel. Oct. 29, 1997) (accepting Sprint's application for filing).

[135] *See infra* Section VI.B.

[136] *See Regulation of International Accounting Rates*, Phase II, CC Docket No. 90-337, First Report and Order, 7 FCC Rcd 559, 561-562 ¶¶ 17-24 (1991) (*International Resale Order*); Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992); Third Report and Order and Order on Reconsideration, 11 FCC Rcd 12,498 (1996).

based private lines.[137] The *Foreign Carrier Entry Order* also restated this equivalency test in the same manner as the ECO test.[138] We adopted the equivalency requirement in order to prevent "one-way bypass" of the settlements regime by routing only inbound traffic over private lines. By engaging in such a practice, a foreign carrier is able to avoid making settlement payments to a U.S. carrier for inbound calls, but may continue to receive such payments for outbound calls.[139] The Commission has found that such "one-way bypass" could increase U.S. rates and distort competition.[140]

73. In the *Notice,* the Commission tentatively concluded that the WTO Basic Telecom Agreement substantially reduces the threat of one-way bypass.[141] It also tentatively concluded, for the same reasons discussed above for other international services, that it is no longer necessary or desirable to continue to apply the equivalency test to pending or future Section 214 applications to provide switched, basic services over private lines between the United States and WTO Member countries.[142] We also note that in the *Benchmarks Order*, the Commission required that carriers seeking to provide switched services over resold or facilities-based international private lines demonstrate that settlement rates for at least 50

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137 Authorized U.S. carriers may use their facilities-based private lines to carry switched traffic without demonstrating equivalency for the country at the foreign end of the private line provided that (1) the carrier's private line is interconnected to the public switched network only on one end — either the U.S. end or the foreign end; and (2) the carrier is not operating the facility in correspondence with a carrier that directly or indirectly owns the private line facility in the foreign country at the other end of the private line. *See* 47 C.F.R. § 63.18(e)(4)(ii); *Foreign Carrier Entry Order*, 11 FCC Rcd at 3933-34 ¶¶ 157-161.

138 *Foreign Carrier Entry Order*, 11 FCC Rcd at 3924-26 ¶¶ 133-38. We noted, however, two practical distinctions between the equivalency and ECO tests. First, the equivalency test applies to applications from *any* entity seeking to provide switched services via international private lines — regardless of any foreign carrier affiliation in the destination market. Second, the equivalency test requires that the *de jure* and *de facto* criteria be met at the time we make an equivalency finding, while the ECO test requires that these criteria be satisfied in the near future. *Id.* at 3926 ¶ 138.

139 *See International Resale Order*, 7 FCC Rcd at 561 ¶¶ 17-20.

140 *See id.*

141 *Notice* ¶¶ 48-52.

142 *Notice* ¶ 50.

percent of the settled, U.S.-billed traffic on the route be at or below the appropriate settlement rate benchmark.[143] We committed to take prompt action in the event of a market distortion.[144]

Positions of the Parties

74. Most parties addressing this issue support the Commission's proposal.[145] Viatel states that removing the ECO test for the provision of switched service over private lines is timely, appropriate and will promote competition.[146] Frontier states that one-way bypass is a relatively short-term concern and the Commission should eliminate the ECO analysis for service provided to all countries, including non-WTO countries.[147] Sprint supports removing the ECO test, but stresses that the benchmark settlement rate condition is important in removing incentives to engage in one-way bypass.[148]

75. AT&T, however, opposes removing the ECO/equivalency analysis for switched services provided over private lines. It argues that the benchmarks settlement rate condition and our regulatory safeguards will be insufficient to prevent one-way bypass even after the WTO Basic Telecom Agreement goes into effect. It advocates requiring settlement rates at cost-based levels or that the Commission apply the same criteria the *Notice* proposed to apply to flexible settlement rate arrangements (i.e., a presumption in favor of granting a flexibility petition that could be rebutted by a showing that the foreign carrier that is party to the alternative settlement arrangement does not face competition from multiple facilities-based

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143 *Benchmarks Order* ¶¶ 242-259. In light of the Commission's proposal to remove the equivalency test for resold and facilities-based private lines, the *Notice* proposed to apply the benchmark settlement rate condition to carriers seeking to provide switched services over facilities-based private lines. The Commission issued a Public Notice concurrent with adoption of the *Notice* in this proceeding inviting parties to file comments on this proposal in the *Benchmarks* proceeding. *Notice* ¶ 121; *see* Public Notice, DA 97-1173 (rel. June 4, 1997).

144 *See Benchmarks Order* ¶¶ 249-257 (adopting a presumption that a market distortion exists and enforcement action is necessary where the ratio of outbound to inbound settled traffic increases 10 or more percent in two successive quarterly measurement periods).

145 *See, e.g.*, Frontier Comments at 2-3 (arguing that the Commission should abandon the ECO test because one-way bypass is a small and relatively short-term concern); Viatel Comments at 3 (stating that the WTO Agreement will reduce the threat of one-way bypass by exerting considerable pressure for accounting rate reform); Sprint Comments at 13. *Contra* AT&T Comments at 25.

146 Viatel Comments at 3-8; Viatel also makes several arguments in opposition to the benchmark settlement rate condition that was adopted in the *Benchmarks Order*. Viatel argues that the benchmark condition inhibits competition, is unnecessary from a policy perspective, and is inconsistent with the GATS obligations of the United States. Because these arguments were addressed in the *Benchmarks Order*, we do not address them here. *See Benchmarks Order* ¶¶ 232-259.

147 Frontier Comments at 3.

148 Sprint Comments at 12-14.

carriers).[149] Finally, AT&T also argues that only inbound ISR should be regulated and that U.S. carriers should be free to bypass high foreign settlement rates through the use of outbound switched services over private lines.[150] We also note that in the *Benchmarks* proceeding, several commenters supported allowing carriers to provide service to markets that do not meet our benchmark settlement rate condition, but that do satisfy our equivalency analysis. We stated there that we would address those commenters' concerns in this proceeding.[151]

Discussion

76. For the reasons explained below, we find that it is no longer necessary or appropriate to apply the equivalency test for carriers seeking to provide switched services over private lines that terminate in WTO Member countries. As a result of the market opening commitments of WTO Members and the resulting opening of global markets, as well as the adoption of our benchmark settlement rate condition, we find that "one-way bypass" will be far less of a concern as countries' WTO commitments are implemented.

77. In the Commission's *International Resale Order*, we concluded that the public interest in cost-based international telecommunications services would be served by the adoption of policies that encourage resale.[152] We find that there continue to be great benefits resulting from international private line resale and the carriage of switched services over facilities-based private lines. Because these services carry traffic outside of the traditional settlement rate system, carriers are able to offer service at reduced costs. The result is strong pressure to lower settlement rates and reduce consumer prices.

78. The Commission has long been concerned, however, about one-way bypass. One-way bypass exacerbates the settlements deficit and ultimately may lead to higher prices for consumers. In the *International Resale Order*, the Commission imposed the equivalency requirement to ensure that U.S. carriers and consumers would not be injured by our pro-resale policy.[153] Contrary to Viatel's assertion, the fact that we have not had to take action against carriers for one-way bypass does not mean that one-way bypass is not a problem, but rather that our equivalency policy has been effective in preventing such conduct.[154] Despite the increase in global competition that will result from implementation of the WTO

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149 AT&T Comments at 34, 36*; see Notice* ¶ 151; *see also infra* Section V.E.

150 AT&T Reply Comments at 28; *see also* Frontier Comments at 3-4.

151 *See Benchmarks Order* ¶ 258.

152 *See International Resale Order,* 7 FCC Rcd at 560-61 ¶¶ 15-16.

153 *See id.,* 7 FCC Rcd at 561-562 ¶¶ 17-22. The *International Resale Order* required carriers seeking authority to carry switched traffic over private lines to demonstrate that the destination country offers equivalent resale opportunities. *See also ACC/Alanna,* 9 FCC Rcd 6240 (1994); *fONOROLA and EMI,* 7 FCC Rcd 7312 (1992), *recon.,* 9 FCC Rcd 4066 (1994).

154 *See* Viatel Comments at 3.

Basic Telecom Agreement, the potential for one-way bypass in the U.S. international services market still exists in markets that are not yet fully open to competition.[155] We find, however, that the settlement rate benchmark condition we adopted in our *Benchmarks Order* is sufficient to address our concern about one-way bypass.

79. Pursuant to the Section 214 authorization condition adopted in the *Benchmarks Order*, we will authorize carriers to provide switched services over international facilities-based or resold private lines[156] on the condition that settlement rates for at least 50 percent of the settled U.S.-billed traffic on the route or routes in question are at or below the relevant benchmark adopted in that *Order*. If, after a carrier has commenced providing service, we learn that one-way bypass is occurring, we will take enforcement action. That enforcement action may include a requirement that carriers be prohibited from using their authorizations to provide switched services over private lines until settlement rates for at least 50 percent of the settled U.S.-billed traffic on the route are at a level equal to or below the best practice rate we adopted in the *Benchmarks Order*, $0.08,[157] or a revocation of carriers' authorizations to provide service. We adopted a rebuttable presumption that one-way bypass is occurring if the percentage of outbound traffic relative to inbound traffic increases by 10 or more percent in two successive quarterly measurement periods and reserved the right to investigate other shifts in the inbound/outbound ratio to determine whether one-way bypass is occurring.[158]

80. In the *Benchmarks Order*, the Commission concluded that the benchmark condition would best balance the Commission's desire to encourage the provision of switched services over private lines and at the same time limit the potential for one-way bypass.[159] We do not alter that

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155 *See* Sprint Comments at 2-3 (citing its observation of "sufficient instances of substantial and unexplained deviation of its return traffic from some foreign countries to know that inbound bypass issues are not an illusion").

156 We note that these are services interconnected to the public switched network on one or both ends.

157 The "best practice rate" is based on the lowest, commercially viable, settlement rate paid today by U.S. carriers to an overseas carrier from a competitive market. In the *Benchmarks Order*, we determined that this was the $0.08 rate that U.S. carriers pay on average with Sweden. We stated that we will revisit this rate in the future, as market conditions warrant. We also stated that we will consider, on a case-by-case basis, other factors that may influence the level of the best practice rate applied to individual carriers where the best practice rate adopted by the Commission does not accurately reflect a carrier's costs of providing international termination service. *Benchmarks Order* ¶¶ 65-66.

158 We amended our reporting requirements in Section 43.61 of our rules to enable us to detect one-way bypass. We now require that quarterly traffic reports be filed by certain common carriers in addition to the annual Section 43.61 traffic report. *See* 47 C.F.R. § 43.61.

159 *Benchmarks Order* ¶¶ 242-259.

finding here.[160] To the extent that carriers providing service outbound from the United States have low cost alternatives to terminate traffic on the route in question, one-way bypass would not have a significant effect on the U.S. settlements payment and on prices paid by U.S. consumers. We expect that any carrier or combination of carriers with 50 percent of the market for termination of U.S. outbound traffic would have sufficient capacity to handle all the traffic from U.S. carriers.[161] We therefore find that, in light of the commitments of our trading partners to allow entry by U.S. carriers and to require that carriers allow interconnection of competing providers, our benchmarks condition and other safeguards are sufficient to prevent one-way bypass and that an equivalency analysis is no longer necessary. We will however, as discussed above, take effective measures to ensure that carriers providing switched services over private lines do not engage in one-way bypass.[162]

81. We decline to adopt AT&T's proposal that we maintain the ECO/equivalency test. AT&T maintains that a significant danger of one-way bypass exists from carriers from WTO countries that have not made commitments or that have made limited commitments, and that we should continue to evaluate such applications under our equivalency analysis to ensure that carriers from those countries are unable to distort competition in the U.S. market. We do not agree with AT&T. For the reasons discussed above with regard to our general entry analysis,[163] we expect that the increasingly competitive global environment will encourage governments to liberalize and discourage anticompetitive conduct such as one-way bypass. We also find that maintaining the equivalency test for countries that have made no or limited market access commitments is unnecessary because our benchmarks condition and accompanying enforcement measures, along with our generally applicable safeguards, will remove incentives for one-way bypass and deter such conduct by U.S. and foreign carriers. We also find that maintaining the equivalency test only for countries that have made no commitments or limited commitments could be viewed negatively by other WTO Members and damage our trading relationships.

82. AT&T's proposed alternatives to the equivalency analysis are equally without merit. AT&T suggests that the Commission adopt a "cost-based settlement requirement," or apply the same standard for switched services over private lines as we do for accounting rate flexibility.[164] We agree with AT&T that settling all traffic on a particular route at cost-based rates would remove the incentive for one-way bypass. Requiring cost-based rates, however, would effectively preclude any carrier from continuing to provide switched service over international private lines to countries currently considered equivalent because none

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[160] We note that parties filed comments in this proceeding addressing the benchmark condition for provision of switched services over private lines. Because we explicitly stated in the *Notice* that we would decide whether to adopt the condition in the *Benchmarks* proceeding, comments on the condition filed in this proceeding are outside the scope of issues raised in the *Notice*. *See Notice* ¶ 119.

[161] *See Benchmarks Order* ¶¶ 243-244.

[162] *See supra* ¶ 79.

[163] *See supra* ¶ 39.

[164] AT&T Comments at 34-36.

settle their traffic at cost. Further, as discussed in the *Benchmarks Order*, we lack accurate data on foreign carriers' costs; therefore, we would be unable, under AT&T's proposal, to determine whether a particular rate complied with our condition.[165] We also note that adopting such a strict condition would seriously restrict the provision of switched services over private lines to all but the most liberalized of countries, eroding the capacity of this service to drive collection rates lower and settlement rates toward cost. To the extent incentives to engage in one-way bypass remain, the mechanism we adopted in the *Benchmarks Order* for detecting one-way bypass will provide a timely remedy.[166] Finally, adopting AT&T's proposal would severely restrain the ability of new entrants to provide service in the United States, denying consumers the benefits of increased competition.

83. We also decline to adopt AT&T's proposal that we require carriers that seek to provide switched services over private lines to be subject to the same standard we adopt for allowing a flexible settlement arrangement.[167] Our *Flexibility Order* governs carriers who wish to exchange switched traffic in a traditional half-circuit correspondent arrangement, but in a manner that deviates from our international settlements policy (ISP).[168] As discussed below, in this *Order* we remove the requirement that an applicant for such a flexibility arrangement satisfy the ECO test, and instead adopt a presumption that flexibility is in the public interest. Our flexibility framework retains, however, measures to ensure that the discrimination concerns upon which the ISP is based are adequately addressed.[169] We do not believe the same standards or safeguards we use in the flexibility context would be appropriate to address the distinct one-way bypass concern related to switched traffic carried over private lines.[170] As discussed above, we find that more tailored safeguards, most notably the benchmark settlement rate condition, will best serve to prevent one-

165 *See Benchmarks Order* ¶¶ 42-43.

166 *Id.* ¶ 248. In the *Benchmarks Order*, the Commission adopted a rebuttable presumption that one-way bypass is occurring if the percentage of outbound traffic relative to inbound traffic increases by 10 or more percent in two successive quarterly measurement periods and reserved the right to investigate other shifts in the inbound/outbound ratio to determine whether one-way bypass is occurring. *Id*. ¶ 249.

167 AT&T Comments at 40-43; s*ee infra* Section V.E.

168 *See Flexibility Order* ¶¶ 10-27. The *Flexibility Order* allows carriers to enter into flexible settlement rate arrangements under terms and conditions that deviate from our International Settlements Policy, which requires equal division of accounting rates, nondiscriminatory treatment of U.S. carriers, and proportionate return of inbound traffic. *See Implementation and Scope of the International Settlements Policy for Parallel Routes,* CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (Feb. 7, 1986) (*ISP Order*), *modified in part on recon.*, 2 FCC Rcd 1118 (1987) (*ISP Reconsideration*), *further recon.*, 3 FCC Rcd 1614 (1988); *see also Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992).

169 *See infra* Section V.E. This presumption in favor of flexibility can be rebutted by a showing that the foreign carrier that is party to an alternative settlement arrangement does not face competition from multiple facilities-based carriers.

170 *See Benchmarks Order* ¶¶ 232-259.

way bypass, while offering carriers maximum freedom to provide switched service over private lines. We also find that subjecting carriers that provide switched traffic over private lines to the flexibility rules would expose them to an additional layer of regulation, needlessly causing additional expense and delay for carriers seeking to provide this service.

84. We also fail to see the merits of removing all restrictions on outbound traffic, while maintaining our benchmarks condition and other safeguards for inbound traffic as AT&T proposes. Adopting AT&T's proposal would allow U.S. carriers to engage in one-way outbound bypass. Such carriers could terminate outbound traffic in a foreign country without making settlement payments while collecting such payments from the foreign carrier for inbound traffic. Although adopting this proposal would not directly exacerbate the U.S. settlements deficit, it has other significant problems. Adopting AT&T's proposal to allow one-way outbound bypass could funnel traffic off the settlements process to the detriment of the foreign carrier. Since we seek to prevent one-way inbound bypass from foreign markets, allowing U.S. carriers to engage in this practice to foreign markets could set a poor example to countries implementing their own WTO commitments and would run contrary to our interest in maintaining stable relationships with our trading partners. In addition, since AT&T's proposal would allow the private line to be interconnected to the public switched network on both ends, it would be difficult to determine whether a carrier authorized to provide service on an outbound basis only is in actuality also providing one-way *inbound* service. We find that the danger of one-way bypass from carriers offering such an arrangement could be significant.[171]

85. We decline to adopt AT&T's proposal that we continue to apply the equivalency test to applicants seeking to serve WTO Member countries. We do find, however, that carriers seeking authorization to provide switched services over private lines should be given the option of satisfying our existing equivalency criteria, where they are unable to satisfy the benchmarks condition, as suggested by several parties in the *Benchmarks* proceeding.[172] We adopted our benchmarks condition as a mechanism to address one-way bypass. There may be cases however, where a carrier could not satisfy the benchmark condition but could satisfy the equivalency test, which, as discussed above, was adopted to prevent one-way bypass.[173] In such cases, there would be no concern about one-way bypass and it would be in the public interest to allow carriers to provide switched services over private lines. In fact, allowing carriers to provide switched services on equivalent routes should reduce the settlement rates on those routes to a level well below the benchmark rate. As we stated in the *International Resale Order*, the provision of switched services over private lines exerts downward pressure on settlement rates and collection rates on both ends

171 Ordinarily, the *Benchmarks* condition would prevent a carrier from engaging in such a conduct by imposing a presumption that one-way bypass is occurring, and that enforcement action is necessary where the ratio of inbound to outbound settled traffic increases by 10 percent or more. Because AT&T proposes that we exempt one-way switched traffic over private lines from our *Benchmarks* condition, this safeguard would not apply.

172 *See Benchmarks Order* ¶ 258.

173 *See supra* ¶ 72.

of a route.[174] Thus, we should encourage the development of such services to the greatest extent possible consistent with our goal of preventing the market distortions that result from one-way bypass.

86. We codify these policy decisions in Sections 63.17, 63.18, and 63.21 of our rules.[175] Sections 63.18 and 63.21 specify our Section 214 filing requirements and certain conditions applicable to U.S. international common carriers, respectively. Section 63.17 permits U.S. carriers to engage in "switched hubbing" of U.S.-inbound and U.S.-outbound switched traffic through equivalent countries in accordance with the provisions of that rule.[176] Consistent with the policies adopted in this Section for the provision of switched services over private lines between the United States and WTO Member countries, we amend Section 63.17 to permit switched hubbing of U.S. traffic through WTO Member countries that we have determined satisfy either our equivalency standard or our *Benchmarks* condition. We also reiterate here the Commission's general view that "the international resale policy is not undermined by the routing of switched traffic via end-to-end private lines extending from the United States through one equivalent to a third equivalent country." We extend this policy to include the routing of switched traffic via end-to-end private lines through and to WTO Member countries that we have determined meet our *Benchmarks* condition.

C. Foreign Ownership under the Submarine Cable Landing License Act

Background

87. Pursuant to Executive Order 10530,[177] the Commission has been delegated the President's authority to grant licenses for the landing and operation of submarine cables.[178] The Executive Order requires us to obtain the approval of the State Department, and, as appropriate, to seek advice from other Executive Branch agencies, before granting any such license. The *Notice* proposed to end our policy of applying an ECO-type analysis as part of our inquiry under Section 2 of the Submarine Cable Landing License Act.[179] We tentatively concluded that, because of the market opening commitments made by other

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[174] *International Resale Order*, 7 FCC Rcd at 561 ¶ 16.

[175] *See infra* Appendix C.

[176] Section 63.17(b) permits a U.S. carrier to route U.S.-outbound traffic over U.S. international private lines that terminate in equivalent countries and then to forward that traffic to a third, non-equivalent country by taking at published rates and reselling the IMTS of a carrier in the equivalent country. The rule also permits U.S. carriers to route U.S.-inbound switched traffic in a similar manner. *See infra* note 322.

[177] Exec. Order No. 10,530, *reprinted as amended in* 3 U.S.C. § 301 app. at 459-60 (1994).

[178] Submarine Cable Landing License Act, 47 U.S.C. §§ 34-39.

[179] *Notice* ¶ 62; *see Telefónica Larga Distancia de Puerto Rico, Inc.*, File Nos. ITC-92-116-AL, SCL-93-001, ITC-93-029, Memorandum Opinion and Order, 12 FCC Rcd 5173 (1997); *Cable & Wireless, plc,* File No. SCL-96-005, Cable Landing License, FCC 97-204 (rel. June 20, 1997).

countries in the WTO negotiations, our concerns with respect to opening foreign markets and eliminating the opportunity for anticompetitive conduct have largely been satisfied with respect to WTO Member countries. We therefore proposed to eliminate the ECO test and to grant most applications unless the State Department disapproves or there is some other compelling public interest reason, consistent with our discretion under the Submarine Cable Landing License Act, to deny a particular application.

88. We sought comment on those proposals and specifically on whether there are circumstances in which grant of a cable landing license would pose such a high risk to competition that we should exercise our discretion to deny an application. We also sought comment from the Executive Branch and from other interested parties regarding what conditions should be placed on cable landing licenses.[180]

Positions of the Parties

89. Many parties' general comments regarding use of the ECO test are equally applicable in this context, and we have considered them in that light. This Section addresses those comments that focused specifically on cable landing licenses.

90. Most parties commenting specifically on our proposals for cable landing licenses support replacing the ECO test with an open entry policy.[181] Some commenters argue that we should not retain the discretion to deny applications for other public interest reasons. Sprint argues that if a particular application raises concerns about risks to competition, the license should be granted subject to conditions to guard against anticompetitive conduct.[182] Deutsche Telekom states that denying or conditioning a cable landing license based upon Executive Branch preferences or "other compelling public interest reason[s]" would violate the GATS principles involving market access, MFN, national treatment, and domestic regulation.[183] France Telecom states that the Commission should not use the "compelling public interest reasons" caveat as a way to reintroduce ECO-related factors back into the analysis.[184]

91. WorldCom opposes our proposal to grant most cable landing licenses routinely. WorldCom is concerned that the WTO Basic Telecom Agreement has not substantially eliminated the risk that WTO Member countries will not allow U.S. carriers to land and operate cables, and that these asymmetric market opening commitments will significantly disadvantage U.S. carriers. WorldCom urges us to retain adequate

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180 *Notice* ¶¶ 62-64.

181 *See, e.g.*, Telefónica Internacional Comments at 1, 3, 4; FT Comments at 24; Letter from Larry Irving, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, to William E. Kennard, Chairman, FCC, at 2 (Nov. 5, 1997).

182 Sprint Comments at 15-16.

183 DT Comments at 33 n.29. These arguments are addressed in Section VII, *infra*.

184 FT Comments at 24.

discretion to consider any and all factors bearing on the public interest, including whether a cable would raise the potential for anticompetitive leveraging of bottleneck facilities by foreign carriers.[185]

92. DOD states that it is not necessary in every instance for the Commission to impose a restriction on the ownership of cable landing stations. DOD states that, should it have a concern in a particular situation, it can address that concern under the procedures of Executive Order 10530. Alternatively, DOD states, the Commission could impose the conditions contained in the agreement that DOD and the FBI reached with MCI Telecommunications Corporation and British Telecommunications plc in the context of their proposed merger. In that agreement, DOD determined that U.S. ownership of cable landing stations was unnecessary because the companies agreed to other terms and conditions that assured U.S. control of the facilities in the event of presidential exercise of war powers under 47 U.S.C. § 606. DOD states that, should the Commission impose the conditions contained in that agreement, we will have addressed all of DOD's concerns relating to cable landing stations, and no ownership restriction would be necessary.[186]

Discussion

93. We adopt our proposal to apply our new open entry policies to applications to land and operate submarine cables from WTO Member countries in the United States. In general, the market opening commitments of other WTO Member countries, together with our ability to condition both cable landing licenses and Section 214 authorizations and to deny licenses in exceptional circumstances, render the ECO test unnecessary. We will continue to analyze each application in the manner described above[187] while seeking the approval of the State Department as required by Executive Order 10530.

94. We do not agree with WorldCom that remaining risks to competition require that we not routinely grant cable landing licenses. We anticipate that the WTO Basic Telecom Agreement will significantly reduce the opportunities for carriers with bottleneck control on the foreign end of a cable to harm competition in the U.S. market by acting anticompetitively. Because 52 countries committed to granting market access for international services, alternative routing options will almost always be available. Even if a particular application presents unusual risks to competition, most potential problems can be addressed by imposing conditions on the license.

95. When there is a danger of inadequate common carrier capacity on submarine cables to a particular destination, we have the authority to require that any new or existing cables be operated on a common carrier basis. We can also impose conditions on cable landing licenses short of requiring that they be operated on a common carrier basis. For example, the International Bureau recently imposed recordkeeping requirements on a licensee where it was deemed necessary to address anticompetitive

185 WorldCom Comments at 7-8.

186 *Ex Parte* Presentation of the Secretary of Defense (filed Oct. 16, 1997) at 3.

187 *See supra* Section III.A.

concerns specific to the proposed submarine cable.[188] We have also traditionally required that a non–common carrier licensee not acquire any exclusive arrangement to land cables.[189] Furthermore, neither the owner of a non–common carrier submarine cable nor any common carrier may provide common carrier service over the cable without obtaining Section 214 authority and becoming subject to our common carrier regulation, including the safeguards we adopt here.[190] In exceptional cases where no conditions would adequately address a very high risk to competition, we could deny an application.

96. Finally, we will no longer routinely impose a restriction on foreign ownership of cable landing stations. Should the Department of State, pursuant to Executive Order 10530, condition its approval of a particular cable landing license on such a restriction, we will include a condition to that effect in the particular cable landing license.[191]

D. Section 310(b)(4) Standard for Indirect Foreign Ownership of Radio Licensees

Background

97. Section 310(b)(4) of the Communications Act allows the Commission to deny or revoke a common carrier, broadcast, or aeronautical radio license if more than 25 percent of an entity that controls the applicant or licensee is owned of record or voted by aliens, foreign governments or their representatives, or foreign corporations and the Commission finds that denial or revocation would serve the public interest.[192] In the *Foreign Carrier Entry Order*, we adopted an ECO test as part of this public interest analysis under Section 310(b)(4) for common carrier radio licensees. We found that opening the U.S. market to foreign investment to the extent foreign countries do so in their markets would best serve our goals of promoting competition, preventing anticompetitive conduct, and opening foreign markets.[193]

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188 *See General Communication, Inc.*, File No. SCL-97-003, DA 97-2357, ¶¶ 33, 40(5) (Int'l Bur., Telecom. Div., rel. Nov. 7, 1997) (ordering the licensee to maintain complete records including the percentage of circuits conveyed on the cable, to whom capacity is sold, and on what terms and conditions); *see also* 47 U.S.C. § 35 (providing that a cable landing license may be granted "upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed").

189 *See, e.g.*, *SSI Atlantic Crossing LLC*, File No. SCL-97-002, DA 97-2034, ¶ 15(4) (Int'l Bur., Telecom. Div., rel. Sept. 23, 1997).

190 *See infra* Section V.

191 Any such restriction would be necessary to protect the national security of the United States.

192 47 U.S.C. § 310(b)(4). We note that, as pointed out by the Wireless Cable Association International, Inc., the foreign ownership restrictions in Section 310(b) do not apply to non-broadcast, non-common carrier services and facilities. *See* WCA Comments at 1-5.

193 *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3944 ¶ 186.

98. In the *Notice*, we proposed to eliminate the ECO test as part of the Section 310(b)(4) public interest analysis for common carrier radio licensees or applicants with indirect foreign investment from WTO Member countries. We proposed to simplify our review of such foreign investment and to presumptively allow any amount of indirect investment by investors whose home markets are in WTO Member countries. We stated that we would continue to consider public interest factors, including any national security, law enforcement, foreign policy, or trade concerns brought to our attention by the Executive Branch, and that we would deny applications that pose a very high risk to competition that could not be addressed by conditions that we could impose on the license.[194]

99. We sought comment on all of our tentative conclusions and particularly on whether any specific criteria might be relevant under Section 310(b)(4). We also asked whether we need to continue to review increases in foreign ownership that do not effect a transfer of control where we have already approved a licensee's request to exceed the 25 percent foreign ownership benchmark. In addition, we asked whether we should examine the extent of a WTO Member's commitment or its implementation of that commitment in determining whether a particular application presents competition problems that must be addressed.[195]

100. The *Notice* tentatively concluded that we would continue to determine a foreign investor's home market by applying a "principal place of business" test. We sought comment on that conclusion and on whether the GATS concept of "service supplier" of a WTO Member should affect that analysis.[196]

101. The *Notice* also sought comment on our tentative conclusion that we would not change our *ad hoc* approach toward indirect foreign ownership of aeronautical licenses because experience has shown that approach to be appropriate.[197]

Positions of the Parties

102. Several commenters generally support our proposal to remove the ECO test and further liberalize our rules on foreign investment.[198] They point out the benefits to the U.S. wireless markets of

194 *Notice* ¶¶ 74-75.

195 *Id.* ¶ 75.

196 *Id.* ¶ 76.

197 *Id.* ¶ 70.

198 *See, e.g.*, Sprint Comments at 16; Telecom Finland Comments at 6; WinStar Comments at 4-5; New T&T Hong Kong Comments ¶ 5.1; Telefónica Internacional Comments at 1, 3, 4; Indus Comments at 5; Letter from Larry Irving, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, to William E. Kennard, Chairman, FCC, at 2 (Nov. 5, 1997).

facilitating foreign investment.[199] No commenter disputes our tentative conclusion that, because common carrier wireless markets are, for the most part, wholly domestic, foreign investment in those services does not implicate the anticompetitive dangers that we see in the Section 214 context.[200] In fact, AT&T, which supports retaining a standard similar to the ECO test for Section 214, supports eliminating the ECO test for Section 310(b)(4) analyses because it agrees that similar anticompetitive dangers do not exist.[201] Sprint states that it is unlikely that non-controlling investments would ever pose a threat to competition in the United States.[202]

103. NextWave argues that there is "no conceivable risk to competition" in the U.S. market from indirect foreign ownership in C- and F-block licensees because those licenses are held by entrepreneurs who are new entrants into the markets.[203] Therefore, NextWave argues, the Commission should conclude that indirect foreign investment above 25 percent in C- and F-block personal communications systems (PCS) licensees by any entity whose home market is a WTO Member country serves the public interest and will be subject only to a Commission notification requirement. NextWave notes that its proposal would not affect transfers of control, which would remain subject to Commission review or approval whether the investor is domestic or foreign.[204] In the alternative, if we continue to require prior approval, NextWave urges the Commission to establish an expedited process for reviewing such applications.[205]

104. Telephone and Data Systems suggests that we need not review indirect foreign ownership of common carrier radio licensees held in the form of registered securities when the investor is from one of the 64 other WTO Member countries that has committed to enforce fair rules of competition for basic telecommunications and is not a carrier.[206] Such investments, TDS argues, are passive investments that the Commission has, in the past, decided are not important to the Section 310(b)(4) public interest analysis. We could instead rely on after-the-fact reporting requirements and retain the right to cause divestiture of ownership interests that we find to be inconsistent with the public interest. TDS suggests that we could

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199 *See, e.g.,* FT Comments at 24; WinStar Comments at 5; Indus Comments at 5-6.

200 *Notice* ¶ 73.

201 AT&T Reply Comments at 10. AT&T nevertheless states that the removal of restrictions on foreign ownership should not be applied in a manner that defeats other neutral grounds for investment limitations, such as those imposed on C- and F-block licensees. *Id.*

202 Sprint Comments at 17-18.

203 NextWave Comments at 6.

204 *Id.* at 7.

205 *Id.* at 8.

206 TDS Comments at 3 & passim.

scrutinize SEC filings to monitor foreign ownership of registered securities.[207] Under TDS's proposal, prior approval would continue to be required for investment in excess of 25 percent held by investors from other WTO Member countries, by investors from non-WTO countries, and by any foreign carrier.

105. Some commenters, including USTR, do not oppose our consideration of competitive risks in the context of Section 310(b)(4).[208] USTR states that our proposal to continue to apply a public interest test is consistent with U.S. commitments under the GATS.[209] Other parties argue, as they do in other contexts, that denial on the grounds of risks to competition or other public interest factors might be inconsistent with U.S. international obligations.[210] Deutsche Telekom argues further that GATS principles prohibit the U.S. Government from imposing conditions upon approvals that it does not impose upon U.S.-owned licensees.[211] Some parties contend that our consideration of Executive Branch concerns regarding national security, law enforcement, foreign policy, and trade policy violates GATS principles.[212]

106. The FBI states that special national security and law enforcement concerns are presented by foreign ownership or control of, or influence over, common carrier radio licenses — concerns that are not presented when a license is held by a U.S. citizen or entity. Those concerns include (1) foreign-power-sponsored interceptions of U.S. communications for intelligence purposes; (2) compromise of U.S. Government efforts to conduct electronic surveillance for law enforcement or national security purposes against foreign targets associated with the home country of a foreign-owned telecommunications carrier; (3) exposure to the home government of the foreign-owned carrier of sensitive governmental and private-sector information maintained in common carrier records, databases, and central office facilities; (4) exposure of intercept capabilities and vulnerabilities of U.S. law enforcement and intelligence agencies; and (5) compromise of the National Security Emergency Preparedness functions that all U.S. telecommunications licensees are expected to perform in the event of a national emergency.[213] The FBI states that our current public interest review process under Section 310(b)(4) has worked well.[214] By

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[207] *Id.* at 9-11.

[208] *See, e.g.*, Telecom Finland Comments at 6; Indus Comments at 6-7.

[209] USTR Comments at 3.

[210] Telefónica Internacional Comments at 5; DT Comments at 32-33; Sprint Comments at 17.

[211] DT Comments at 32 n.27.

[212] *See, e.g.*, *id.* at 32; FT Comments at 5. We assume that other parties' comments about the GATS-consistency of the public interest analysis that we described in the *Notice* are intended to apply in this context as well. These comments are addressed in Section VII, *infra*.

[213] FBI Comments at 3-4.

[214] *Id.* at 4.

contrast, J. Gregory Sidak argues that DOD and the FBI appear to overestimate the scope and efficacy of Section 310(b)(4) as a tool of national security.[215]

107. We sought comment on whether we should continue to review increases in foreign ownership (that do not result in transfers of control) by licensees that have already obtained approval to exceed the 25 percent benchmark. All parties who addressed the issue except the FBI opposed our continuing to review those increases. They argue that those increases serve the public interest and will never pose a threat to competition.[216] The FBI argues that we must review each increase in foreign ownership in order to determine whether it will effect a transfer of control, which might effectively happen at a level below 50 percent. Even if the transaction does not result in a transfer of control, the FBI argues, the increased foreign influence may present public interest concerns, including national security and law enforcement concerns.[217]

108. Telecom Finland argues that, because a weak or unfulfilled commitment is no better than no commitment, we should consider the extent of a WTO Member country's commitment or its implementation of that commitment in determining whether to allow indirect investment by that country's entities in common carrier radio licensees.[218] NextWave and Telefónica Internacional oppose such an inquiry, because it would be time-consuming, it might violate U.S. WTO obligations, and those concerns are properly addressed in WTO dispute resolution.[219]

109. Sprint and Telecom Finland support our retaining the "principal place of business" definition of an applicant's or licensee's "home market." They state that the test has been workable and has accurately determined the appropriate home market of a foreign investor.[220] Sprint comments that it remains to be seen whether the test will continue to be workable in the future, when different kinds of alliances, ventures, and partnerships apply for common carrier radio licenses.[221]

110. On the issue of aeronautical licenses, Société Internationale de Télécommunications Aéronautiques (SITA), which provides aeronautical enroute services in Europe, argues that the

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[215] Sidak Reply Comments at 2; *see also* J. Gregory Sidak, *Foreign Investment in American Telecommunications* chs. 2, 3.

[216] *See* Sprint Comments at 18; FT Comments at 24-25; NextWave Comments at 10; Telecom Finland Comments at 6.

[217] FBI Comments at 10-11.

[218] Telecom Finland Comments at 7.

[219] NextWave Comments at 9-10; Telefónica Internacional Comments at 3, 16.

[220] Sprint Comments at 16 n.20; Telecom Finland Comments at 8.

[221] Sprint Comments at 16 n.20.

Commission should allow competition in the provision of aeronautical services in the United States. SITA contends that aeronautical service is a basic telecommunications service and is therefore covered by the WTO Basic Telecom Agreement. It argues that our *ad hoc* approach to analyzing indirect foreign ownership of aeronautical licensees violates GATS requirements and that our "one station licensee per location" rule is inconsistent with U.S. market access and national treatment obligations. ARINC, the sole aeronautical licensee for most of the locations in the United States, argues that the WTO Basic Telecom Agreement does not apply because aeronautical services are not basic telecommunications; that, in any event, the Commission's current policies are consistent with U.S. WTO commitments; and that the "one station licensee per location" rule is essential to the continued safe and fair operation of the aeronautical enroute service and to efficient spectrum management.[222] The European Union joins SITA in arguing that the *ad hoc* approach to foreign ownership is contrary to U.S. WTO obligations.[223]

Discussion

111. We adopt our proposal as refined in the following paragraphs. We conclude, pursuant to Section 310(b)(4), that it would not serve the public interest to deny or revoke a common carrier, aeronautical enroute, or aeronautical fixed radio station license pursuant to Section 310(b)(4) except under the narrow circumstances discussed in this *Order*. Because additional foreign investment can promote competition in the U.S. market, we conclude that the public interest will be served by permitting more open investment by entities from WTO Member countries in U.S. common carrier wireless licensees. We will therefore replace our current ECO test as applied to foreign investment from WTO Member countries in common carrier radio licenses with the entry policies we justify and describe above in Section III.A. We note that such an analysis could apply in various contexts: petitions for declaratory rulings by existing or prospective licensees that the public interest would be served by allowing them to exceed 25 percent indirect foreign ownership; initial license applications; and transfers of control.[224]

112. We find it significant that no commenter argued that indirect foreign investment in common carrier wireless markets can raise anticompetitive dangers such as those that might occur in the context of a Section 214 application. Because those markets are, for the most part, wholly domestic, there is no possibility of leveraging foreign bottlenecks in order to create advantages for some competitors in U.S. markets. In light of the comments, we conclude that we cannot at this time envision a circumstance in which indirect foreign investments by entities from WTO Member countries that do not result in a transfer of control will pose a very high risk to competition.[225] In applying our open entry policy to Section

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222 ARINC Reply Comments at 12-14.

223 European Commission Comments ¶ 17.

224 Applications for wireless licenses are of course also subject to whatever service-specific rules may apply, and transfers of control must be evaluated under Section 310(d). Any such rules are administered without regard to nationality and are consistent with U.S. GATS obligations.

225 Thus, we will not apply an ECO analysis to investments from WTO Member countries. For a description of how we would evaluate indirect foreign ownership from WTO Member countries when the licensee or

310(b)(4) requests, therefore, we conclude that we can streamline requests to exceed the 25 percent benchmark.[226]

113. We have responded to concerns about our consideration of Executive Branch views regarding national security, law enforcement, foreign policy, and trade policy in Section III.A.2.c above. We accept that the Executive Branch concerns regarding national security, law enforcement,[227] foreign policy, and trade policy are legitimately addressed under the Section 310(b)(4) public interest analysis and therefore conclude that our review of Section 310(b)(4) requests should include consultation with the appropriate Executive Branch agencies regarding those concerns. Those agencies will have an opportunity to raise their concerns before authorizations are granted during the 21-day comment period provided for streamlined applications.[228] We reiterate that Executive Branch agencies are not required to overcome a "strong presumption" in favor of granting these requests. Nevertheless, as discussed above, we expect that such concerns will be raised only in very rare circumstances.[229] Furthermore, applicants can expect in almost all cases that the International Bureau will issue a decision on their requests within the streamlined processing period.[230]

114. We accordingly retain our general requirement that licensees seek Commission approval before they accept indirect foreign ownership that would put them over Section 310(b)(4)'s 25 percent benchmark. For the same reasons, we will also continue to require licensees who have already received approval to exceed the 25 percent benchmark up to a certain level of indirect foreign ownership to seek further Commission approval in order to increase that level of indirect foreign ownership. We accept the FBI's assertion that the increases in foreign ownership or influence may present concerns that Executive Branch agencies may need an opportunity to evaluate before we allow an increased level of foreign ownership. In any event, we expect that in the future most applicants will seek authorization to accept indirect foreign investment up to any non-controlling level when they initially file, so maintaining this requirement will not impose a significant burden on applicants or the Commission.

115. Because we find that we must retain a procedure for prior approval of indirect foreign investment in excess of 25 percent, we decline to adopt the proposal advocated by Telephone and Data Systems to disregard investments by non-carriers held as publicly traded securities. We accept the concerns of Executive Branch agencies that even small investments in publicly traded securities could, if aggregated, nevertheless create a degree of control or influence over a licensee that would be contrary to

applicant also has indirect foreign ownership from non-WTO Member countries, see *infra* ¶ 131.

226 *See infra* Section VI.A.

227 *See supra* ¶ 106.

228 47 C.F.R. § 63.20(c), (d).

229 *See supra* Section III.A.2.b.

230 *See infra* ¶ 327.

U.S. national security or law enforcement interests.[231] When applicants and licensees seek Commission approval under Section 310(b)(4) for a particular amount of indirect foreign ownership, they should indicate how much of that amount is attributable to each identified shareholder and how much of that amount is an allowance for fluctuations in publicly traded shares.

116. We will continue to use the "principal place of business" test to determine the nationality or "home market" of foreign investors.[232] No commenter suggested an alternative test or argued that the test was inappropriate. We will also consider other means of determining an applicant's nationality if requested to do so by an applicant or if so advised by the Executive Branch. For the reasons discussed above,[233] we will not inquire into the extent or implementation of a WTO Member country's commitment in determining whether to apply our open entry policies to an investor with its home market in that country.

117. We agree with SITA that some aeronautical enroute and aeronautical fixed services[234] are basic telecommunications services that fall within the class of services covered by the WTO Basic Telecom Agreement. Contrary to ARINC's assertions, the WTO Basic Telecom Agreement encompasses both private and commercial telecommunications services. Most WTO Members, including the United States, committed to provide market access to "mobile services," of which aeronautical enroute and fixed services is a subset. We accordingly conclude that we should apply the same standard to those services that we apply to other basic telecommunications services under Section 310(b)(4) and not apply an ECO test to indirect foreign ownership by entities from WTO Member countries. As in other contexts, we believe that participation by a foreign entity may create additional competition in aeronautical services. Consideration of whether a particular investment presents a very high risk to competition and other public interest factors, including input from Executive Branch agencies regarding matters uniquely within their expertise, will be sufficient to protect the public interest. We will therefore apply the standard developed above for indirect foreign ownership of common carrier radio licensees to indirect foreign ownership of aeronautical services.

118. We decline, in this proceeding, to address the rule limiting the number of aeronautical enroute licenses to one per location.[235] That rule is beyond the scope of this proceeding. The *Notice* raised

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231 *See* Letter from John F. Lewis, Jr., Assistant Director in Charge, National Security Division, Federal Bureau of Investigation, to Regina M. Keeney, Chief, International Bureau, FCC (Oct. 31, 1997); *Ex Parte* Presentation of the Secretary of Defense (filed Oct. 16, 1997) at 2-3.

232 *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3948-52 ¶¶ 199-208.

233 *See supra* ¶¶ 37-39.

234 Aeronautical enroute and aeronautical fixed stations provide communications for the operational control of aircraft by aircraft operating companies. Communications relate to safe, efficient, and economical operation of aircraft. Typical messages concern aircraft performance, fuel, weather, position reports, and essential services and supplies. Public correspondence (e.g., private or personal messages of passengers or crew) is not permitted. 47 C.F.R. §§ 87.261, 87.275.

235 47 C.F.R. § 87.261(c).

only the issue of whether to continue our *ad hoc* approach to analyzing indirect foreign investment in aeronautical enroute and aeronautical fixed licensees pursuant to Section 310(b)(4).[236] Because the service-specific licensing rules were not discussed in the *Notice*, we are concerned that critical parties such as the Federal Aviation Administration have not had sufficient opportunity to provide the input that we would need before we were to reconsider our licensing rules. However, we conclude that the issue should be explored in a separate proceeding, in which we would solicit the input of all members of the air transport industry and appropriate U.S. Government agencies. We will commence such a proceeding in the near future. In the meantime, SITA and other entities seeking to provide aeronautical services in the United States may apply for unencumbered enroute spectrum under the Commission's existing rules and seek rule waivers, as necessary, to provide service in areas where another entity is already licensed.

IV. Policies toward Non-WTO Members

A. Application of ECO Analysis

Background

119. We tentatively concluded in the *Notice* that, with respect to non-WTO Member countries, we would not change our policies of applying an ECO test for Section 214 authorizations, cable landing licenses, Section 310(b)(4) authorizations, and petitions to approve alternative settlement arrangements.[237] In each case, we tentatively concluded that the circumstances that existed when we adopted the *Foreign Carrier Entry Order* in 1995 and the *Flexibility Order* in 1996 had not changed sufficiently with respect to countries that are not Members of the WTO, as they had for countries that are WTO Members. We also sought comment on whether the ECO test should be modified.[238]

120. In addition, we tentatively concluded that our equivalency test would continue to be necessary to prevent one-way bypass of the accounting rate system between the United States and non-WTO Member countries. Although we expect liberalization of the international services markets of WTO Member countries to increase pressure on non-WTO Member countries to reform their telecommunications markets and their accounting rates, we stated that we were not confident that the reform would come quickly or broadly enough to outweigh the need to maintain the equivalency standard.

Positions of the Parties

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[236] *See Notice* ¶ 70.

[237] *Notice* ¶¶ 53-59, 65-66, 77, 154.

[238] *Notice* ¶ 56; *see* Telefónica Larga Distancia de Puerto Rico Petition for Reconsideration of the *Foreign Carrier Entry Order* (filed Jan. 29, 1996) (TLD Petition); TLD Reply to Oppositions to Petition for Reconsideration (filed Mar. 11, 1996) (TLD Reply).

121. Most parties that addressed the issue agree that we should continue to apply the ECO test to non-WTO countries.[239] BTNA and WorldCom support applying the ECO test to applicants from non-WTO Member countries in order to advance the goals of the Commission's competitive policies and in the expectation that bilateral pressures may serve to create incentives for those countries to join the WTO, make market opening commitments, and adopt the Reference Paper.[240]

122. Sprint favors elimination of the ECO test even as applied to non-WTO Member countries. Sprint argues that the ECO test is unworkable and impractical and that we should base our policies only on protecting competition in the U.S. market. Sprint argues that it would be incongruous to deny an application from a carrier in a non-WTO Member country because it fails ECO, even though the country's telecommunications market is more competitive than the markets of some WTO Members.[241] Applications that pose similar degrees of harm to competition should be conditioned similarly, Sprint argues, whether or not the countries involved are WTO Members.[242] FaciliCom similarly opposes the continued use of the ECO test because it is too inflexible. FaciliCom favors evaluation of a flexible set of public interest factors and use of conditional authorizations depending on the special circumstances of each country.[243]

123. WorldCom argues that the equivalency test is necessary to protect against one-way bypass into the United States from non-WTO Member countries and that the equivalency test creates an incentive for those countries to join the WTO, make market opening commitments, and adopt the Reference Paper.[244] Sprint, however, opposes retaining the equivalency test because our settlement rate benchmark condition may effectively eliminate the potential for discrimination by a dominant foreign carrier.[245] Viatel urges the Commission to consider restricting application of the equivalency test to carriers affiliated with foreign carriers that have market power in the destination country because one-way bypass is a significant threat only from those carriers.[246]

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239 AT&T Comments at 41; BTNA Comments at 6; MCI Comments at 9; New T&T Hong Kong Comments ¶ 4.1; WorldCom Comments at 8-9.

240 BTNA Comments at 6; WorldCom Comments at 9.

241 Sprint Comments at 3-6.

242 *Id.* at 3, 6, 15, 17.

243 FaciliCom Comments at 6-7.

244 WorldCom Comments at 8-9; *see also* MCI Comments at 9.

245 Sprint Comments at 13 n.14.

246 Viatel Comments at 10.

Discussion

124. We conclude that the circumstances that existed when we adopted the *Foreign Carrier Entry Order* and the *Flexibility Order* have not changed sufficiently with respect to countries that are not Members of the WTO. It continues to serve the goals of our international telecommunications policy[247] to apply the ECO and equivalency tests in the context of non-WTO Member countries.

125. We do not agree with Sprint's arguments that our sole focus in this context should be on the potential harm to competition in the U.S. markets. It continues to serve the public interest to maintain policies directed at encouraging non-WTO Member countries to open their telecommunications markets to competition. Since 1995, our application of the ECO test has provided incentives for foreign governments to allow U.S. participation in their markets, and it played a part in the WTO negotiations that resulted in the Basic Telecom Agreement. We believe that continuing to apply the ECO test to non-WTO Member countries may encourage some of those countries to take unilateral or bilateral steps toward opening their markets to competition and may provide incentives for them to join the WTO.

126. It is not incongruous to apply different standards to countries that are WTO Members and countries that are not. Members of the WTO, whether or not they made commitments on basic telecommunications, are bound by general GATS obligations, including the MFN obligation.[248] Furthermore, WTO Members are committed to the progressive liberalization of trade. We therefore expect that WTO Members will either unilaterally or multilaterally liberalize their markets, and when they do so, they will be obligated not to discriminate against U.S. service providers. Carriers from WTO Member countries therefore present, as a group, less of a concern with anticompetitive conduct.

127. By contrast, the markets of non-WTO Members, in almost all cases, are not liberalized,[249] so they are far more likely than WTO Members to present anticompetitive concerns that would dictate continued application of the ECO test. Moreover, even those non-WTO Members that do liberalize their markets are not bound by international commitments to do so; thus, there is no external assurance that their markets will continue to be open, in terms of both legal and practical barriers to entry. In addition, for non-WTO Members there is far greater reason to continue to apply the ECO test as a means of encouraging them to open their markets to competition and join the WTO. Finally, we observe that the United States owes no international trade obligations to most non-WTO Members, so there is no obligation under the WTO Basic Telecom Agreement to adopt the same approach for these countries as for WTO Members.

128. In the case of Section 214 applications to provide facilities-based, resold switched, and resold non-interconnected private line services, we will continue to apply the ECO test as part of the public

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[247] *See supra* ¶ 11.

[248] *See* GATS art. VI.

[249] We recognize that there are some exceptions, such as the Russian Federation and Taiwan, which have taken steps toward liberalization despite not being Members of the WTO.

interest inquiry when presented with an application from a foreign carrier or a carrier affiliated with a foreign carrier where the foreign carrier is from a non-WTO Member country and has market power in the destination market. We define market power in this context the same way that we define it in the context of our regulations prohibiting any carrier from accepting certain "special concessions" from foreign carriers with market power.[250]

129. We also conclude, for the reasons discussed above, that it remains important to maintain the equivalency test as part of our standard for permitting the provision of switched services over private lines, whether facilities-based or through resale, for non-WTO Member countries.[251] Therefore, for non-WTO Member countries, it remains necessary to allow the provision of switched services over private lines only when the foreign country provides equivalent resale opportunities.

130. We also conclude, for the reasons discussed above, that we will continue to apply an ECO test in this context as part of our analysis under Section 2 of the Submarine Cable Landing License Act.[252] Thus, when considering an application to land and operate a submarine cable that will connect to a non-WTO Member country, we will consider whether the applicant is or is affiliated with a carrier that has market power in the destination market of the cable, and if so, we will consider whether that destination market offers effective opportunities for U.S. companies to land and operate a submarine cable in that country. We will also continue to consider, in addition to the *de jure* and *de facto* ECO criteria, other factors consistent with our discretion under the Submarine Cable Landing License Act that may weigh in favor of or against grant of a license.

131. We will also continue to apply the ECO test as part of our general public interest analysis under Section 310(b)(4) regarding foreign investment by entities from non-WTO Member countries in common carrier radio licensees. We conclude that our goals of increasing competition and opening foreign markets would continue to be served by opening the U.S. market to investors from non-WTO Member countries only to the extent that the investors' home markets are open to U.S. investors.[253] We will deny an application if we find that more than 25 percent of the ownership of an entity that controls a common carrier radio licensee is attributable to parties whose principal place(s) of business are in non-WTO Member countries that do not offer effective competitive opportunities to U.S. investors in the particular

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250 *See infra* Section V.B.1.

251 In the *Benchmarks Order*, we also adopted the requirement that settlement rates for at least 50 percent of the U.S. settled traffic on the relevant route be at or below the benchmark rate. *See Benchmarks Order* ¶¶ 242-259. We here amend Sections 63.17, 63.18, and 63.21 to implement these policy changes. *See infra* Appendix C (to be codified at 47 C.F.R. §§ 63.17, 63.18, 63.21).

252 Submarine Cable Landing License Act § 2, 47 U.S.C. § 35. That provision gives us discretion to deny an application if to do so would "assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States."

253 *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3944 ¶ 186.

service sector in which the applicant seeks to compete in the U.S. market, unless other public interest considerations outweigh that finding.

132. Finally, we adopt our proposal to retain the ECO test as the threshold standard for permitting accounting rate flexibility with carriers from countries that are not WTO Members. As we said in the *Notice* and in the *Flexibility Order*, the ECO test provides the best indicator of whether the legal, regulatory, and economic conditions in a foreign market support competition such that our International Settlements Policy is no longer necessary to protect against abuse of market power by foreign carriers. Because non-WTO Member countries are not necessarily subject to the market forces and GATS obligations to which WTO Members are subject and the United States owes them no international obligation, we find that it would not serve the public interest to remove the ECO test as applied to those countries.

B. Modification of Contexts in Which ECO Analysis Applies

Background

133. In the *Foreign Carrier Entry Order*, we decided not to apply the ECO test to U.S. carrier interests in foreign carriers.[254] We also decided, in the *Foreign Carrier Entry Order*, to apply the ECO test on routes where a carrier that has market power is controlled by or under common control with an otherwise-affiliated foreign carrier.[255] We found that such indirect investments by affiliated foreign carriers raise anticompetitive dangers equivalent to those raised by direct investments. Telefónica Larga Distancia de Puerto Rico (TLD) and BT North America (BTNA) sought reconsideration of these issues, and we dispose of those petitions here. In the *Notice* in this *Foreign Participation* proceeding, we noted the pendency of the petitions for reconsideration and sought comment on whether we should, for purposes of countries that are not WTO Members, apply the ECO test to U.S. carriers that own more than 25 percent of, or control, a foreign carrier from a non-WTO country.[256]

Positions of the Parties

134. TLD argues that we adopted an unjustifiable double standard in applying the ECO test to foreign carriers' interests in third-country carriers but not to U.S.-based carriers' interests in any foreign carriers. TLD argues primarily that we should not apply the ECO test to destination markets where the affiliation results only from an affiliated foreign carrier's control of a third country's dominant carrier.[257]

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[254] *See id.* at 3912-13 ¶¶ 103-106.

[255] *See id.* at 3906 ¶ 87.

[256] *Notice* ¶ 57.

[257] Telefónica Larga Distancia de Puerto Rico, Inc., Petition for Reconsideration (IB Docket No. 95-22). TLD does not formally request reconsideration of our decision in the *Foreign Carrier Entry Order* to apply an ECO test to the destination market of a foreign carrier that has a greater-than-25-percent interest

The policy we adopted in the *Foreign Carrier Entry Order*, TLD argues, could discourage third countries from privatizing their telecommunications carriers and could discourage foreign carriers from participating in third countries' privatizations by taking away the possibility of carrying U.S. traffic to that third country. No developing country, TLD argues, will be able to privatize its telecommunications without offering a period of exclusivity. In its reply to oppositions to its petition, TLD proposes a narrower modification of our policy, suggesting that we should permit a foreign carrier to carry traffic on a route to a developing foreign country (despite its affiliate's exclusivity) where (1) the developing country has privatized a substantial portion of its telecommunications carrier; (2) U.S. competitors have had an equal opportunity to participate in the privatization and obtain exclusivity; and (3) a date certain is set to introduce effective competition.

135. Alternatively, TLD argues that we must apply the ECO test to U.S. carriers' investments in foreign carriers. It contends that our concerns with the potential for anticompetitive conduct are equally raised by U.S. carrier investments in foreign carriers and that treating U.S. carrier investments in foreign carriers differently from foreign carrier investments in third countries' carriers violates the Due Process Clause of the Fifth Amendment. Allowing U.S. companies to acquire controlling interests in foreign carriers without being subject to the ECO test, TLD contends, gives U.S. carriers an unfair and unjustified advantage in bidding on privatizations. U.S. carriers would value those third countries' carriers higher because they would be allowed to carry U.S. traffic to that country. The distinction, TLD argues, cannot be rationally justified by our goals in these proceedings.

136. BTNA argues that the Commission may have underestimated the extent to which U.S. carrier investment in dominant foreign carriers raises anticompetitive concerns. It argues that we should address our concerns regarding possible discriminatory conduct relating to equity relationships between U.S. carriers and dominant foreign carriers without regard to whether the U.S. carrier or the foreign carrier is making the investment.[258] WorldCom supports the application of the ECO test to U.S. carriers that hold a 25 percent or greater interest in a foreign carrier with market power from a non-WTO country. WorldCom states that the ECO test is appropriate because the potential for anticompetitive conduct is the same.[259]

137. In response, AT&T argues that the Commission was correct in determining that applying the ECO test to U.S. carriers' investments in foreign carriers would be unnecessary. AT&T states that it is unnecessary to apply the ECO test in those situations because U.S. carriers are subject to the Commission's jurisdiction, and to do so would decrease U.S. opportunities to invest abroad. AT&T argues that foreign carriers and investors have no equal protection rights to assert and that, even if they did, there would be no constitutional violation because the distinction between U.S. ownership and foreign ownership is fully

in a U.S. carrier. Although TLD opposed adoption of an ECO test for any foreign carrier entry, it requests reconsideration only of our decision to apply an ECO test to destination markets where a foreign carrier entrant's commonly controlled carriers have market power.

258 BT North America Inc. Petition for Reconsideration (IB Docket No. 95-22) at 4-5.

259 WorldCom Comments at 9.

justified. AT&T also opposes TLD's argument that we should not apply an ECO test to foreign carriers' interests in third-country carriers. AT&T argues that our main goal is liberalization, not just privatization, and that we should not encourage foreign carriers to pay premiums to get monopolies in third countries.[260]

Discussion

138. We note at the outset that these issues are moot for the great majority of the world's telecommunications markets. They remain relevant only to those countries to which we will continue to apply our ECO test — i.e., to non-WTO countries, which accounted for less than five percent of the world's telecommunications revenues in 1995.

139. Upon reconsideration and in light of the record and developments in the global telecommunications market since we adopted the *Foreign Carrier Entry Order* in 1995, we modify the application of the ECO test as follows. We will henceforth apply the ECO test without regard to whether the applicant, or its affiliate, is a U.S. carrier. We will continue, however, to apply the ECO test to a route whenever a carrier or its foreign affiliate controls, is controlled by, or is under common control with a carrier that has market power in a destination market, where that destination market is a non-WTO country.

140. As we discuss below,[261] our primary competitive concern in this proceeding is preventing carriers that control bottleneck facilities in foreign countries from using those bottlenecks to discriminate against unaffiliated U.S. carriers. Our experience since adopting the *Foreign Carrier Entry Order* indicates that there can be significant risks to competition when a U.S. carrier owns a controlling interest in a foreign carrier with market power. Furthermore, we anticipate that, in the more liberalized environment that will result from the WTO Basic Telecom Agreement, it will become increasingly difficult to define a "U.S. carrier" for the purpose of distinguishing between U.S.-carrier and foreign-carrier ownership of carriers. In light of those difficulties, we can no longer rely on our greater ability to redress anticompetitive conduct by U.S. carriers as compared to foreign carriers. Moreover, the GATS principle of National Treatment[262] obligates the U.S. Government to treat investments by carriers from WTO Member countries no less favorably than it treats investments by domestic carriers. We therefore modify our conclusion in the *Foreign Carrier Entry Order* and conclude that we will apply the ECO test where a U.S. carrier, or a

[260] AT&T Corp. Opposition to Petitions for Reconsideration (IB Docket No. 95-22) at 9-13. MCI also opposed TLD's petition. MCI Telecommunications Corporation Opposition (IB Docket No. 95-22). TLD asks us to strike MCI's Opposition on the ground that it was not served upon TLD as required by Section 1.429(f) of the Commission's rules, 47 C.F.R. § 1.429(f). Because we do not rely upon any of MCI's assertions or arguments made in that filing, we need not rule on this request by TLD.

[261] *See infra* ¶¶ 145-149.

[262] *See infra* ¶ 338.

company that owns more than 25 percent of a U.S. carrier, owns a controlling interest in a foreign carrier that has market power in a non-WTO country.[263]

141. We disagree with TLD that it does not serve our purposes to apply the ECO test to third countries. When a foreign carrier that controls bottleneck facilities controls, is controlled by, or is under common control with a carrier that is affiliated with a U.S. carrier, there is a danger that the bottleneck facilities will be used to discriminate against unaffiliated U.S. carriers. For example, if we were to adopt TLD's primary proposal, the U.S. affiliate of a foreign carrier that enters various markets through wholly owned subsidiaries would be able to serve all of those subsidiaries' routes without application of the ECO test. The other subsidiaries would have the ability and incentive to use their market power to discriminate against unaffiliated U.S. carriers by routing traffic in ways that take advantage of their market power.

142. Moreover, applying the ECO test to non-WTO countries will encourage non-WTO countries to open their markets to competition in addition to privatizing their telecommunications carriers. Because privatization without liberalization neither promotes competition nor reduces the risk of anticompetitive conduct, our goal is to encourage simultaneous privatization and liberalization. Developments in Guatemala, Chile, Brazil, and other countries indicate that the trend in privatizations is toward a very rapid transition to liberalization and procompetitive regulation. If the ECO test lowers the value of an exclusive arrangement in a privatization, it would thereby encourage simultaneous liberalization and privatization. Finally, our decision to apply the ECO test to U.S. carriers' investments in foreign carriers cures the alleged inequity cited by TLD.[264]

V. Regulatory Issues

A. Regulatory Approach

143. As noted above, we anticipate that the WTO Basic Telecom Agreement will spur competition across the globe and open foreign markets to U.S. carriers. Here in the United States, the open entry standard we adopt above will attract foreign entry into the U.S. market, to the benefit of U.S. consumers. Given our new open entry approach, the public interest mandates that we revisit the competitive safeguards governing foreign-affiliated carrier provision of basic telecommunications services in the U.S. market and, more broadly, U.S. carrier dealings with foreign carriers.[265] In particular, we

[263] *See infra* Appendix C (to be codified at 47 C.F.R. § 63.18(h)(5), (6)).

[264] Although we decline to adopt the general rule that TLD proposes in its Reply to Oppositions to Petition for Reconsideration for supporting developing countries' privatization efforts, we note that an applicant could raise such considerations as additional public interest factors in a particular case.

[265] We use the term "U.S. carrier" to refer to any carrier authorized to provide U.S. international services pursuant to Section 214 of the Act, regardless of the nationality of the carrier's ownership. A "foreign carrier" is defined in Section 63.18(h)(1)(ii) of our rules as "any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations . . . which includes

examine our rules preventing the exercise of foreign market power in the U.S. market. The regulatory framework we establish here modifies or eliminates rules that could hamper competition. We adopt a targeted approach designed to monitor and detect anticompetitive behavior in the U.S. market without imposing regulations that are more burdensome than necessary. In determining which competitive safeguards are necessary, we first identify what concerns arise when U.S. carriers enter into arrangements with foreign carriers. Next, we address the appropriateness of our existing safeguards and those we proposed in the *Notice*.

144. Concerns about potential anticompetitive conduct generally are triggered where one party has sufficient market power to cause harm to competition and consumers in the U.S. market. Consistent with Commission precedent, we define market power as a carrier's ability to raise price by restricting its output of services.[266] A carrier can raise prices profitably and sustain them above competitive levels, and thereby exercise market power, in two ways.[267] First, a carrier may be able to raise service prices by restricting its own output of that service; second, a carrier may be able to raise prices by increasing its rivals' costs or restricting its rivals' output through the control of an input that is necessary for the provision of service.[268] Our general regulatory framework has long addressed the ability of carriers to engage in both

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entities authorized to engage in the provision of domestic telecommunications services if such carriers have the ability to originate or terminate telecommunications services to or from points outside their country." 47 C.F.R. § 63.18(h)(1)(ii). We clarify here that we use the term "foreign carrier" regardless of national ownership. A "U.S. carrier," therefore, could refer to a wholly owned subsidiary of a foreign entity, while a "foreign carrier" could be a U.S.-owned entity.

[266] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142, ¶ 11 (rel. Apr. 18, 1997), *recon.*, FCC 97-229 (rel. June 27, 1997) (*LEC Regulatory Treatment Order*) (citing *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 83-481, Fourth Report and Order, 95 FCC 2d 554, 558 ¶ 7 (1983), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913, 13 S. Ct. 3020 (1993) (*Competitive Carrier Fourth Report and Order*)). In the *Competitive Carrier Fourth Report and Order*, the Commission defined market power alternatively as "the ability to raise prices by restricting output" and as "the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable." *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 558 ¶ 7. The 1992 Department of Justice/Federal Trade Commission Merger Guidelines similarly define market power as "the ability profitably to maintain prices above competitive levels for a significant period of time." 1992 Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) 20,569, 20,570; *see also LEC Regulatory Treatment Order* ¶ 11 n.26, ¶ 16 n.41.

[267] *See Notice* ¶ 88; *see also LEC Regulatory Treatment Order* ¶ 83.

[268] Economists have recognized these different ways to exercise market power by distinguishing between "Stiglerian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by restricting its own output, and "Bainian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by

types of behavior in the U.S. international services market.[269] We have found, however, that dealings with foreign carriers generally present concerns for the U.S. international services market that fall into the second category.[270] In the *Notice*, we noted that our concern regarding market power on the foreign end involves "the ability to act anticompetitively against unaffiliated U.S. carriers through the control of bottleneck services or facilities on the route in question."[271] We clarify that the regulatory framework we adopt here focuses in large part on dealings with foreign carriers that possess sufficient market power on the foreign end of a U.S. international route to affect competition adversely in the U.S. international services market. As we stated in the *Foreign Carrier Entry Order*, our regulatory concern involves the U.S. market for international telecommunications services, "*i.e.*, telecommunications services that originate or terminate in, or transit the United States . . . includ[ing] the U.S. market for global, seamless network

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raising its rivals' costs, thereby causing the rivals to restrain their output. *See* Thomas G. Krattenmaker, Robert H. Lande, & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 249-53 (1987).

269 We have imposed regulatory safeguards on carriers when they possess the ability to raise prices in the international services market by restricting their output of such services. *See International Competitive Carrier Policies*, CC Docket No. 85-107, Report and Order, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (*International Competitive Carrier*); *see also LEC Regulatory Treatment Order*. Our rules also address the ability of a U.S. carrier with market power in the local exchange market to discriminate or otherwise act anticompetitively against its rivals in the U.S. international services market. *See International Competitive Carrier*, 102 FCC 2d 812; *LEC Regulatory Treatment Order*; *see also* 47 U.S.C. § 272; *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21,905 (1996) (*Non-Accounting Safeguards Order*). We also have rules to prevent a carrier with market power on the foreign end of a U.S. international route from exercising that market power in the U.S. international services market. *See International Competitive Carrier*, 102 FCC 2d 812; *Regulation of International Common Carrier Services*, CC Docket No. 91-360, Report and Order, 7 FCC Rcd 7331 (1992) (*International Services Order*); *Foreign Carrier Entry Order*, 11 FCC Rcd 3873; *Implementation and Scope of the International Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (1986), *modified in part on recon.*, 2 FCC Rcd 1118 (1987), *further recon.*, 3 FCC Rcd 1614 (1988); *see also Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992); *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063 (Dec. 3, 1996) (*Flexibility Order*), *recon. pending*; *International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280 (rel. Aug. 18, 1997) (*Benchmarks Order*), *recon. pending*.

270 As we stated in the *Notice*, it is unlikely that a foreign carrier could possess sufficient market share in the U.S. international services market to raise price by restricting output of such service. *See Notice* ¶ 89. Given the competitiveness of the U.S. international services market, we believe this to be true whether the foreign carrier penetrates the U.S. market via new entry, investment or merger. Moreover, in the event that a foreign carrier would have the ability, upon entry or shortly thereafter, to raise the price of U.S. international service by restricting its own output, our domestic dominant carrier rules would apply. *See infra* note 434.

271 *See Notice* ¶ 6 (citing *Foreign Carrier Entry Order*, 11 FCC Rcd at 3917 ¶ 116).

services that increasingly are being used by U.S. businesses."[272] Our primary concern in this proceeding, however, involves the ability of U.S. carriers to terminate traffic on the foreign end of an international route.

145. Absent effective regulation in our market, we are concerned that a foreign carrier with market power in an input market on the foreign end of a U.S. international route has the ability to exercise, or leverage, that market power into the U.S. market to the detriment of competition and consumers. Firms with market power in an "upstream" input market can engage in discrimination in a "downstream" end-user market by favoring one downstream entity at the expense of its competitors. Where the upstream firm possesses market power, the downstream competitors have few, if any, alternative sources for the upstream input.[273] We find that the relevant input markets on the foreign end of a U.S. international route are the markets that involve services or facilities necessary for the provision of U.S. international services. These relevant markets generally include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end.[274] We are not persuaded by KDD's claim that, in examining foreign market power, we should consider only the control of *local exchange* facilities.[275] Nor are we convinced by GTE that our market power determinations should not consider the control of local exchange facilities in WTO Member countries.[276] Our concern extends to a carrier's control of any services or facilities market on the foreign end that could result in harm to competition in the U.S. market. We recognize that, for purposes of identifying the relevant geographic market for inter-city and local access facilities, it may be appropriate in some instances to examine a discrete geographic region rather than the national market of a foreign country.

146. We observed in the *BT/MCI Merger Order* that the exercise of foreign market power in the U.S. market could harm U.S. consumers through increases in prices, decreases in quality, or a reduction in

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[272] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3960-61 ¶ 230; *see also The Merger of MCI Communications Corporation and British Telecommunications plc*, GN Docket No. 96-245, Memorandum Opinion and Order, FCC 97-302, ¶¶ 56-57 (rel. Sept. 24, 1997) (*BT/MCI Merger Order*).

[273] *See BT/MCI Merger Order* ¶¶ 39-40 (citing Thomas G. Krattenmaker, Richard H. Lande, and Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 249-53 (1987); *LEC Regulatory Treatment Order* ¶ 83).

[274] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3917 ¶ 116 ("'Bottleneck services or facilities' are those that are necessary for the provision of international services, including inter-city or local access facilities on the foreign end."); *BT/MCI Merger Order* ¶ 43 (identifying six input markets in its merger review: (1) international transport between the United States and United Kingdom; (2) U.K. cable landing station access; (3) U.K. backhaul; (4) U.K. inter-city transport; (5) U.K. terminating access services; and (6) U.K. originating access services).

[275] *See* KDD Comments at 13; KDD Reply Comments at 7.

[276] *See* GTE Comments at 10.

alternatives in end-user markets.[277] More specifically, we discussed three anticompetitive strategies that could cause harm to competition in the downstream market: price discrimination, non-price discrimination, and price squeeze behavior. A foreign carrier with market power could engage in price discrimination by raising the price of the input to its downstream competitors, whether or not it raises the price to its own downstream partner (which, from the perspective of a fully integrated firm, pays economic cost regardless of the nominal transfer price of the input). A foreign carrier could engage in non-price discrimination by delaying its delivery of the input product to U.S. rivals while continuing to provide the input to its own U.S. partner on a timely basis. A foreign carrier also could degrade the quality of the input provided to U.S. rivals to such an extent that, in conjunction with its U.S. partner, it could price higher quality services at monopoly rates. In addition, a foreign carrier and its U.S. affiliate could engage in a predatory strategy — known as a price squeeze — to drive its U.S. rivals from the market.[278] Given these concerns, we are not persuaded by those commenters that argue we should rely on general antitrust law to protect competition and consumers in the U.S. market from anticompetitive behavior.[279] Rather, we agree with our tentative conclusion in the *Notice* that effective, narrowly tailored safeguards are necessary to prevent such harms to competition and consumers in U.S. markets.[280]

147. As we stated in the *International Services Order*, "foreign market power . . . can be abused with or without a U.S. affiliate."[281] In the increasingly global telecommunications market, unaffiliated entities may enter alliances that offer each other favorable treatment. As we discuss below, however, we find that a vertically integrated carrier or an ownership affiliation between a U.S. and a foreign carrier creates a heightened ability and incentive to engage in anticompetitive behavior. The regulatory framework we adopt, therefore, contains general safeguards that apply to all U.S. carriers' dealings with foreign carriers, as well as additional safeguards that apply to dealings between affiliated or merged carriers, where a heightened risk of anticompetitive conduct exists because of carriers' increased ability and incentive to engage in such behavior.

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277 *See BT/MCI Merger Order* ¶¶ 154-155 (citing Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (Dec. 1986); *see also* A.B.A. Section of Antitrust Law, *Antitrust Law Developments*, 330-33 (3d ed. 1992); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513 (1995); Martin Perry, *Vertical Integration: Determinants and Effects, in The Handbook of Industrial Organization* 183 (Richard Schmalensee & Robert Willig eds., 1989)); *see also Notice* ¶ 90.

278 *See BT/MCI Merger Order* ¶¶ 159-162. A price squeeze is a tactic by which a carrier with a foreign affiliate sets its prices for end-user services below the level of its imputed costs when providing service on an affiliated route because the price of an essential input, the settlement rate charged by its affiliate, is above the economic cost incurred by the foreign affiliate to provide international termination. *See infra* ¶ 192.

279 *See, e.g.*, Telstra Reply Comments at 10; FT Comments at 11.

280 *See Notice* ¶ 89.

281 *International Services Order*, 7 FCC Rcd at 7332 ¶ 6.

148. We believe that greater liberalization in foreign markets is the long-term solution to the risk that foreign market power may be leveraged into the U.S. market to the detriment of competition and U.S. consumers.[282] As countries fulfill their commitments to the WTO Basic Telecom Agreement, new entrants will make inroads into formerly monopolized markets and consumers will benefit from innovative services and price competition. We fully expect that, as competitive conditions improve in foreign markets, the need for some of our safeguards will diminish. We note that when market conditions preclude foreign carriers from leveraging market power to affect competition adversely in the U.S. market, we may further modify our safeguards. We already have in place a policy that permits alternative settlement arrangements where market conditions so permit.[283]

149. Commenters do not dispute our fundamental premise that market power on the foreign end of a U.S. international route — if unrestrained — could be leveraged into the U.S. market to the detriment of competition and U.S. consumers. To the extent that they disagree with the regulatory framework we adopt or the specific safeguards we apply, we address their concerns below. We conclude, however, that the competitive safeguards we adopt here are necessary to restrain the leveraging of foreign market power into the U.S. market and that they will do so without imposing overly burdensome regulation.

B. General Obligations on All U.S. International Carriers

1. "No Special Concessions" Rule

Background

150. In the *Foreign Carrier Entry Order*, we stated that the No Special Concessions rule prohibits all U.S. international carriers from agreeing to accept special concessions from any foreign carrier or administration.[284] We noted that we would entertain requests to waive the provision where the U.S. carrier could demonstrate that the foreign carrier granting the concession "lacks the ability to leverage

[282] *See id*. at 7332 ¶ 6; *see also Foreign Carrier Entry Order*, 11 FCC Rcd at 3880 ¶ 16 (stating that "full facilities-based competition on the foreign end of a U.S. international route is ultimately the most potent safeguard against anticompetitive effects from the entry of a foreign carrier in the U.S. international services market").

[283] *See Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063, FCC 96-459 (1996) (*Flexibility Order*); *see also infra* Section V.E.

[284] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3971-72 ¶ 257. Section 63.14 of the Commission's rules prohibits a U.S. international carrier from agreeing to accept special concessions directly or indirectly from any foreign carrier with respect to traffic or revenue flows. *See* 47 C.F.R. § 63.14. A "special concession" is defined as "any arrangement that affects traffic or revenue flows to or from the United States that is offered exclusively by a foreign carrier or administration to a particular carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route." *Id.* § 63.18(i)(1).

control over bottleneck services or facilities into the U.S. international services market."[285] We also stated that we would revisit our approach to regulating exclusive arrangements as foreign markets eliminated restrictions to entry and adopted competitive safeguards.[286] In the *Notice*, we observed that the WTO Basic Telecom Agreement is expected to open markets to competition throughout the world.[287] As a result, we proposed to apply the No Special Concessions rule in more targeted circumstances.

151. We tentatively concluded in the *Notice* that the No Special Concessions rule should be narrowed to prohibit exclusive arrangements only between a U.S. carrier and a foreign carrier that has market power on the foreign end of a U.S. international route.[288] We sought comment on whether a "bright-line" test exists that could identify a class of foreign carriers that do not raise market power concerns. Alternatively, we sought comment on whether to permit exclusive deals where the foreign carrier has market power in a country that has eliminated barriers to international facilities-based entry and licensed multiple international facilities-based carriers.

152. We also proposed to give greater specificity to the No Special Concessions rule by identifying the types of conduct that are prohibited. We requested comment on our proposal, as well as how to implement it in circumstances where the Commission has not made a specific market power determination for a particular foreign carrier.[289]

Positions of the Parties

153. The commenters are divided over our proposal to limit the rule to special concessions granted by a foreign carrier with market power. AT&T and New T&T Hong Kong support the proposal.[290] Several other commenters, however, contend that applying the rule to dealings with any foreign carrier that has market power in the destination country would be too broad.[291] NTT contends that

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[285] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3972 ¶ 258.

[286] *See id*. at 3971-72 ¶ 257.

[287] *See Notice* ¶ 115.

[288] *See id*.

[289] *See id*. ¶¶ 116-117.

[290] *See* AT&T Comments at 46; AT&T Reply Comments at 33; New T&T Hong Kong Comments at 4.

[291] *See, e.g.*, BTNA Comments at 5 (arguing that the rule should apply only to dealings between U.S.-licensed carriers and their foreign affiliates that hold a monopoly position in the provision of international facilities); MCI Comments at 6 (arguing that the rule should apply only to dealings with foreign carriers that do not face facilities-based competition); DT Comments at 28-29 (arguing that it is unnecessary to impose the rule on dealings with carriers from WTO Member countries and that the rule should apply only to dealings with foreign carriers that do not face multiple facilities-based competitors); FT Comments at 21 (arguing that the Commission should not use a market power test for carriers from

the rule should be imposed only as a remedy to address proven anticompetitive conduct.[292] Sprint argues that the rule should not be modified because the WTO Basic Telecom Agreement does not implicate it.[293]

154. In addition, some commenters assert that a market power threshold for application of the rule would be administratively burdensome.[294] GTE asserts that any market power determinations should not include a review of market share.[295] Deutsche Telekom argues that the Commission should specify the factors it will examine in making foreign market power determinations.[296] New T&T Hong Kong asserts that market power determinations should be based on U.S. antitrust law.[297] AT&T, which supports using a market power threshold, states that it cannot identify a bright-line test to distinguish carriers that possess market power from those that do not.[298] MCI and BTNA suggest that the bright-line test should be whether facilities-based competition exists on the foreign end.[299]

155. No commenters oppose our proposal to delineate the types of conduct prohibited by the rule. New T&T Hong Kong supports the proposal.[300] AT&T recommends that the rule be expanded to prohibit acceptance of exclusive arrangements involving "*any service* . . . affecting traffic or revenue flow to or from the United States" including, but not limited to, those arrangements identified in the *Notice*.[301] In contrast, MCI and Telmex assert that elements of the proposal may be overly restrictive.[302]

Discussion

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countries that allow competition and have committed to the WTO Basic Telecom Agreement's Reference Paper).

292 *See* NTT Reply Comments at 4.

293 *See* Sprint Comments at 28.

294 *See* Telstra Reply Comments at 5; Sprint Comments at 29.

295 *See* GTE Comments at 12.

296 *See* DT Comments at 27.

297 *See* New T&T Hong Kong Comments at 2.

298 *See* AT&T Comments at 46 n.77.

299 *See* MCI Comments at 8; BTNA Comments at 5 n.6.

300 *See* New T&T Hong Kong Comments at 4.

301 AT&T Comments at 46 (emphasis in original); *see also* AT&T Reply Comments at 33 n.53.

302 *See* MCI Reply Comments at 4 n.7; Telmex Comments at 5 n.13.

156. The No Special Concessions rule currently prohibits all U.S. carriers from entering into exclusive arrangements with any foreign carrier affecting traffic or revenue flows to or from the United States.[303] The Commission has recognized, however, that special concessions granted by a foreign carrier can serve the public interest in appropriate circumstances.[304] Such arrangements, for example, may involve innovative services or operational efficiencies that reduce the rates for U.S. international services or increase the quality of such services. We adopt a policy here that narrows our No Special Concessions rule in a way that will encourage such arrangements, provided they do not result in an unacceptable risk of harm to competition and consumers in the U.S. international services market. To strike an appropriate balance, we modify the rule so that it only prohibits U.S. carriers from agreeing to accept special concessions granted by foreign carriers that possess market power in a relevant market on the foreign end of a U.S. international route.[305]

157. Our competitive safeguards framework is intended to prevent the leveraging of foreign market power into the U.S. international services market.[306] In particular, we are concerned that an exclusive vertical arrangement between a foreign carrier with market power on the foreign end and a U.S. carrier (whether through ownership affiliation or contractual arrangement) could result in harm to competition and consumers in the U.S. market.[307] If a foreign carrier with market power were to enter into an exclusive arrangement, competing carriers on the foreign end, if any exist, might not have sufficient capacity to accommodate rival U.S. carriers' needs. Such an arrangement, therefore, could limit rival U.S. carriers' ability to provide international services, raise these carriers' costs of termination, or degrade the quality of their service offerings, to the ultimate harm of U.S. consumers.

158. By contrast, it is unlikely that an exclusive deal involving a foreign carrier that lacks market power would result in harm to competition and consumers in the U.S. market. Because the foreign carrier cannot restrict the supply of those services or facilities necessary for the provision of U.S. international services to such a degree as to raise prices, it cannot effectively leverage its market power into the U.S. market. A special concession granted by such a carrier would not unreasonably limit rival U.S. carriers' ability to provide international services. A special concession, moreover, generally would not raise U.S. rivals' costs or degrade their services. Such arrangements, therefore, would not raise competitive concerns. We thus adopt our proposal to limit the No Special Concessions rule to dealings between U.S. carriers and

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[303] *See* 47 C.F.R. § 63.14.

[304] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3971-72 ¶¶ 257-258.

[305] For a discussion of market power and relevant markets, see *supra* ¶¶ 144-145.

[306] *See supra* Section V.A.

[307] A vertical arrangement involves a relationship between two markets that can be thought of as vertically related, in the sense that one market provides an input to the other. *See BT/MCI Merger Order* ¶ 16 n.21.

foreign carriers that possess market power in a relevant market on the foreign end of an international route.[308]

159. We agree with several commenters, however, that contend that determinations of market power on the foreign end of an international route can involve extensive analysis.[309] We therefore sought comment in the *Notice* on whether a "bright-line" test exists to identify a class of foreign carriers that do not raise market power concerns. The record in this proceeding contains little input with regard to a bright-line test. MCI and BTNA suggest that we impose the rule on dealings with foreign carriers that do not face facilities-based competition.[310] We find, however, that foreign carriers with market power may retain the ability to engage in discriminatory behavior long after the entry of new competitors.

160. We nonetheless find that identifying a class of foreign carriers that are not subject to the No Special Concessions rule will reduce the need for parties to file petitions for declaratory ruling to determine whether it is permissible to enter into an exclusive arrangement with a particular foreign carrier. We agree with the comments of U S WEST that the rules we adopt should "enable carriers to establish quickly and accurately what international transactions, services, and practices are permissible."[311] We therefore conclude that identifying a class of foreign carriers that presumptively lack market power on the foreign end will provide U.S. carriers with greater certainty and expediency as they negotiate with their foreign counterparts. Any presumption should only identify a category of foreign carriers that, as a general matter, lack the ability to leverage foreign market power into the U.S. market. Any classification, moreover, should serve only as a rebuttable presumption.

161. Based on these objectives, we adopt a rebuttable presumption that foreign carriers with less than 50 percent market share in each relevant market on the foreign end lack sufficient market power to affect competition adversely in the U.S. market.[312] We recognize that market share is but one factor in a

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308 The rule we adopt here does not alter the International Settlements Policy (ISP) or our policy governing alternative settlement arrangements, see *infra* Section V.E. We reiterate our earlier finding that alternative settlement arrangements "create an exception to our [N]o [S]pecial [C]oncessions rule." *Flexibility Order*, 11 FCC Rcd at 20,084 ¶ 51. We note, however, that the competitive safeguards we adopted in the *Flexibility Order* continue to apply to any alternative settlement arrangement. *See infra* ¶ 308.

309 *See, e.g.*, Sprint Comments at 21, 29; Telstra Reply Comments at 5.

310 *See* MCI Comments at 8; BTNA Comments at 5 n.6.

311 U S WEST Comments at 8.

312 As note above, the relevant markets on the foreign end of a U.S. international route generally include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end. *See supra* ¶ 145.

traditional market power analysis.[313] A firm's control of available capacity on a particular route, for example, is an important component of any market power determination. On balance, however, we find that market share data is more readily available and will serve as a sufficient approximation of foreign market power for purposes of satisfying our rebuttable presumption. As the authors of the 1997 edition of the American Bar Association Antitrust Law Developments publication recently concluded, "[c]ourts virtually never find monopoly power when market share is less than about 50 percent."[314] We conclude, therefore, that for purposes of applying our competitive safeguards, we will create a rebuttable presumption that a foreign carrier with less than 50 percent market share in each of the relevant markets on the foreign end of a U.S. international route lacks sufficient market power to affect competition adversely in the U.S. market. In doing so, we decline to adopt GTE's generalized assertion that market share should not be considered in any market power determination.[315] We adopt a presumption to allow U.S. carriers to

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[313] Indeed, as we have stated with regard to market power analyses pertaining to dominant carrier status, a finding "cannot be made in scientifically precise terms. No factor by itself is determinative. Rather, it is necessary to determine if a firm has the ability to control prices." *International Competitive Carrier Order*, 102 FCC 2d at 830 ¶ 42.

[314] A.B.A. Section of Antitrust Law, *Antitrust Law Developments* at 235-236 (4th ed.) (1997); *see also id*. at 236 n.41 (citing, *inter alia*, cases holding that market share below 50 percent is insufficient to evidence market power, including *Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic,* 65 F.3d 1406, 1411 (7th Cir. 1995) ("Fifty percent is below any accepted benchmark for inferring monopoly power from market share"), *cert denied*, 116 S. Ct. 1288 (1996); *U.S. Anchor Mfg., Inc. v. Rule Indus. Inc.*, 7 F.3d 986, 1000 (11th Cir. 1993) ("we have discovered no cases in which a court found the existence of actual monopoly established by a bare majority share of the market"); *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 512 F.2d 1264, 1274 (9th Cir. 1975) (indicating that fifty percent market share is insufficient); *Cliff Food Stores v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969) (indicating that "something more than 50% of the market is a prerequisite to a finding of monopoly"); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 924 F. Supp. 1474, 1490-95 (N.D. Ohio 1996) (39 percent to 51 percent market shares insufficient); *Advanced Health-Care Servs., Inc. v. Giles Mem'l Hosp.*, 846 F. Supp. 488, 493-94 & n.9 (W.D. Va. 1994) (absent extraordinary circumstances, market share over 50 percent is required to show market power); *AT&T v. Delta Communs. Corp.*, 408 F. Supp. 1075, 1106 (S.D. Miss. 1976) (less than 50 percent market share insufficient), *district court opinion adopted and aff'd per curiam*, 579 F.2d 972 (5th Cir. 1978), *modified on other grounds*, 590 F.2d 100, *cert. denied*, 444 U.S. 926 (1979)). While other courts have held that higher levels of market share are insufficient to infer market power, *see, e.g.*, *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 201 (3d Cir. 1992) ("As a matter of law, absent other relevant factors, a 55 percent market share will not prove the existence of monopoly power."), *cert. denied*, 507 U.S. 921 (1993), the authors of the A.B.A. Antit. Law Devs. observe that "the greatest uncertainty exists when market shares are between 50 percent and 70 percent." *Antitrust Law Developments* at 236.

[315] *See* GTE Comments at 12. GTE argues that a foreign carrier may have a large market share because the market is too small to support competitors or because competitors may "not immediately be able to challenge that market share for reasons unrelated to actions of the incumbent." *Id*. While true, these assertions do not warrant a finding that market share should be disregarded in a market power analysis. To the contrary, case law on this issue lends support to our rebuttable presumption that foreign carriers with less than 50 percent market share in each relevant input market lack the ability to leverage market

accept special concessions granted by foreign carriers that possess less than 50 percent market share in each relevant market on the foreign end without first obtaining specific approval from the Commission.

162. We emphasize that the presumption we adopt here is rebuttable. While we require no prior approval, we note here that under Section 43.51 of our rules, U.S. carriers are required to file with the Commission contracts, operating agreements, and other arrangements with foreign carriers that involve, among other things, the exchange of services and the interchange or routing of traffic.[316] These agreements must be filed with the Commission within 30 days of execution and are routinely available for public review. The Commission and carriers, therefore, have the ability to examine these agreements. We will entertain petitions for declaratory ruling that demonstrate that a foreign carrier with less than 50 percent market share has the ability -- either unilaterally or in concert with other carriers -- to affect competition adversely in the U.S. market. If we find that a U.S. carrier has entered into an agreement that violates the No Special Concessions rule, the U.S. carrier will be required to terminate the arrangement or modify it to conform with our policies. We also will entertain petitions for declaratory ruling that demonstrate that a foreign carrier with a market share of 50 percent or more in any relevant market should be allowed to grant a special concession because it lacks the ability to affect competition adversely in the U.S. market. We will review these petitions under an appropriate economic analysis of market power.[317]

163. If a U.S. carrier seeks to use the under-50 percent market share presumption as the basis to accept a special concession from a foreign carrier, it must file data with the Commission to substantiate that claim for the relevant input markets on the foreign end of the international route.[318] This material

power into the U.S. market. *See supra* note 314.

[316] 47 C.F.R. § 43.51.

[317] *See supra* note 266. In previous decisions, our market power analysis has considered: (1) the foreign affiliate's market share in any relevant terminating market on the foreign end of the particular route; (2) the supply elasticity of the market; (3) the demand elasticity of that market's customers; and (4) the foreign affiliate's cost structure, size and resources. *See, e.g., IDC America, Inc., Application Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Non-interconnected International Private Line Service between the United States and Japan*, Order, Authorization and Certificate, DA 97-571, File No. ITC-96-685, ¶ 4 (Int'l Bur., Tel. Div. rel. Mar. 21, 1997) (citing *Motion of AT&T Corp. to be Declared Non-dominant for International Service*, Order, FCC 96-209, ¶¶ 37-79 (rel. May 14, 1996), *recon. pending*; *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3293-94 (1995)); *see also Merger Guidelines*, 4 Trade Reg. Rep. (CCH) at 20,570. In evaluating market power, the Commission has recognized that neither market share, by itself, nor lower costs, sheer size, superior resources, financial strength, and technical capability, by themselves, confer market power. Indeed, consistent with well accepted economic principles, market conditions related to demand and supply elasticities are the more crucial determinants of a firm's market power. These conditions include the availability of close demand substitutes and ease of entry and expansion.

[318] In the international services market, the U.S. carrier may use the following data to make its market share showing: the percentage of the foreign carrier's foreign-billed minutes or, if unavailable, foreign-billed

should be included in the U.S. carrier's Section 43.51 filing of the contract or agreement in question.[319] The U.S. carrier should rely on data compiled by regulatory authorities in the destination market or by international bodies. If such data is unavailable, the carrier may rely on information from industry sources, including the foreign carrier itself, supported by an affidavit from a representative of the U.S. carrier that the information relied upon is true and correct to the best of the representative's knowledge and belief. We reiterate that our market share screen serves only as a presumption that may be rebutted by a full-fledged analysis of the foreign carrier's market power in the relevant market on the foreign end.

164. We also tentatively concluded in the *Notice* that it would be beneficial to delineate the types of exclusive arrangements that the No Special Concessions rule prohibits. We proposed that the rule should prohibit any special concessions not offered to similarly situated U.S. carriers involving: (1) operating agreements for the provision of basic services; (2) distribution or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; (3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers; (4) any proprietary or confidential information obtained by the foreign carrier from competing U.S. carriers in the course of regular business activities with such U.S. carriers, unless specific permission has been obtained in writing from the U.S. carrier involved; and (5) arrangements for the joint handling of basic U.S. traffic originating or terminating in third countries.[320]

165. As an initial matter, we decline to adopt AT&T's proposal that the rule cover all types of services affecting traffic or revenue flows to or from the United States, including, but not limited to, those arrangements identified in the *Notice*.[321] AT&T's proposal would include non-basic telecommunications

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revenues on the relevant U.S. international route. In circumstances where the foreign carrier provides local exchange or exchange access service, the U.S. carrier may rely on the percentage of access lines provided by the foreign carrier in its franchise area and the percentage of all access lines in the nation that the franchise area represents. We find, as a general matter, that it is unlikely that a carrier would possess market power in the inter-city input market if it did not have market power in either the international transport or the local exchange or local access input markets. For purposes of the presumption, we therefore will not require a showing that the foreign carrier has less than 50 percent market share in the inter-city market. In addition, carriers may rely on the fact that the foreign carrier neither owns nor controls facilities in a relevant market on the foreign end of the international route. We note that participation in the U.S. market by foreign carriers that do not own or control telecommunications facilities in the foreign market is unlikely to raise market power concerns. *See, e.g., KDD America, Inc., Application for Authority under Section 214 of the Communications Act of 1934, as amended, to Resell Non-interconnected Private Line Services Between the United States and Various International Points,* Order, Authorization and Certificate, 11 FCC Rcd 10,828, 10,830 ¶ 7 (Int'l Bur. 1996).

319 *See* 47 C.F.R. § 43.51.

320 *See Notice* ¶ 117.

321 *See* AT&T Comments at 46.

services, and is far broader than necessary. We conclude that our No Special Concessions rule should be limited to exclusive dealings involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications service. Anticompetitive conduct involving these input markets, we conclude, can lead to harm to competition and consumers in the U.S. international services market. We find, moreover, that the record supports a narrower scope for the No Special Concessions rule than was proposed in the *Notice*. We conclude that the No Special Concessions rule should be limited in scope to prohibit any U.S. carrier from agreeing to accept from a foreign carrier with market power any special concession not offered to similarly situated U.S.-licensed carriers involving: (1) operating agreements for the provision of basic services; (2) distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; and (3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers.

166. We have decided not to adopt the proposal to specify a prohibition on special concessions involving the joint handling of basic U.S. traffic originating or terminating in third countries. We conclude that in this case specifying "joint handling" could well result in less, rather than more, clarity with respect to our No Special Concession rule. MCI, for example, is concerned that the No Special Concessions ban could be construed to prohibit switched hubbing.[322] This was not our intent in proposing the joint handling prohibition. We thus decline to specify a ban on exclusive arrangements involving the joint handling of basic U.S. traffic originating or terminating in third countries. We also decline to include in the No Special Concessions rule a specific prohibition on the receipt of proprietary or confidential information of a competing U.S. carrier obtained by a foreign carrier with market power. Instead, we address the confidentiality of competing carrier information more broadly below.[323]

167. In response to Telmex's claim that the No Special Concessions rule would prohibit "one-stop shopping," we clarify that the rule does not prevent a U.S. carrier and a foreign carrier from offering end-to-end services. It does, however, prohibit U.S. carriers from entering into exclusive arrangements with

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322 *See* MCI Reply Comments at 4 n.7. Our "switched hubbing" rule, 47 C.F.R. § 63.17(b), permits a U.S. carrier to route U.S.-outbound switched traffic over U.S. international private lines that terminate in equivalent countries, and then to forward that traffic to a third, non-equivalent country by taking at published rates and reselling the IMTS of a carrier in the equivalent country. The rule also permits U.S. carriers to route U.S.-inbound switched traffic in a similar manner. *See id*. We take this opportunity to reaffirm our switched hubbing rule, a rule that requires nondiscriminatory treatment and therefore addresses our concern regarding preferential arrangements between a U.S. carrier and a foreign carrier in the routing of traffic to or from third countries. *See generally Implementation and Scope of the International Settlements Policy for Parallel Routes,* CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (Feb. 7, 1986) (*ISP Order*), *modified in part on recon*., 2 FCC Rcd 1118 (1987) (*ISP Reconsideration*), *further recon.,* 3 FCC Rcd 1614 (1988); *see also Regulation of International Accounting Rates,* 6 FCC Rcd 3552 (1991), *on recon.,* 7 FCC Rcd 8049 (1992).

323 *See infra* Section V.B.2.a.

certain carriers for certain services. For example, a U.S. carrier cannot agree to enter an *exclusive* "one-stop shopping" arrangement in which the U.S. carrier acts as an agent on behalf of its U.S. customers in obtaining private line service from a foreign carrier with market power, where the foreign carrier refuses to recognize other U.S. carriers as agents. This type of exclusive arrangement would preclude competing U.S. carriers from serving an important segment of the U.S. international services market.

168. For the reasons discussed below, we are not persuaded by commenters' claims that applying the No Special Concessions rule to dealings with foreign carriers that possess market power would continue to impose restrictions on too many arrangements between U.S. carriers and foreign carriers. In particular, these commenters argue that use of market power as a threshold standard is too broad. Deutsche Telekom argues that the proposal would "stifle the development of innovative service and pricing arrangements to the detriment of U.S. consumers."[324] MCI claims that it could standardize all arrangements and inhibit the development of new services.[325] We disagree. As an initial matter, we find that the rule will encourage innovative services by providing U.S. carriers with a presumption that they may engage in exclusive arrangements with a well-defined class of foreign carriers. As we observed in the *Notice*, the WTO Basic Telecom Agreement is expected to result in the introduction of competition on the foreign end of major U.S. international routes.[326] New entrants in these markets, who will lack market power as a general matter, will offer U.S. international carriers more opportunities to enter into such arrangements. In contrast to Sprint's assertions, we therefore find that the WTO Basic Telecom Agreement warrants a review of the No Special Concessions rule. Moreover, the No Special Concessions rule allows U.S. carriers to enter into "non-standardized arrangements" with all foreign carriers -- including those that possess market power, provided that the same terms and conditions are available to other similarly situated U.S. carriers. In addition, our *Flexibility Order* allows U.S. carriers to enter into alternative settlement arrangements with any foreign carrier, subject to certain competitive safeguards[327] and our determination that the arrangement is consistent with our policy objectives.[328]

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324 DT Comments at 28.

325 *See* MCI Comments at 7.

326 *See Notice* ¶ 115.

327 To ensure that our flexibility policy does not have anticompetitive effects in the international market, we adopted the following safeguards: (i) alternative settlement arrangements between affiliated carriers and those involved in non-equity joint ventures affecting the provision of basic services must be filed with the Commission and be publicly available; and (ii) alternative arrangements affecting more than 25 percent of either the inbound or outbound traffic on a particular route must be filed with the Commission and be publicly available and must not contain unreasonably discriminatory terms and conditions. *See Flexibility Order*, 11 FCC Rcd at 20,061-63 ¶¶ 45, 48. We will continue to apply these competitive safeguards to alternative settlement arrangements. *See infra* Section V.E.

328 *See Flexibility Order*, 11 FCC Rcd at 20,087-88 ¶ 59.

169. We find, moreover, that several commenters' specific proposals to limit the rule would not be sufficient to prevent exclusive arrangements that create an unacceptable risk of harm to competition and consumers in the U.S. international services market. NTT, for example, contends that, given the reporting requirements proposed in the *Notice*, the Commission should only impose the No Special Concessions rule as a remedial measure to address proven anticompetitive conduct.[329] We agree with NTT's underlying premise that the reporting requirements we adopt below will serve to deter, monitor, and detect anticompetitive behavior in the U.S. international services market.[330] We also generally support a commitment to remedial measures rather than proscriptive safeguards, where feasible, as a means to reduce regulatory intervention in the market. For these reasons, we narrow the No Special Concessions rule to allow U.S. carriers to enter into exclusive arrangements where they are in the public interest. Where a significant risk of anticompetitive behavior exists, however, we find that targeted proscriptive restrictions such as the No Special Concessions rule are necessary.

170. We are not persuaded by other commenters' proposals to narrow application of the rule to arrangements with a class of foreign carriers more limited than those with market power. BTNA argues that we should adopt the rule as a supplemental safeguard, applicable only to dealings between U.S.-licensed carriers and their foreign affiliates that do not face international facilities-based competition.[331] Similarly, MCI argues that the rule should apply only to dealings between U.S.-licensed carriers and any foreign carriers that do not face international facilities-based competition. Deutsche Telekom and Telstra assert that the No Special Concessions rule should apply only to dealings with carriers from non-WTO Member countries. France Telecom claims that we should allow U.S. carriers to accept special concessions from foreign carriers, regardless of their market power on the foreign end, as long as the foreign country allows competition and has committed to the Reference Paper.[332] With regard to BTNA's claim, we note that unaffiliated carriers, as well as affiliated carriers, have incentives to enter into exclusive arrangements involving services and facilities on the foreign end that are necessary for the provision of U.S. international services. A threshold standard tied to affiliation, therefore, would not address many exclusive deals that raise substantial competitiveness concerns. More broadly, we do not adopt these proposals because, as AT&T notes, they "ignore[] the continued ability of incumbents with market power to engage in discriminatory behavior long after the entry of new competitors."[333] Regardless of the number of competitors in a foreign market or a country's commitment to liberalization, exclusive arrangements with foreign carriers that have market power may result in harm to competition and consumers in the U.S. market. We note, however, that we will entertain petitions for alternative settlement arrangements

329 *See* NTT Reply Comments at 4.

330 *See infra* Section V.C.2.b.(iv)-(vi).

331 *See* BTNA Comments at 5; *see also* DT Comments at 28-29.

332 *See* FT Comments at 21.

333 AT&T Reply Comments at 34.

consistent with our flexibility policy.[334] We will also consider other petitions asserting that an otherwise prohibited exclusive arrangement is in the public interest and should be allowed.

2. Foreign Market-Derived Confidential Information

a. Competing U.S. Carrier Information

171. We proposed in the *Notice* to adopt a No Special Concessions ban on a U.S. carrier's exclusive receipt of proprietary or confidential information obtained by a foreign carrier with market power in the course of its dealings with another U.S. carrier, unless specific permission had been obtained in writing from that U.S. carrier.[335] If this ban were adopted as part of the No Special Concessions rule, however, U.S. carriers could accept the confidential information of a competing U.S. carrier, provided the foreign carrier either lacked market power or made the information available to all similarly situated carriers on the U.S. end.[336] As a result, we find that preserving the confidentiality of competing U.S. carriers' information requires that we prohibit U.S. carriers from receiving such information from any foreign carrier absent permission, without regard to that foreign carrier's ability to exercise market power and without a provision allowing for non-discriminatory dissemination. We find that this general approach is consistent with our general policy governing the confidentiality of competing carrier information.[337] We thus prohibit U.S. carriers from receiving proprietary or confidential information obtained by *any* foreign carrier in the course of its regular business dealings with a competing U.S. carrier, unless the competing U.S. carrier provides its specific permission in writing. We clarify that, where a U.S. carrier is affiliated with a foreign carrier, the proprietary or confidential information of other U.S. carriers obtained by that foreign affiliate may not be used for any purpose other than for conducting the correspondent relationships with those U.S. carriers from which it obtained the information. We adopt this rule as a general requirement on all existing, pending, and future authorizations to provide U.S. international services.[338]

b. U.S. Customer Proprietary Network Information

172. We requested comment in the *Notice*[339] on whether a U.S. carrier's use of foreign market telephone customer information is subject to Section 222 of the Act and any rules that the Commission

[334] *See infra* Section V.E.

[335] *See Notice* ¶ 117.

[336] *See* 47 C.F.R. § 63.14.

[337] *Cf.* 47 U.S.C. § 222(a) (imposing a duty on "[e]very telecommunications carrier . . . to protect the confidential or proprietary information of, and relating to, other telecommunications carriers . . .").

[338] *See infra* Appendix C (to be codified at 47 C.F.R. § 63.21(f)).

[339] *See Notice* ¶ 106.

adopts to implement that provision.[340] In enacting Section 222, entitled "Privacy of Customer Information," Congress expressly directed a balancing of "both competitive and consumer privacy interests" with respect to customer proprietary network information (CPNI).[341] We examine foreign market telephone customer information in light of Section 222.

173. Several commenters oppose applying Section 222 to the use of foreign-derived CPNI. Sprint and SBC assert that foreign-derived customer information is not CPNI under Section 222.[342] Sprint argues that the Commission is not responsible for the privacy of such information, which pertains to foreign citizens and is within the jurisdiction of a foreign administration. To the extent the United States has any interest, Sprint claims, it relates solely to the possibility that unequal distribution of such information will harm competition in the United States.[343] AT&T asserts that a U.S. carrier's exclusive use of customer information derived from its foreign affiliate is within the Commission's authority.[344] SBC contends that applying Section 222 "would raise numerous foreign relations problems."[345]

174. USTA contends that rules governing foreign-derived CPNI are not necessary but argues that, if the Commission decides to move forward, "[i]t is absolutely vital that these rules be consistent with the domestic CPNI rules now under consideration."[346] USTA also asserts that the Commission should avoid imposing "onerous" customer approval procedures that would make it harder to provide one-stop shopping options or to notify customers of new products.[347] Sprint argues in favor of a case-by-case approach that would allow the Commission to ban the use of foreign market information where such information could

[340] *See* 47 U.S.C. § 222; *see also Implementation of the Telecommunications Act of 1996: Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, 11 FCC Rcd 12,513 (1996) (*CPNI Notice*).

[341] *See* Joint Statement of Managers, S. Conf. Rep. No. 104-230, at 205 (1996). The Act defines CPNI as "information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." 47 U.S.C. § 222(f)(1).

[342] *See* Sprint Comments at 24; SBC Comments at 5.

[343] *See* Sprint Comments at 24-25.

[344] *See* AT&T Reply Comments at 35 n.58.

[345] SBC Comments at 5-6.

[346] USTA Comments at 6; *see also* USTA Reply Comments at 5.

[347] USTA Comments at 6.

have an anticompetitive effect on a particular route.[348] AT&T concludes that it is unclear whether Section 222 applies to a foreign carrier's foreign market telephone customer information, but asserts that the Commission has the authority to require a U.S. affiliate to make available on a nondiscriminatory basis any foreign market telephone customer information it obtains from its foreign affiliate.[349]

175. We have issued a notice of proposed rulemaking to establish rules governing carrier use of CPNI pursuant to Section 222.[350] Our proposed rules, however, do not address the use of U.S. customer information derived from a foreign telecommunications market. We recognize here that *foreign customer* information derived from a foreign network is within the jurisdiction of foreign administrations, but we note that foreign carriers also may collect information about *U.S. customers* who either make international calls to, or receive calls from, the foreign country. We consider this U.S. customer information to be foreign-derived CPNI.[351] Absent effective safeguards, a U.S. carrier could acquire from a foreign carrier, and make use of, this information without obtaining the U.S. customer's consent. Use of this information raises concerns about U.S. customer privacy. We also find that the use of foreign-derived CPNI in the U.S. market could raise competitive concerns, as Sprint contends.[352] In particular, competition in the U.S. market might be harmed if a U.S. carrier were to gain exclusive access to CPNI generated by a foreign carrier through its monopoly control or near-monopoly control in a relevant market on the foreign end of a particular route. Rival U.S. carriers would have no alternative means to obtain similar information on that route. We conclude here that safeguards are necessary given the privacy concerns and anticompetitive effects that may result from the use of foreign-derived U.S. customer CPNI.

176. Section 222(a), by its terms, applies a duty on *every* telecommunications carrier to protect the confidentiality of customer information.[353] We find that this general obligation requires all U.S. carriers to protect individual U.S. customers' information, whether the information is U.S.- or foreign-derived. We are not persuaded that a case-by-case approach to banning the use of foreign-derived CPNI, as Sprint suggests, would address our concerns related to U.S. customer privacy. In response to the comments of

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348 *See* Sprint Comments at 25-26.

349 *See* AT&T Comments at 49 n.80; AT&T Reply Comments at 35 n.58.

350 *See CPNI Notice*, 11 FCC Rcd 12,513.

351 As noted above, the Act defines CPNI as information made available to the carrier by the customer by virtue of the carrier-customer relationship. *See* 47 U.S.C. § 222(f)(1). If a U.S. carrier collects information pertaining to a customer on the U.S. end, it would be subject to the rules to be enacted in our proceeding implementing Section 222(c) of the Act. *See CPNI Notice*, 11 FCC Rcd 12,513. Although a foreign carrier generally does not have a direct relationship with U.S. customers, it may have the ability to collect this information as it originates or terminates traffic to or from U.S. customers. If a foreign carrier collects this U.S. customer information on the foreign end of a U.S. international route, we consider this information to be foreign-derived CPNI.

352 *See* Sprint Comments at 25-26.

353 *See* 47 U.S.C. § 222(a).

USTA, we adopt rules governing foreign-derived U.S. customer CPNI that are consistent with Section 222 of the Act.[354] We therefore conclude that if a U.S. carrier desires to gain access to, or make use of, foreign-derived CPNI pertaining to a specific U.S. customer, it must first obtain approval from that customer.[355] In doing so, the U.S. carrier also must notify the customer that the customer may require the U.S. carrier to disclose the CPNI to unaffiliated third parties upon written request by the customer.[356] This requirement serves to alert the customer of its right to decide whether, in addition to the requesting carrier, it would like other carriers to gain access to the information. Taken together, these procedures balance Section 222's privacy and competitive issues. We find, moreover, that these conditions are not unnecessarily burdensome and will not prevent U.S. carriers from offering one-stop shopping options.

C. Competitive Safeguards for Affiliated Carriers

177. As we noted above, a U.S. carrier and a foreign carrier with market power on the foreign end of a particular route may have the ability, absent effective safeguards, to engage in anticompetitive behavior that results in competitive harms in the U.S. market.[357] Consistent with our previous decisions,[358] we find that an ownership affiliation between a U.S. carrier and its foreign counterpart significantly increases the ability and often the incentive to engage in such behavior. Anticompetitive strategies are easier to enact when carriers share common ownership; the incentive to do so, moreover, is frequently much greater when the profits from such behavior accrue to an affiliated or integrated entity. As we stated in the *Foreign Carrier Entry Order*, a foreign carrier can benefit directly by engaging in anticompetitive behavior that increases the profits of its U.S. affiliate when the profits are

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354 *See* USTA Comments at 6; USTA Reply Comments at 5.

355 We emphasize that the U.S. carrier may not use foreign-derived CPNI to select which U.S. customers it will seek approval from. Additionally, we clarify that where a U.S. carrier is affiliated with a foreign carrier that collects foreign-derived CPNI, the U.S. carrier may not permit access to, or make use of, the information for any prohibited use.

356 This approach is consistent with Section 222(c). *Cf.* 47 U.S.C. § 222(c)(1) (providing that a carrier can use CPNI only in the provision of the telecommunications service from which it was derived, except with the approval of the customer or as required by law); *id.* § 222(c)(2) (requiring a carrier to disclose CPNI to any person designated by the customer, upon written request by the customer). We recognize that Section 222(c)(1)(A) permits a carrier's use of CPNI "that [it] receives or obtains . . . by virtue of its provision of a telecommunications service," *see id.* § 222(c)(1)(A), whereas in the scenarios discussed in the text above, a U.S. carrier does not acquire the U.S. customer CPNI "by virtue of its provision of a telecommunications service," but rather from a foreign carrier. Nonetheless, customer approval for use of foreign-derived U.S. customer CPNI satisfies the carrier's duty to protect the confidentiality of customer information.

357 *See supra* Section V.A.

358 *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3902-03 ¶ 79; *see also International Services Order*, 7 FCC Rcd at 7332 ¶ 10.

passed through to the foreign carrier.[359] Similarly, a significant investment in a U.S. carrier can provide a foreign carrier with sufficient influence to entice the U.S. affiliate to engage in anticompetitive conduct in the U.S. market.

178. Because we find that affiliated carriers have a "heightened" ability and incentive to engage in anticompetitive behavior, we therefore apply additional safeguards to U.S. carriers on routes where they are affiliated with foreign carriers. We clarify that our decision here retains the "greater than 25 percent" ownership affiliation standard that we adopted in the *Foreign Carrier Entry Order*.[360]

1. Benchmark Conditions

Background

179. In the *Notice*, we observed that we had proposed in our *Benchmarks* proceeding to condition the facilities-based switched and private line authorizations of U.S. carriers to serve affiliated foreign markets on the affiliated foreign carrier offering U.S. carriers a settlement rate that is at or below the relevant settlement rate benchmark.[361] Following the release of our *Notice* we adopted the *Benchmarks Order*, which prohibits a U.S. carrier from offering facilities-based switched or private line service to an affiliated market unless its foreign affiliate charges a settlement rate to all U.S. carriers that does not exceed the relevant benchmark.[362] We concluded that this benchmark condition would reduce the ability of a U.S. facilities-based carrier to execute a "predatory price squeeze."

180. In an *Ex Parte* filed in the *Benchmarks* proceeding, AT&T argued that we should apply the facilities-based benchmark condition we proposed in the *Benchmarks Notice* to authorizations to provide switched resale service from the United States to an affiliated market.[363] AT&T attached to its *Ex Parte* its comments in this proceeding. We concluded in the *Benchmarks Order* that AT&T's argument was better

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[359] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3902-03 ¶ 79.

[360] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3967-68 ¶ 249. For purposes of determining a U.S carrier's regulatory treatment, we generally consider a U.S. carrier to be affiliated with a foreign carrier if a greater than 25 percent interest, or a controlling interest at any level, is held by a foreign carrier, or if the U.S. carrier holds an interest of more than 25 percent in, or controls, a foreign carrier. 47 C.F.R. § 63.18(h)(1)(i). As we stated in the *Foreign Carrier Entry Order*, we also may find that a U.S. carrier should be treated as an affiliate of a foreign carrier where there is a significant potential impact on competition, even if the investment falls below the 25 percent affiliation threshold. *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3906 ¶ 89, 3968 ¶ 250.

[361] *See Notice* ¶ 119 (citing *International Settlement Rates*, IB Docket No. 96-261, Notice of Proposed Rulemaking, FCC 96-484 (rel. Dec. 19, 1996)).

[362] *See Benchmarks Order* ¶¶ 195-231.

[363] Letter from James Talbot, AT&T, to William Caton, Acting Secretary, Federal Communications Commission, IB Docket No. 96-261 (July 10, 1997).

addressed in this proceeding, where we would have a more complete record on the issue of applying the benchmark condition to switched resale service.[364]

Positions of the Parties

181. Commenters for the most part raise the same arguments in this proceeding as they raised in our *Benchmarks* proceeding. As in the *Benchmarks* proceeding, some commenters support our settlement rate benchmark condition for authorizations to provide international facilities-based service from the United States to an affiliated foreign market, some oppose it on the ground that it is not necessary, and others seek to modify the condition because, they argue, it is not stringent enough. Some commenters also raise concerns, as they did in the *Benchmarks* proceeding, that the condition violates the United States' GATS obligations.

182. Certain commenters state that the benchmark condition is not necessary because foreign-affiliated carriers do not have the ability and/or incentive to execute a price squeeze.[365] Others contend that a benchmark condition is not necessary because market forces will force significant reductions in settlement rates without further regulatory intervention.[366] Some commenters argue that there are means to address potential anticompetitive behavior other than the benchmark condition.[367]

183. Several commenters also express a concern that the benchmark condition violates the United States' GATS obligations. Some contend that the condition constitutes a prohibited pre-entry restriction and will create a barrier to entry into the U.S. market.[368] Others argue that the condition is inconsistent

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[364] *Benchmarks Order* ¶ 230.

[365] Telefónica Internacional Comments at 7; Cable and Wireless Reply Comments at 4-6.

[366] *See, e.g.,* Telefónica Internacional Comments at 11; GTE Reply Comments at 24 (citing our *Foreign Carrier Entry Order* as support for the argument that competitive pressures and Commission policies have strengthened the ability of U.S. carriers to negotiate lower accounting rates); GTE Reply Comments at 20-21 (concerns about price squeeze are rooted in a static view of the world and ignore the fact that competitive pressures are increasing); Cable and Wireless Reply Comments at 6 (implementation of the WTO Basic Telecom Agreement will give U.S. carriers the right to enter foreign markets and provide end-to-end service in direct response to any anticompetitive conduct); *see also* TAS Comments at 2 (arguing that the benchmarks condition is inappropriate in light of multilateral reform efforts and that, because the benchmarks are themselves inappropriate, the benchmark condition is inappropriate).

[367] *See, e.g.,* GTE Reply Comments at 22-23 (arguing that our *Access Charge Reform Order* supports its argument that existing Commission reporting requirements and U.S. antitrust laws are sufficient to detect and address price squeeze behavior); Telstra Reply Comments at 10.

[368] *See, e.g.,* KDD Comments at 10; France Telecom Comments at 22-23; Japan Comments at 3; Viatel Comments at 7-8; Telstra Reply Comments at 9; Telefónica Internacional Comments at 12-13; Cable and Wireless Reply Comments at 7-8.

with the national treatment and/or Most Favored Nation ("MFN") principles of the GATS because, they argue, it is directed at foreign carriers.[369]

184. AT&T supports using the settlement rate benchmarks as an authorization condition to address price squeeze behavior by carriers serving affiliated markets.[370] However, AT&T contends that we should condition a carrier's authorization to serve an affiliated market on that carrier's foreign affiliate offering U.S. carriers a cost-based settlement rate, rather than a settlement rate at or below the relevant benchmark.[371] AT&T further argues that we should apply the same condition we proposed in the *Benchmarks Notice* for authorizations to provide facilities-based switched service from the United States to an affiliated market to authorizations to provide switched resale service from the United States to an affiliated market. AT&T submits an affidavit of William Lehr which argues that the same ability and incentives to engage in a price squeeze that exist with respect to facilities-based service to affiliated markets apply with equal force to the provision of switched resale to affiliated markets.[372] According to AT&T, because resale entry has major advantages over facilities-based entry, application of the benchmark condition to the provision of switched resale services to affiliated markets is especially imperative.[373]

185. AT&T further argues that the benchmarks condition is necessary to address the incentive of foreign-affiliated facilities-based carriers and switched resellers to distort traffic flows from the U.S. market. Specifically, AT&T argues that a foreign-affiliated carrier providing service in the U.S. market could distort traffic flows in two primary ways: (i) by participating in a call turnaround scheme to turn the U.S.-inbound calls of its foreign affiliate into U.S.-outbound calls; and (ii) by re-originating from the United States calls from a third country.[374] AT&T states that these traffic distortion schemes would harm

[369] *See, e.g.*, KDD Comments at 10; Viatel Reply Comments at 9; GTE Reply Comments at 21; Sprint Comments at 29; Telefónica Internacional Comments at 29.

[370] AT&T Comments at 24-30.

[371] *Id.*; *see also* MCI Comments at 3; Letter from Sanford C. Reback, Larry A. Blosser, Scott A. Shefferman to Magalie Roman Salas, Secretary, FCC, IB Docket No. 97-142 (November 17, 1997) at 2 (MCI November 17 *Ex Parte*) (arguing that the benchmark condition should apply to the switched resale authorization of any carrier whose foreign affiliate carries more than 25 percent of the traffic on the route between its home country and the United States, or where there is control of bottleneck facilities or services on either end of the route).

[372] AT&T Comments, Attachment 3: Affidavit of William H. Lehr on Behalf of AT&T Corp. ("Lehr Affidavit").

[373] AT&T Comments at 32; Lehr Affidavit at 16-18.

[374] AT&T October 27 *Ex Parte* at 18-20.

consumers by increasing U.S. net settlement payments. This increase would, according to AT&T, increase U.S. carriers' marginal costs, which in turn would put upward pressure on calling prices.[375]

186. AT&T proposes that if the Commission does not apply the benchmarks condition for service to affiliated markets adopted in the *Benchmarks Order* to switched resellers, the Commission should "require the foreign affiliate to charge usual (i.e., benchmark glidepath) settlement rates for its existing traffic, *and* the "best practice" settlement rate for incremental minutes (i.e., minutes above levels consistent with the existing industry outbound-inbound traffic ratio)."[376] AT&T states that this condition would reduce but not eliminate a foreign-affiliated carriers' incentives to engage in settlement manipulation activities. WorldCom and MCI make similar proposals. WorldCom argues that the Commission should condition authorizations to provide switched resale service to an affiliated market on the switched reseller's foreign affiliate "(1) committing to abide by the transition schedules and proportional glide-path requirements set forth in the FCC's *Benchmarks Order*; and (2) within 90 days of the grant of authority, entering into unconditional commercial agreements complying with the *Benchmarks Order*."[377] MCI similarly proposes that the Commission condition switched resale authorizations on the foreign carrier entering into a binding contractual commitment with U.S. carriers that it will reduce its settlement rate to the applicable benchmarks by the date established in the *Benchmarks Order* and make a binding commitment to undertake proportionate annual reductions in its settlement rates.[378] WorldCom states that its proposal recognizes the distinction between the potential for market distortion by facilities-based and switched resale entry.[379] WorldCom and MCI also state that allowing foreign carriers to enter the U.S. market without making a commitment to comply with the settlement rate benchmarks would undermine the *Benchmarks Order* by creating a disincentive for foreign carriers to negotiate lower accounting rates.[380]

187. Cable and Wireless opposes AT&T's request that we extend the benchmarks condition to the provision of switched resale services. Cable and Wireless states that the condition is not necessary, as evidenced by the fact that it and other carriers have been providing switched resale services for years

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375 Letter from Judy Simonson to Magalie Roman Salas, Secretary, FCC, IB Docket No. 97-142, FCC File No. ITC 97-127 (November 18, 1997) at 10-11 (AT&T November 18 *Ex Parte*).

376 *Id.* at 2.

377 Letter from Robert S. Koppel to Magalie Roman Salas, Secretary, FCC, IB Docket No. 97-142 November 18, 1997) (WorldCom November 18 *Ex Parte*).

378 Letter from Sanford C. Reback, Larry A. Blosser, Scott A. Shefferman to Magalie Roman Salas, Secretary, FCC, IB Docket No. 97-142 (November 18, 1997) at 1 (MCI November 18 *Ex Parte*).

379 WorldCom November 18 *Ex Parte*.

380 *Id.*; MCI November 17 *Ex Parte* at 1.

without evidence of price squeeze behavior.[381] AT&T dismisses this argument, countering that Cable and Wireless' regulation as a dominant carrier and its position as one of a few U.S.-licensed carriers with a foreign affiliate made it unlikely to attempt to engage in anticompetitive behavior.[382]

188. Cable and Wireless further states that extending the condition would undermine competition in the U.S. market by preventing future competitors from providing service and forcing existing competitors to cease providing service.[383] Such a result, Cable and Wireless argues, would undermine competition in the U.S. IMTS market and be disruptive to customers of existing carriers.[384] It cites its own operations as an example of the potential impact of extending the condition to switched resale services. It states that if the condition is applied to switched resale services, Cable and Wireless would effectively be forced to discontinue service to several countries, which would have a severe financial impact on the company.[385] AT&T disputes this claim. It contends that Cable and Wireless is essentially arguing that, unless Cable and Wireless' foreign affiliates can continue to receive above-cost settlement payments from U.S. carriers, Cable and Wireless cannot continue to provide service to affiliated markets.[386] AT&T concludes that this cannot be true, given that Cable and Wireless is "a highly profitable corporation."[387]

189. Cable and Wireless further argues that there are several differences between the facilities-based and switched resale markets that make application of the condition to switched resale services unnecessary or undesirable.[388] First, it contends that the competitive impact of applying the condition

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381 Letter from Robert J. Aamoth and Joan M. Griffen to William Caton, Acting Secretary, FCC, IB Docket No. 97-142 (October 10, 1997) at 1-2 (Cable and Wireless October 10 *Ex Parte*); *see also* Letter from Alfred M. Mamlet and Colleen A. Sechrest to William Caton, Acting Secretary, FCC, IB Docket No. 97-142 (October 28, 1997) at 2-3 (Telefónica Internacional October 28 *Ex Parte*); Letter from Hance Haney to William F. Caton, Acting Secretary, FCC, IB Docket 97-142 (November 14, 1997) at 2 (USTA November 14 *Ex Parte*).

382 Letter from Kristen Thatcher to William Caton, Acting Secretary, FCC, IB Docket No. 97-142 (October 27, 1997) at 16 (AT&T October 27 *Ex Parte*).

383 Cable and Wireless October 10 *Ex Parte* at 2-4; *see also* USTA November 14 *Ex Parte* at 1. Cable and Wireless also contends that the Commission lacks adequate notice to apply the condition to existing Section 214 resale authorizations. Cable and Wireless October 10 *Ex Parte* at 20.

384 *Id*. at 4-5; *see also* Telefónica Internacional October 28 *Ex Parte* at 5-6.

385 *Id*. at 4. Cable and Wireless states that it serves nearly 80,000 customers in the United States, 50% of which made at least one call to a Cable and Wireless-affiliated country in the last three months.

386 AT&T October 27 *Ex Parte* at 15.

387 *Id*.

388 *Id*. at 6-7. Cable and Wireless also opposes the settlement rate benchmark condition for the provision of facilities-based and private line services to affiliated markets we adopted in the *Benchmarks Order*. But,

would be much greater for switched resale services. Second, it claims that it would be easier to detect a price squeeze strategy in the switched resale context because the Commission and underlying facilities-based carriers know, or can easily ascertain, the wholesale rates that the switched resale carrier pays to the underlying facilities-based carrier.[389] AT&T and MCI disagree, arguing that there are certain factors that make monitoring of wholesale prices difficult.[390] Third, Cable and Wireless states that a switched reseller has less incentive to engage in a below-cost pricing scheme because it is less likely such a scheme would be profitable. The reasons for this, according to Cable and Wireless, are that a resale carrier normally will have higher costs and lower margins than a facilities-based carrier serving the same route and, unlike a facilities-based carrier, a resale carrier does not qualify for return traffic from its foreign affiliate.[391] Finally, it states that a below-cost pricing strategy would cause the underlying facilities-based carrier to raise the wholesale rates it charges to the resale carrier because increased traffic from the resale carrier would increase the net settlement payments of the underlying facilities-based carrier. This would in turn raise the costs of the switched reseller as it gains market share from its below-cost pricing.[392] AT&T, on the other hand, contends that, because of the intensity of wholesale competition among facilities-based carriers, the reseller's facilities-based carrier is unlikely to raise wholesale prices.[393] AT&T further argues that even if a reseller's wholesale prices did increase, the increase might be offset by return traffic to the switched reseller's foreign affiliate.[394]

190. Cable and Wireless also disputes the Lehr Affidavit submitted by AT&T, arguing that the price squeeze theory articulated in that affidavit rests on several assumptions, including the margins in the U.S. market, whether competing carriers will match price reductions, and the degree of demand elasticity in the U.S. market, that have not been substantiated.[395] It further argues that the Lehr Affidavit is not credible because it does not take into account the differences between the switched resale and facilities-based

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as discussed above, comments on the facilities-based condition adopted in the *Benchmarks Order* are outside the scope of this proceeding.

389 *See also* Telefónica Internacional October 28 *Ex Parte* at 4-5.

390 AT&T October 27 *Ex Parte* at 4; *see also* MCI November 17 *Ex Parte* at 2.

391 *See also* Telefónica Internacional October 28 *Ex Parte* at 4; Letter from F. Gordon Maxson to William F. Caton, Acting Secretary, FCC, IB Docket No. 97-142 (November 18, 1997) at 1 (GTE November 18 *Ex Parte*).

392 *Id*.

393 AT&T October 27 *Ex Parte* at 13 (this argument is contained in a surrebuttal by William Lehr contained in AT&T's *Ex Parte* filing).

394 *Id*. n.20.

395 *Id*. at 11-15; *see also* Telefónica Internacional Reply at 15-20 (the assumptions underlying AT&T's model of price squeeze do not "hold true").

markets.[396] Cable and Wireless also argues that applying the settlement rate condition to switched resale services would violate the United States' GATS commitments, contravene the equal protection provisions of the Fifth Amendment, constitute an unlawful taking under the Fifth Amendment, and be inconsistent with the Commission's domestic policies.[397]

Discussion

191. In the *Benchmarks Order*, we concluded that we should condition authorizations to provide facilities-based switched or private line service to an affiliated market on compliance with the benchmark settlement rates. We concluded that this authorization condition is necessary to reduce the ability of carriers serving affiliated markets to execute a predatory price squeeze. We do not revisit those conclusions here. Nor do we address the comments filed in this proceeding on the authorization condition for facilities-based service to affiliated markets. Because we explicitly stated in the *Notice* that we would decide whether to adopt the conditions in the *Benchmarks* proceeding, comments on the condition filed in this proceeding are outside the scope of the issues raised in the *Notice*.[398] However, because the authorization condition is an important element of the new regulatory scheme we adopt in this *Order*, we describe the condition here.[399] We also address AT&T's request that we extend the facilities-based condition to cover the provision of resold switched services to affiliated markets. In our *Benchmarks Order*, we deferred consideration of AT&T's request to this proceeding.

a. Benchmark Condition for Facilities-Based Service to Affiliated Markets

192. The settlement rate benchmark condition we adopted in the *Benchmarks Order* is intended to reduce the ability of U.S.-licensed carriers to engage in a predatory price squeeze, *i.e.*, to price below the level of its imputed costs, when providing service to an affiliated foreign market.[400] Pursuant to the *Benchmarks Order*, we will condition an authorization to serve an affiliated market on the foreign carrier offering U.S.-licensed international carriers a settlement rate for the affiliated route at or below the relevant

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396 Cable and Wireless October 10 *Ex Parte* at 8.

397 *Id*. at 17-24; *see also* Telefónica Internacional October 28 *Ex Parte* at 6-7 (condition would be unconstitutional and would compromise key GATS principles).

398 KDD states that the Commission's "decision to issue apparently identical settlement rate proposals in two different proceedings is confusing." KDD Comments at 11. We specifically stated in the *Notice*, however, that the settlement rate benchmarks conditions would be considered in the *Benchmarks* proceeding. *Notice* ¶ 119.

399 We clarify that we do not address in this section the benchmarks condition for the provision of switched services over private lines adopted in the *Benchmarks Order*. That benchmarks condition is discussed *supra* in Section II.B.2.

400 For a discussion of the ability of a foreign affiliated facilities-based carrier to execute a predatory price squeeze, see *Benchmarks Order* ¶¶ 195-231.

benchmark adopted in the *Benchmarks Order*.[401] Requiring that a carrier's settlement rates be at or below the relevant benchmark before its U.S. affiliate may provide facilities-based service to an affiliated market substantially reduces the above-cost settlement rates that could be used to execute a price squeeze. It does not, however, completely eliminate the ability of a carrier to execute a price squeeze because the settlement rate benchmarks we adopted in the *Benchmarks Order* are still above-cost. We therefore decided in the *Benchmarks Order* that we will take enforcement action if, after the U.S.-licensed carrier has commenced service to the affiliated market, we discover that the carrier has attempted to execute a predatory price squeeze or engaged in other anticompetitive behavior that distorts market performance. That action may include a requirement that the foreign affiliate reduce its settlement rate for the route to a level equal to or below the best practices rate we adopted in the *Benchmarks Order*, $0.08, or a revocation of the authorization of the carrier to serve the affiliated market. We adopted a rebuttable presumption in the *Benchmarks Order* that a carrier has distorted market performance if any of the carrier's tariffed collection rates on the affiliated route are less than the carrier's average variable costs on that route.

b. Consideration of Benchmark Condition for Switched Resale Service to Affiliated Markets

193. We now turn to the issue of whether to apply our benchmark condition to authorizations to provide switched resale service from the United States to an affiliated market, which we did not resolve in the *Benchmarks Order*. A switched reseller normally takes service from an underlying facilities-based carrier at a generally-available tariffed rate reflecting a volume discount, and then resells that service to end-user customers. The underlying facilities-based carrier is responsible for all settlement payments and receives all proportionate return traffic.

194. We decline to apply the settlement rate benchmark condition to switched resale providers. Our goal in this proceeding is to adopt a regulatory framework that is narrowly tailored to address identifiable harms to competition and consumers in the U.S. market. We, therefore, approach critically any request for conditions that would impose additional burdens on the manner in which companies could provide service to the U.S. market and thereby provide consumers with additional choices. We concluded in our *Benchmarks Order* that there exists a danger of anticompetitive effects resulting from the ability of a facilities-based U.S. affiliate of a foreign carrier to "price squeeze" its competitors because of its relationship with the foreign affiliate. We do not find that the same danger of anticompetitive effects results from a switched reseller's provision of service to an affiliated market. We decline, therefore, to adopt AT&T's proposal that we apply the benchmarks condition to the provision of resold switched services.

195. We find that such a condition is unnecessary for two reasons. First, a switched reseller has substantially less incentive to engage in a predatory price squeeze strategy than a facilities-based carrier. Second, it is easier to detect a predatory price squeeze in the switched resale context than in the facilities-

[401] In the *Benchmarks Order*, we found that we have authority to establish and enforce settlement rate benchmarks under Sections 1, 2, 4(i), 201, 205, 214 and 303(r) of the Communications Act, 47 U.S.C. §§ 151, 152, 154(i), 201, 205, 214, 303(r).

based context. Easier detection should deter switched resellers from attempting a predatory price squeeze and will allow the Commission or other authorities to take action in the event a carrier does attempt a predatory price squeeze. We explain each of these reasons in more detail below. We also believe the benefits to consumers of additional new entrants and existing switched resale providers in the U.S. market outweigh the minimal risk to competition from a possible predatory price squeeze or other anticompetitive behavior by a switched resale provider providing service to an affiliated market.

196. We also decline to apply the settlement rate benchmark conditions proposed by WorldCom and MCI. The conditions proposed by WorldCom and MCI would require that a switched reseller's foreign affiliate commit to abide by the transition schedules and proportional glide-path requirements set forth in the FCC's *Benchmarks Order*.[402] We decline to adopt WorldCom and MCI's proposed conditions for the same reason we do not apply the condition adopted in the *Benchmarks Order*: they are not necessary or appropriate to address a concern about anticompetitive behavior in the U.S. market. As discussed in more detail below, we conclude that the provision of switched resale services to affiliated markets does not raise the same competitive concerns as the provision of facilities-based service to affiliated markets. WorldCom and MCI state that allowing foreign carriers to enter the U.S. market without making a commitment to comply with the settlement rate benchmarks would undermine the *Benchmarks Order* by creating a disincentive for foreign carriers to negotiate lower accounting rates. The safeguards we adopt in this *Order* and the settlement rate benchmark conditions we adopted in the *Benchmarks Order* are designed to address competitive concerns in the U.S. market. Where conditions are not necessary to address such concerns, we do not believe they are appropriate. As we stated in the *Benchmarks Order*, we will take appropriate enforcement measures as may be necessary to ensure that U.S. carriers satisfy our benchmark requirements. Our action in this proceeding does not undermine our commitment to achieving compliance by U.S. carriers with our benchmarks.

197. We also find, contrary to AT&T's argument, that there is no evidence that affiliation status significantly exacerbates the potential for traffic distortions. At most, an affiliate relationship could facilitate arrangements that may result in traffic distortions. We thus conclude that the settlement rate benchmark condition would not be an appropriate safeguard against such potential traffic distortions. Nevertheless, to monitor whether switched resale entry into the U.S. market exacerbates the potential risk of traffic distortions, we will apply a quarterly traffic and revenue reporting requirement to switched resale carriers where they are affiliated with a foreign carrier that possesses sufficient market power in the foreign market to adversely affect competition in the U.S. market.

i. Incentive to Engage in a Price Squeeze Strategy

198. We address first our conclusion that a switched reseller lacks significant incentives to engage in a predatory price squeeze strategy. AT&T argues that a U.S.-licensed carrier providing switched resale services to an affiliated market has the same ability and incentive to execute a price squeeze against

[402] WorldCom November 18 *Ex Parte*; MCI November 18 *Ex Parte* at 1.

competitors in the U.S. market as a facilities-based carrier providing service to an affiliated market.[403] We agree with AT&T that a U.S.-licensed carrier providing switched resale services to an affiliated market has the ability to price its retail services below the level of its imputed costs. We disagree, however, with AT&T's contention that the threat of a predatory price squeeze is the same in the switched resale context as it is in the facilities-based context. For the reasons described below, we believe that a switched resale carrier has less of an incentive than a facilities-based carrier to attempt a price squeeze that aims to foreclose competition in the IMTS market on an affiliated route.

199. An integrated carrier may attempt a predatory price squeeze if it expects that it can subsequently raise price while foreclosing subsequent entry by new competitors. However, a switched reseller generally can neither force competitors to exit nor prevent subsequent entry. This is because a switched resale provider does not control the underlying international facilities over which it provides service.[404] The lack of control over facilities means that it would be impossible for a switched reseller to force all facilities-based carriers to cease serving a route permanently. Because existing facilities are sunk investments, it is implausible that they would be abandoned. If a facilities-based carrier were forced to exit as a result of the predatory strategy of a competing facilities-based carrier, the predating facilities-based carrier could take control of the exiting carrier's facilities. However, a switched reseller by definition cannot acquire facilities without itself becoming a facilities-based carrier subject to the benchmark condition.[405] Moreover, because a reseller must purchase wholesale service from a facilities-based carrier, there will always be at least one facilities-based carrier in the market from whom the reseller has to buy wholesale service. In such a circumstance, the underlying facilities-based carrier, not the reseller, is best positioned to benefit from the exclusion of competition. The underlying facilities-based carrier could either profitably raise the price of the wholesale service it sells to the preying switched reseller, or, if it had the capability to offer retail service, profitably enter or re-enter the retail market for that route.

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403 AT&T Comments at 31-32.

404 Even where a switched reseller has an affiliation or a common business interest with the underlying facilities-based carrier, the switched reseller's lack of control over the underlying facilities makes a predatory strategy highly unreliable. This is because if the switched reseller were successful in driving all other competitors out of the market, the underlying facilities-based carrier would have a strong incentive to break its alliance with the preying switched reseller and benefit from the lack of competition by raising the price of the wholesale service it provides to the preying switched reseller or by entering the retail market itself and charging a supra-competitive price. To the extent that a switched reseller's affiliation with a facilities-based carrier may create a significant potential for a price squeeze in an individual circumstance, we can impose the benchmarks condition, or some other condition, on that reseller's authorization. *See infra* ¶ 214 (noting that we reserve the right to impose additional conditions on individual authorizations, as necessary).

405 It is conceivable that a predatory price squeeze executed by a reseller might result in a more concentrated ownership of facilities, if, for example, a facilities-based carrier sells its facilities to the carrier that provides service to the predating reseller. To the extent the facilities-based carrier providing service to the predating reseller increases its market power in the wholesale market, however, it will have the incentive and ability to charge a higher wholesale price to the predator, thus increasing the predator's cost and making recoupment less likely.

200. The lack of control over facilities also means that it would be difficult for a switched reseller to impede resale entry. Resellers provide price discipline in the market because they can enter on short notice and with minimal financial risk. Unlike a facilities-based provider, a switched reseller is fully dependent upon an underlying facilities-based carrier that is under a legal obligation as a common carrier to provide wholesale service to any and all resellers on a nondiscriminatory basis. Thus, a reseller that attempts to execute a predatory price squeeze would be unable to prevent new switched resale entrants from easily entering the market and defeating the predatory strategy. Further, the lack of control over facilities would make it substantially more difficult for a switched reseller to deter future entry by both facilities-based carriers and resellers. A predating switched reseller is unlikely to be able to command sufficient network capacity to credibly convince potential new entrants that they will be driven from the market by predatory pricing. Given that a switched reseller generally can neither force competitors to exit nor prevent subsequent entry, we conclude that a switched reseller has less of an incentive than a facilities-based carrier to attempt a price squeeze that aims to foreclose competition in the IMTS market on an affiliated route.

201. AT&T argues that a switched reseller, as well as a facilities-based carrier, would have the incentive and ability to engage in a price squeeze without subsequently raising calling prices. It argues that a U.S.-licensed carrier would benefit from permanently pricing below its imputed costs because such a pricing strategy would generate additional settlements profits to its foreign affiliate by stimulating demand from the U.S. market to the affiliated market.[406] These additional settlements profits, according to AT&T, would more than offset a carrier's losses from engaging in below-cost pricing. We are not convinced by AT&T's argument. As an initial matter, it is not clear that the pricing behavior AT&T describes would harm consumers because, under the scenario AT&T describes, calling prices would remain low permanently. Moreover, even if the price squeeze strategy AT&T describes would harm consumers, we are not convinced that the strategy would be successful for the predating carrier.

202. AT&T's argument is based on the assumption, contained in the Lehr Affidavit, that U.S. competitors would match the U.S.-licensed carrier's price reductions, *i.e.*, price below the level of their costs, and accept losses indefinitely on the affiliated route in order to remain viable as full service providers.[407] The premise that carriers will offer service at below-cost prices in the long-term is a highly

[406] AT&T Comments at 30. AT&T also states that "while the desire to maximize the settlement subsidy provides an important rationale for engaging in anticompetitive behavior," it is not the only reason to apply the benchmarks condition to switched resellers. AT&T states that the condition would also "reduce [a] foreign carrier's ability to engage in other sorts of anticompetitive activity." AT&T October 27 *Ex Parte* at 10. AT&T does not, however, explain the connection between above-cost settlement rates and the ability to engage in other types of anticompetitive behavior. Moreover, the competitive safeguards we adopt in this *Order* address the ability of a foreign carrier to leverage market power into the U.S. market.

[407] Cable and Wireless notes that the Lehr Affidavit relies on several unsubstantiated assumptions concerning the margins in the U.S. market, whether competing carriers will match price reductions, and the degree of demand elasticity in the U.S. market. Cable and Wireless October 10 *Ex Parte* at 11-15. We agree with Cable and Wireless that many of the assumptions in the Lehr Affidavit are unsubstantiated. We believe the most important of these assumptions to AT&T's argument, and the one that is most suspect, is that

unusual economic theory and we are not convinced by AT&T's justification. Moreover, competing carriers could defeat the predating carrier's strategy by refusing to follow the price reductions. If competing carriers did not follow the price reductions, the predating carrier would take a greater loss because the predating carrier would be selling more minutes at a below-cost level due to the demand that migrates from competing carriers to the predating carrier. Given these considerations, the likely effect of a price squeeze strategy would be to enable the predating carrier to gain market share in the United States, but only at the expense of reduced total profits for the integrated carrier as long as the reduced prices remain in effect.

203. In summary, we conclude that the threat of a switched reseller attempting a predatory price squeeze is substantially less than the threat of a facilities-based carrier attempting a predatory price squeeze. Our conclusion is based on our finding that a switched reseller has less incentive to engage in a predatory price squeeze that aims to foreclose competition in the IMTS market on an affiliated route. Moreover, we are not convinced by AT&T's argument that a carrier would have the incentive and ability to engage in a price squeeze without foreclosing competition and subsequently raising prices. To the contrary, we find that the price squeeze strategy described by AT&T is unlikely to be profitable for either a facilities-based carrier or a switched reseller.

ii. Detection of Price Squeeze Strategy

204. We further find that we need not apply the benchmark condition for service to affiliated markets to the provision of switched services because detection of an attempted predatory price squeeze scheme by a switched reseller is easier than by a facilities-based carrier. As Cable and Wireless notes, a significant portion of a switched resale provider's costs, the wholesale rate at which it takes service from the underlying facilities-based carrier, is known or readily identifiable by the Commission and the underlying facilities-based carrier. As a result, the Commission, antitrust authorities, and, potentially, the underlying facilities-based carrier, will be able to detect if a switched reseller attempts to price below the level of the wholesale rate at which it takes service. This is not the case for facilities-based carriers, because the Commission and carriers do not have precise information on the underlying transmission costs of a facilities-based carrier. While a switched reseller has some additional variable costs, primarily marketing costs, by far the bulk of its variable costs is the wholesale rate at which it takes service. Thus, any price for switched resale service that is below the level of the wholesale tariff at which the switched reseller takes service would be suspect.

205. We note that MCI argues that the Commission should require switched resellers with foreign affiliates that have market power to file with the Commission "copies of all contracts, agreements and arrangements, whether written or oral, with any other carrier relating to services and traffic on all routes."[408] MCI argues that such a condition is necessary to provide an opportunity to monitor the

competing carriers will follow the price reductions of a preying switched reseller indefinitely.

[408] MCI November 18 *Ex Parte*.

reseller's costs to ensure that it is not acting in an anticompetitive manner.[409] We decline to adopt this commitment as a general requirement applied to all switched resellers that are affiliated with a foreign carrier with market power. While obtaining a switched reseller's costs for underlying services may be cumbersome in some cases, the Commission can nonetheless require carriers to provide the information necessary to calculate the price at which they take service. Moreover, as MCI notes, there is an active spot market in wholesale minutes.[410] The existence of a spot market means that market participants have up-to-date information on pricing trends. It does not, contrary to MCI's argument, make it more difficult to detect a price squeeze strategy by a switched reseller.[411] These factors make detection of an attempted price squeeze scheme by a switched reseller easier than for a facilities-based carrier. Easier detection for switched resellers should act as a deterrent to carriers contemplating a predatory price squeeze. It would also enable the Commission to monitor the market and take action, including imposing additional authorization conditions, to prevent anticompetitive behavior if necessary.

206. We also decline to adopt the proposal of Telefónica Internacional, offered as an alternative to the benchmark condition, to apply a requirement that foreign-affiliated switched resellers agree to refrain from offering service at an average price that is below the average price at which they obtain those services from underlying facilities-based carriers.[412] Telefónica Internacional notes that in the *TSC Order*, the International Bureau accepted a similar voluntary commitment by the resale carrier Telmex/Sprint Communications, L.L.C. (TSC).[413] As we discussed above, we find that switched resellers have significantly less incentive to engage in a price squeeze. We therefore decline to adopt this commitment as a general requirement applied to all foreign-affiliated switched resellers. We note, however, that we have the authority to require individual resellers to comply with such a requirement if we deem it is warranted in a particular circumstance.

iii. Traffic Distortions

207. AT&T argues that entry into the U.S. market by dominant foreign carriers can exacerbate gaming of the settlements process on affiliated routes and that this concern justifies application of the benchmarks condition to both facilities-based and switched resale providers. Specifically, AT&T argues

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409 *See id.*; *see also* MCI November 17 *Ex Parte* at 2. AT&T contends that there are certain factors that make monitoring of wholesale prices difficult, including the fact that resellers typically purchase by private contract under complex arrangements and that carriers purchase resale services from numerous carriers frequently at "spot" prices. AT&T October 27 *Ex Parte* at 4.

410 MCI November 17 *Ex Parte* at 2.

411 *Id*.

412 Letter from Alfred Mamlet and Colleen Sechrist to William F. Caton, Acting Secretary, FCC (November 13, 1997) at 2 (Telefónica Internacional November 13 *Ex Parte*).

413 *See Telmex/Sprint Communications, L.L.C.*, File No. I-T-C-97-127, ¶¶ 62, 102 (rel. Oct. 30, 1997)(*TSC Order*).

that a foreign-affiliated carrier providing service in the U.S. market could game the settlement system by distorting traffic flows in two primary ways: (i) by participating in a call turnaround scheme to turn the U.S.-inbound calls of its foreign affiliate into U.S.-outbound calls; and (ii) by re-originating from the United States calls from a third country.[414] AT&T states that the first of these traffic distortion schemes, call turnaround, would benefit the foreign carrier by generating additional settlement revenues and benefit the underlying U.S. facilities-based carrier involved in the scheme by increasing its share of return traffic at the expense of other competing carriers in the U.S. market. According to AT&T, the second of these traffic distortion schemes, re-origination, would benefit a U.S. facilities-based carrier by increasing its share of return traffic at the expense of other competing carriers in the U.S. market. AT&T states that these traffic distortion schemes would harm consumers in the same way that one-way bypass of the settlements system would -- by increasing U.S. net settlement payments. This increase would, according to AT&T, increase U.S. carriers' marginal costs, which in turn would put upward pressure on calling prices.[415]

208. We agree that foreign carriers have incentives to distort traffic flows in ways that would increase settlement payments from U.S. facilities-based carriers and that, in turn, U.S. facilities-based carriers have an incentive to increase their share of proportionate return traffic. In addition, switched resellers have an incentive to engage in call turnaround because it would generate additional revenues from the sale of U.S.-outbound minutes to the foreign carrier. However, it is not clear that these practices are likely to harm competition and consumers in the U.S. market. U.S. carriers currently engage in call turn-around and re-origination practices. As AT&T notes, these practices can have pro-competitive benefits, such as arbitraging differences in retail prices between foreign countries and the U.S. or differences in settlement rates that a foreign country charges for terminating traffic from various countries.[416]

209. Even if the traffic distortions described by AT&T would harm competition and consumers in the U.S., we are not convinced that the potential for such traffic distortions would be exacerbated by foreign entry into the United States, as AT&T argues. To the contrary, the incentives and, to a large extent, the ability to engage in the traffic distortions described by AT&T exist regardless of whether there is an affiliate relationship between a foreign and U.S. carrier. With respect to AT&T's argument about call turn-around practices, it may be somewhat easier for a foreign carrier to engage in call turn-around if it has a U.S. affiliate because the foreign carrier would not have to find a separate carrier in the U.S. market through which to route traffic. Given that any U.S. carrier would increase revenues by participating with a foreign carrier in call turnaround, however, it should not be difficult for a foreign carrier to find an

[414] AT&T October 27 *Ex Parte* at 18-20; AT&T November 18 *Ex Parte* at 9-13. AT&T states that a carrier could achieve the same result through fraudulent reporting of U.S.-outbound minutes. AT&T November 18 *Ex Parte* at 9.

[415] *Id.* at 10-11.

[416] AT&T November 18 *Ex Parte* at 6. The traffic distortions that AT&T describes could in some circumstances potentially harm U.S. consumers if they have the effect of increasing U.S. net settlement payments. However, this effect, to the extent it occurs, could also result from the types of call turn-around and re-origination practices that have pro-competitive benefits, and to which AT&T does not object.

unaffiliated carrier in the United States through which to route traffic.[417] Indeed, AT&T states that because "there are competing U.S. carriers vying to provide wholesale transport capacity, a foreign carrier will find no shortage of willing partners."[418] With respect to AT&T's arguments about re-origination of third country traffic, U.S. facilities-based carriers do not need a foreign affiliate to engage in this practice. As AT&T notes, U.S. facilities-based carriers currently re-originate traffic from third countries to arbitrage differences in accounting rates.[419] They do this despite the fact that foreign carriers generally do not approve of re-origination. We thus believe that affiliation is unlikely to increase substantially a foreign carrier's incentive or ability to engage in traffic manipulation.

210. AT&T states generally that "affiliation can help to align interests" of the parties engaged in the traffic distortion scheme but does not provide any evidence that affiliation status increases the incentive to engage in traffic distortions or makes it significantly easier to engage in such distortions.[420] The only concrete benefit of alliance cited by AT&T is that "any offsetting financial transfers that may be necessary to compensate one party or another could be undertaken in a less detectable manner — and perhaps in a more lawful manner as well — through an affiliate than otherwise."[421] It is not clear, however, that "offsetting financial transfers" would be necessary in most cases, as U.S. carriers would gain revenues from participating in the schemes described by AT&T. As an example of an "offsetting transfer," AT&T states that additional compensation would be necessary if the wholesale price paid by a foreign carrier to a U.S. facilities-based carrier is not sufficient to compensate the facilities-based carrier for the cost of providing U.S.-outbound service for call turn-around practices. AT&T states that this could occur if the additional outbound traffic that resulted from the call turn-around practices raised the facilities-based carriers' marginal cost of providing service.[422] While there may be cases where additional outbound-traffic raises a facilities-based carrier's marginal cost, the facilities-based carrier could be made whole simply by raising its wholesale prices to a compensatory level. Nonetheless, even if "offsetting financial transfers" were necessary in some instances, we believe that the traffic reporting requirements we adopt below will enable us to detect whether affiliated carriers are engaging in traffic distortion schemes on affiliated routes.

211. We find that concerns about potential traffic distortions are not directly related to affiliation status. Moreover, there is not sufficient evidence in the record to demonstrate that the potential traffic

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[417] *See* Letter from Leon Kestenbaum to Magalie R. Salas, Secretary, FCC, IB Docket 97-142 (November 17, 1997) at 2 (Sprint November 17 *Ex Parte*).

[418] *Id*. at 29.

[419] AT&T November 18 *Ex Parte* at 6, 20.

[420] *Id.* at 16.

[421] *Id*. at 30.

[422] AT&T November 18 *Ex Parte* at 17-18 (according to AT&T, the U.S. facilities-based carriers' marginal costs could increase as a result of call turn-around if its initial share of traffic was sufficiently large and the call turn-around scheme involved significant volumes of traffic).

distortions AT&T describes are so likely to harm competition and consumers in the United States that applying the benchmarks condition is necessary. We accordingly conclude that adopting the condition proposed by AT&T or applying the benchmarks condition we adopted in the *Benchmarks Order* to the provision of switched resale services to an affiliated market would not be an appropriate safeguard against potential traffic distortions. Nonetheless, we adopt a reporting scheme to monitor traffic flows carefully to determine whether foreign carrier entry into the U.S. market could exacerbate the potential for anticompetitive traffic distortions. In Section V.C.2.b.(iv), *infra*, we adopt a quarterly traffic and revenue reporting requirement that will enable us to detect whether facilities-based carriers are engaging in traffic distortion schemes on routes where they are affiliated with foreign carriers that possess market power.[423] We adopt here a requirement that all switched resale providers file quarterly traffic and revenue reports pursuant to Section 43.61 on international routes where they are affiliated with a foreign carrier that possesses market power in a relevant market on the foreign end of the route and that collects settlement payments from U.S. carriers.[424] This reporting requirement should enable us to detect whether switched resellers are engaging in traffic distortion schemes on affiliated routes.[425]

212. We emphasize that we reserve the right to review and, if necessary, impose additional conditions as necessary on individual authorizations if we perceive that a carrier is attempting to engage in anticompetitive behavior.[426] If we find that a U.S.-licensed carrier, regardless of whether it is providing service to an affiliated market, is engaging in traffic distortion practices that harm competition and consumers in the U.S. market, we will take appropriate measures.[427] For example, in such a case, we could apply the benchmark condition to an individual switched reseller providing service to an affiliated market.

iv. Other Considerations

213. We are also concerned that applying the settlement rate benchmark condition to the provision of switched resale services to affiliated markets will substantially limit additional entry into the U.S. IMTS market. As AT&T and Cable and Wireless point out, resale entry may have advantages over facilities-based entry for some entrants. It is less expensive initially and less capital intensive, and can thus occur

[423] We note further that, under the *Benchmarks Order*, all carriers with a notable amount of international traffic must also file quarterly traffic and revenue reports. *See Benchmarks Order* ¶ 251; *see also infra* note 574.

[424] As noted above, the relevant markets on the foreign end of a U.S. international route generally include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end. *See supra* ¶ 145.

[425] *See* Sprint November 17 *Ex Parte* at 2.

[426] *See infra* ¶ 214.

[427] *See infra* Section V.D (discussing Commission's enforcement authority).

more rapidly than facilities-based entry.[428] Applying the settlement rate benchmark condition to switched resale services could effectively deter some carriers from entering the U.S. market on a resale basis and is not necessary, given our findings here.[429] We are also concerned, as Cable and Wireless points out, that extending the condition to switched resale services could effectively force existing competitors to exit the market, thereby further reducing competition and resulting in disruption to consumers.[430] We thus conclude that the benefits to consumers of additional new entrants and existing switched resale providers in the U.S. market outweigh the minimal risk to competition from the potential anticompetitive conduct discussed above.

214. We emphasize here that we will monitor the switched resale market carefully and if we find substantial evidence that carriers providing switched resale services to affiliated markets are engaging in anticompetitive behavior that causes harm to competition and consumers in the U.S. market, we may reconsider our decision not to apply the benchmark condition to the provision of switched resale services. We also reserve the right to impose additional conditions as necessary on individual authorizations if we perceive that a carrier is attempting to engage in anticompetitive behavior.

2. Dominant Carrier Safeguards

a. Regulatory Framework

Background

215. Our regulations governing the U.S. international services market traditionally have distinguished between "dominant" and "non-dominant" carriers. We have classified carriers operating in the U.S. market, whether U.S.- or foreign-owned, as dominant in their provision of U.S. international services on particular routes in two circumstances: (1) where we have determined that a U.S. carrier can exercise market power on the U.S. end of a particular route;[431] and (2) where we have determined that a

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[428] AT&T Comments at 32; Cable and Wireless October 10 *Ex Parte* at 5 ("competition starts with resale; it allows carriers to enter the market and establish their brand presence with minimal financial risk").

[429] AT&T contends that a benchmarks condition would deter resale entry "only if the foreign carrier intends to exploit above-cost settlement rates." AT&T October 27 *Ex Parte* at 9 (Lehr surrebuttal). AT&T provides no support for this assumption that U.S.-licensed carriers will only serve affiliated markets in order to exploit the opportunity to engage in anticompetitive behavior.

[430] Cable and Wireless October 10 *Ex Parte* at 4-5.

[431] *See generally International Competitive Carrier Policies*, CC Docket No. 85-585, Report and Order, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142, ¶ 140 (rel. Apr. 18, 1997), *recon.* FCC 97-229 (rel. June 27, 1997) (*LEC Regulatory Treatment Order*).

foreign carrier has market power on the foreign end of a particular route that can adversely affect competition in the U.S. international services market.[432] Carriers regulated as dominant on a particular route due to an affiliation with a carrier possessing market power on the foreign end of that route are subject to specific safeguards set forth in our rules.[433] These safeguards differ significantly from the safeguards the Commission traditionally has imposed on U.S. carriers regulated as dominant due to market power on the U.S. end of a route because our domestic rules are "generally designed to prevent a carrier from raising its prices by restricting its output rather than to prevent a carrier from raising its prices by raising its rivals' costs."[434] Our focus here is to adopt an effective regulatory scheme to address the risk of

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432 *See generally Regulation of International Common Carrier Services*, Report and Order, 7 FCC Rcd 7331, 7334 ¶ 19 (1992) (*International Services*); *see also Foreign Carrier Entry Order*, 11 FCC Rcd at 3917 ¶ 116. For a definition of market power and relevant input markets, see *supra* ¶¶ 144-145.

433 Pursuant to our existing rules, a foreign-affiliated carrier regulated as dominant on a particular route is required to: "(1) file international service tariffs on 14-days notice without cost support; (2) maintain complete records of the provisioning and maintenance of basic network facilities and services procured from its foreign carrier affiliate . . . ; (3) obtain Commission approval pursuant to § 63.18 before adding or discontinuing circuits; and (4) file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic . . . ." 47 C.F.R. § 63.10(c).

434 *LEC Regulatory Treatment Order* ¶ 85. The rules we adopt here do not affect those regulations associated with dominant carrier classification due to the market power of a U.S. carrier on the U.S. end of a route. These domestic regulations include rate of return or price cap regulation to ensure that rates are just and reasonable, *see* 47 C.F.R. § 61.41(a)(1), and more stringent requirements pursuant to Section 214 to prevent investment in unnecessary new plant and to bar service discontinuances in areas served by a single carrier. *See generally LEC Regulatory Treatment Order* ¶¶ 85-86; *Motion of AT&T Corp. to Be Declared Non-Dominant for International Services*, Order, FCC 96-209, ¶¶ 26-28 (May 14, 1996), *recon. pending*; *Petition of GTE Hawaiian Telephone Co., Inc. for Reclassification as a Non-Dominant IMTS Carrier*, Order, DA 96-1748, ¶ 8 (Int'l Bur. Oct. 22, 1996); *but see Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, CC Docket No. 97-11, Notice of Proposed Rulemaking, FCC 97-6 (rel. Jan. 13, 1997). Given the restrictions and safeguards we impose on the Bell operating companies (BOCs) and independent local exchange carriers (LECs), we concluded in the *LEC Regulatory Treatment Order* that these carriers will not be able to use, or leverage, their market power in the local exchange or exchange access markets to such an extent that they would have the ability, upon entry or soon thereafter, to raise the price of interexchange services by restricting their own output. *See, e.g., id*. ¶¶ 206-213. As a result, we concluded that these carriers' market power in the local exchange and exchange access markets did not warrant imposing traditional dominant carrier safeguards on their provision of in-region and out-of-region domestic and international long distance services. *See id.* ¶¶ 6-8; *NYNEX Long Distance Co. et al., GTE Telecom Incorporated, Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide International Service from Certain Parts of the United States to International Points through Facilities-based and Resale Services*, Memorandum Opinion and Order, DA 97-1662, File Nos. ITC-96-125, ITC-95-443, *et al.*, ¶ 12 (Int'l Bur. rel. Aug. 4, 1997). We concluded that the restrictions and safeguards that apply to the BOCs and independent LECs serve to limit their ability to disadvantage their interexchange rivals' provision of service. *See LEC Regulatory Treatment Order* ¶¶ 206-213. We noted in the *LEC Regulatory Treatment Order* that the question we examine here, whether any U.S. carrier should be regulated as dominant in the

anticompetitive behavior by U.S. carriers affiliated with carriers that have market power on the foreign end of a U.S. international route.

216. We tentatively concluded in the *Notice* that the general obligations imposed on all U.S. international carriers[435] permit us to scale back our current dominant carrier safeguards "without compromising in any meaningful way our ability to monitor and prevent anticompetitive conduct."[436] We therefore proposed a set of basic dominant carrier safeguards that would apply to foreign-affiliated carriers if the foreign affiliate faces international facilities-based competition. These safeguards would replace the fourteen-day advance notice requirement for international service tariffs with a one-day notice period and a presumption of lawfulness. We also proposed to substitute a quarterly notification of circuit additions and discontinuances in place of the requirement that dominant foreign-affiliated carriers obtain prior approval before adding or discontinuing circuits on the dominant route. We proposed to retain the requirements that dominant carriers file quarterly traffic and revenue reports and maintain provisioning and maintenance records for services on their affiliated route.[437]

217. We also proposed to adopt a second dominant carrier category for those U.S. carriers affiliated with a foreign carrier that has market power in a relevant market and does not face competition from multiple international facilities-based competitors.[438] In addition to the basic safeguards identified above, we proposed to retain the existing prior approval requirement for circuit additions and discontinuances, require the filing of quarterly summaries of provisioning and maintenance records and quarterly circuit status reports, and ban exclusive arrangements involving joint marketing, customer

provision of international service because of the market power of an affiliated foreign carrier in a foreign destination market, is a separate issue. *See id.* ¶ 8 n.22.

435 *See* 47 U.S.C. §§ 201–203; 47 C.F.R. § 43.51(a)–(d) (requiring common carriers engaged in foreign communications to file with the Commission certain contracts, agreements, and other arrangements); 47 C.F.R. § 43.51(e) (International Settlements Policy); 47 C.F.R. § 43.61 (requiring common carriers engaged in the provision of international telecommunications services between the United States and foreign destinations to file reports containing annual traffic and revenue data); 47 C.F.R. § 43.82 (requiring facilities-based carriers engaged in the provision of international services to file annual international circuit status reports); 47 C.F.R. § 63.14 (prohibiting U.S. carriers authorized to provide international communications services from agreeing to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any foreign country for which the U.S. carrier is authorized to provide service); 47 C.F.R. § 63.15 (requiring private line resellers to file annual circuit addition reports).

436 *Notice* ¶ 83.

437 *See id.* ¶¶ 92-103.

438 *See id.* ¶¶ 104-110.

steering, or the use of foreign market telephone customer information.[439] Finally, we requested comment on whether a U.S. carrier and its foreign affiliate should be subject to some level of structural separation.[440]

Positions of the Parties

218. Commenters are divided over our dominant carrier regulatory framework. Some commenters claim that it is unnecessary to apply any dominant carrier safeguards to U.S. carriers affiliated with foreign carriers that possess market power in a relevant market.[441] A number of commenters contend that, rather than adopting the dominant carrier safeguards, the Commission should impose sanctions where it finds evidence of anticompetitive behavior.[442]

219. Several commenters perceive the need to classify U.S.-licensed carriers as dominant on routes where they are affiliated with a carrier that possesses market power on the foreign end. Several of these commenters strongly support the proposal to remove unnecessary regulations on U.S. carriers that are affiliated with foreign carriers that possess market power.[443] Some commenters support dominant carrier safeguards but oppose the two-tier proposal.[444] Other commenters support our proposal to adopt a

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[439] *See id*.

[440] *See id.* ¶¶ 111-113.

[441] *See*, *e.g.*, DT Comments at 22-31 (arguing that other countries are not imposing safeguards, that there is no evidence that foreign-affiliated carriers have engaged in anticompetitive conduct in the past, that the WTO Basic Telecom Agreement eliminates any theoretical incentive or ability for foreign carriers to engage in such behavior, that other Commission rules restrain the leveraging of foreign market power into the U.S. market, and that at a minimum, the Commission should dispense with all dominant carrier safeguards for U.S. affiliates of carriers from WTO Member countries where the settlement rate is at or below the benchmark); C&W Comments at 4-5 (arguing that there is no evidence that foreign-affiliated carriers have engaged in anticompetitive conduct in the past and that such behavior is unlikely); Telia NA Reply Comments at 4, 10-11(arguing that the WTO Basic Telecom Agreement eliminates any theoretical incentive or ability for foreign carriers to engage in anticompetitive behavior, that an increased number of competitors and facilities reduces the potential for anticompetitive behavior, that the globalization of the telecommunications market decreases the significance of market power, that foreign-affiliated carriers are relatively small, and that local exchange carriers in the U.S. market are regulated as non-dominant in the interexchange market); GTE Comments at 4, 18 (arguing that dominant carrier safeguards are unnecessary because other Commission rules restrain the leveraging of foreign market power into the U.S. market and that the Commission should adopt a presumption that dominant carrier regulation is unnecessary for U.S. affiliates of carriers from WTO Member countries).

[442] *See* BTNA Comments at 3-4; GTE Reply Comments at 29; C&W Reply Comments at 9; NTT Reply Comments at 3.

[443] *See, e.g.*, European Commission Comments at 5; Sprint Comments at 20.

[444] The European Commission, for example, notes that the supplemental safeguards would be "over-regulation" because carriers that have market power in the European Commission home market already

dominant carrier regulatory framework consisting of basic and supplemental safeguards.[445] WorldCom supports the safeguards but argues that the Commission should apply varying levels of safeguards on a case-by-case basis.[446] Finally, New T&T Hong Kong argues that the basic safeguards are not sufficient to prevent harm to competition and urges the Commission to impose the supplemental safeguards on all U.S. affiliates of foreign carriers that possess market power on the foreign end of a U.S. international route.[447]

220. In addition, some commenters assert that the affiliation standard that serves as a threshold for applying dominant carrier safeguards must be clarified.[448] Several commenters also express support for our proposal to continue the existing policy of applying dominant carrier regulation to a U.S. carrier where a co-marketing or other non-equity arrangement with a foreign carrier that has market power raises a substantial risk to competition.[449] France Telecom argues that our affiliation standard should extend to all non-equity alliances.[450] In petitions for reconsideration of the *Foreign Carrier Entry Order*, MCI and BTNA propose that we adopt a requirement that non-equity business arrangements with foreign carriers be filed with the Commission within 30 days of their execution and impose competitive safeguards where necessary and appropriate.[451]

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would be subject to prescriptive obligations against anticompetitive practices through nondiscriminatory and cost-based interconnection. *See* European Commission Comments at 6; *see also* Embassy of Japan Comments at 3 (asserting that supplemental safeguards should not be applied to U.S. carriers affiliated with foreign carriers from WTO Member countries).

445 *See, e.g.*, MCI Comments at 8 (stating that "when no meaningful ability to compete exists, abuse of monopoly power is such a significant risk that the Commission should apply more stringent safeguards"); Sprint Comments at 20 (supporting the two-tier approach and arguing that supplemental safeguards should be imposed until the foreign affiliate faces international facilities-based competition "in some significant way"); AT&T Comments at 49-50 (supporting the overall approach but recommending that the Commission broaden the applicability of the supplemental tier and strengthen both the basic and supplemental safeguards); FaciliCom Comments at 9-10 (expressing general support for the proposal).

446 *See* WorldCom Comments at 11; *see also* Sprint Comments at 22.

447 *See* New T&T Hong Kong Comments at 1, 4.

448 *See* Sprint Comments at 19; DT Comments at 27.

449 *See* Sprint Comments at 20 n.24; PanAmSat Comments at 5-6; AT&T Comments at 43 n.76; AT&T Reply Comments at 16 n.23.

450 *See* FT Comments at 26.

451 MCI Telecommunications Corporation Petition for Reconsideration at 3-7 (IB Docket No. 95-22); BT North America Inc. Petition for Reconsideration at 5-7 (IB Docket No. 95-22).

Discussion

221. The dominant carrier regulatory framework we adopt here is aimed at detecting and deterring anticompetitive behavior in the U.S. market by foreign carriers and their affiliated U.S. carriers. As discussed below, we conclude that we should retain a single-tier dominant carrier regulatory approach and classify any U.S.-licensed carrier as dominant on a particular route if it is affiliated with a foreign carrier that possesses market power in a relevant market on the foreign end of that route. We remove existing requirements that are unnecessarily burdensome and adopt a narrowly tailored dominant carrier framework designed to address specific concerns of anticompetitive behavior. We decline to adopt the restrictions on changes in capacity or service options that were proposed as supplemental safeguards, although we may impose them in the future as remedial measures in the event that we find evidence of anticompetitive conduct. The regulatory framework we adopt here allows the Commission to monitor and detect anticompetitive behavior while limiting the regulatory burden imposed generally on foreign-affiliated U.S. carriers.

222. We modify the safeguards we apply to U.S. carriers classified as dominant due to an affiliation with a foreign carrier that has market power in a relevant market as follows: we replace the fourteen-day advance notice tariff filing requirement with a one-day advance notice requirement and accord these tariff filings a presumption of lawfulness; we remove the prior approval requirement for circuit additions or discontinuances on the dominant route; we require a limited form of structural separation between a U.S. carrier and its foreign affiliate; we retain our quarterly traffic and revenue reporting requirement; we replace our provisioning and maintenance recordkeeping requirement with a quarterly reporting requirement that summarizes the provisioning and maintenance services provided by the foreign affiliate; and we adopt a quarterly circuit status report. We decline to adopt our proposal to ban exclusive arrangements involving joint marketing, customer steering, and the use of foreign market telephone customer information.[452]

223. As we noted above, we retain the greater than 25 percent ownership affiliation standard that we adopted in the *Foreign Carrier Entry Order*.[453] Although Sprint questions our affiliation standard, we generally agree that "[a]s investment increases, not only does the incentive to discriminate increase, but also the means to accomplish such discrimination."[454] We reiterate our finding that the greater than 25 percent affiliation standard represents a level of investment that allows a carrier to provide substantial influence with regard to, and to reap substantial rewards from, anticompetitive conduct.[455] The safeguards we adopt

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[452] These activities do not fall within the scope of activities covered by our No Special Concessions rule. As discussed above, however, we adopt specific rules governing the use of foreign-derived U.S. customer proprietary network information. *See supra* Sections V.B.1, V.B.2.b.

[453] *See supra* note 360.

[454] Sprint Comments at 20.

[455] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3904 ¶ 83.

here are designed to address this heightened incentive and ability of a foreign carrier with market power and its affiliated U.S. carrier to engage in anticompetitive behavior.

224. We also adopt the tentative conclusion in the *Notice*[456] that we should continue our current regulatory treatment of co-marketing and other non-equity business arrangements between U.S. carriers and their foreign counterparts that affect the provision of U.S. basic international services.[457] We agree with the comments of AT&T, Sprint, and PanAmSat that we should apply dominant carrier regulation to a U.S. carrier's provision of service on a particular route where a co-marketing agreement or other non-equity arrangement with a foreign carrier with market power presents a substantial risk of anticompetitive harm in the U.S. international market.[458] We decline to adopt the proposal by France Telecom to subject all non-equity alliances to "at least the same scrutiny and safeguards and any other conditions as are applied to equity alliances."[459] We find that applying dominant classification to all non-equity arrangements, absent a finding of substantial risk of competitive harm, would impose an unnecessary burden.[460] We also decline to adopt a filing requirement for non-equity business relationships as proposed by MCI and BTNA in their petitions for reconsideration in the *Foreign Carrier Entry Order* proceeding.[461] We agree with AT&T that any such filing requirement would be extremely broad and would have little potential impact on competition.[462] We expect the number of those arrangements to increase and the potential harm to competition to decrease as countries begin to liberalize their telecommunications markets. Some of the non-equity business relationships that concern MCI and BTNA, moreover, must be reported pursuant to Section 43.51 of our rules.[463] We anticipate that, if a particular arrangement not covered by Section 43.51 presents a serious risk to competition, other carriers will bring the arrangement to our attention, and,

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456 *See Notice* ¶ 86.

457 *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3969-70 ¶ 253.

458 *See* AT&T Comments at 43 n.76; Sprint Comments at 20 n.24; PanAmSat Comments at 5-6.

459 FT Comments at 26.

460 The incentives to discriminate are not as great as they are in an affiliated or fully integrated relationship. As we concluded in the *Foreign Carrier Entry Order*, "the incentives for collusive conduct by allied carriers are more attenuated than is the case for equity investments in a U.S. carrier by a foreign carrier. Non-equity arrangements can provide a financial incentive for carriers to act jointly in the pursuit of marketing objectives, but neither carrier derives a direct financial benefit with respect to the other's telecommunications operations." *Foreign Carrier Entry Order*, 11 FCC Rcd at 3909 ¶ 95.

461 *See* MCI Telecommunications Corporation Petition for Reconsideration at 3-7 (IB Docket No. 95-22); BT North America Inc. Petition for Reconsideration at 5-7 (IB Docket No. 95-22).

462 AT&T Corp. Opposition to Petitions for Reconsideration at 13-14 (IB Docket No. 95-22).

463 *See* 47 C.F.R. § 43.51. For example, a non-equity agreement may contain the terms of an operating agreement for the U.S. partner's provision of U.S. international common carrier services in correspondence with its foreign partners.

pursuant to Section 218 of the Act,[464] we could require the filing of any information necessary to review the participating U.S. carrier's regulatory status.

225. Given the heightened risks of anticompetitive behavior associated with affiliated carrier dealings, we conclude that, in addition to the No Special Concessions rule and the benchmark condition, further safeguards are warranted where a U.S. carrier is affiliated with a foreign carrier that possesses market power in a relevant market on the foreign end of a particular route.[465] These further safeguards, we find, should allow the Commission to monitor and detect anticompetitive behavior without imposing unnecessarily burdensome regulation on a U.S. carrier's provision of service due to its affiliation with a foreign carrier. We thus adopt an approach that in large part relies on reporting requirements, rather than restrictions on capacity changes or service options, to prevent affiliated carriers from causing competitive harms in the U.S. market.

226. Some of the reporting requirements we adopt are similar in nature to requirements the Commission has applied in the domestic context to carriers with market power. As part of the *Computer III* proceeding, for example, the Commission required AT&T and the Bell Operating Companies (BOCs) to file quarterly nondiscrimination reports with regard to the underlying basic services they provide to their own enhanced service offerings in comparison with the basic services they make available to their competitors in the enhanced services market.[466] In the U.S. international services context, we are similarly concerned that a foreign carrier with market power in a relevant market on the foreign end of a particular route will favor its U.S. affiliate to the detriment of unaffiliated U.S. carriers and U.S. consumers. We assert our jurisdiction over the U.S. affiliates of these foreign carriers and require these U.S. carriers to file reports that allow the Commission and others to determine whether they receive favorable treatment at the expense of unaffiliated U.S. carriers. Consistent with this approach, we also require these U.S. affiliates to file other reports that indicate whether they are engaging in anticompetitive behavior that affects traffic or revenues to or from the United States.

227. We decline to adopt a supplemental tier of dominant carrier safeguards that would apply to U.S. carriers affiliated with foreign carriers that do not face facilities-based competition on the foreign end of a particular route, as proposed in the *Notice*.[467] We are not convinced, as we initially proposed and as several U.S.-based carriers contend, that it is necessary to differentiate between a U.S. carrier that is

[464] 47 U.S.C. § 218.

[465] For a discussion of market power and relevant markets, see *supra* ¶¶ 144-145.

[466] *See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958, 1055 ¶ 192 (1986), *on recon.*, 2 FCC Rcd 3035 (1987), *on further recon.*, 3 FCC Rcd 1135 (1988), *on second further recon.*, 4 FCC Rcd 5927 (1989), *vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("[W]e seek to ensure that the BOCs or AT&T do not discriminate in favor of their own operations or their own customers in providing underlying basic services.").

[467] *See Notice* ¶¶ 104-110.

affiliated with a foreign carrier that is a monopolist and one that possesses market power but faces some level of international facilities-based competition.[468] Both a monopolist and a foreign carrier with market power that faces some level of competition have the ability to engage in price and non-price discrimination against unaffiliated U.S. carriers. Although a monopolist may be able to cause a greater degree of competitive harm because it possesses greater market power, it cannot engage in a different kind of anticompetitive conduct. We find that the dominant carrier safeguards we adopt here, which include some of the reporting requirements proposed as supplemental safeguards, are necessary and sufficient to enable the Commission to detect and deter a foreign carrier from using its market power on the foreign end to benefit its affiliated U.S. carrier, regardless of whether the foreign carrier faces some level of competition in its home market or is a monopolist.

228. We do not adopt as part of our dominant carrier framework those safeguards that would restrict the service options or circuit capacity changes of U.S. carriers affiliated with foreign monopoly carriers. We concur with statements of the European Commission and Deutsche Telekom that such proscriptive measures may be overly burdensome, absent any finding of proven anticompetitive conduct.[469] We agree with several commenters,[470] however, that the Commission should retain authority to impose sanctions, including those restrictions proposed as supplemental safeguards, in the event we find evidence of anticompetitive conduct.[471]

229. We also are not persuaded by AT&T that we should apply a supplemental tier of safeguards to U.S. carriers that are affiliated with foreign carriers with market power unless the destination country not only has authorized multiple facilities-based competitors but also has fully implemented the Reference Paper and allows foreign entities to hold controlling interests in telecommunications carriers.[472] Nor are we convinced by Sprint that we should apply a supplemental tier unless there is some international competition taking place in the foreign market.[473] We find that the No Special Concessions rule and the dominant carrier safeguards we adopt here are tailored to enable the Commission to prevent the exercise of foreign market power in the U.S. market, regardless of the nature of the foreign regulatory regime or the level of foreign investment permitted. We note, however, that if a foreign country does not fulfill its commitments to the WTO Basic Telecom Agreement, the United States may file a complaint in the WTO dispute settlement process.

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[468] *See* AT&T Comments at 48; MCI Comments at 4-8; Sprint Comments at 20; WorldCom Comments at 11; PanAmSat Comments at 4.

[469] *See* European Commission Comments at 6; DT Comments at 26.

[470] *See* C&W Reply Comments at 9; NTT Reply Comments at 3; BTNA Comments at 3-4; GTE Reply Comments at 29.

[471] *See infra* Section V.D.

[472] *See* AT&T Comments at 44, 49.

[473] *See* Sprint Comments at 21.

230. We adopt our tentative conclusion that we generally should not consider the effectiveness of foreign regulation as a separate matter when making a determination of a foreign-affiliated carrier's regulatory classification.[474] We are not persuaded by AT&T that the benefits derived from such evaluations outweigh the costs incurred.[475] We agree with Sprint that such attempts at evaluating the effectiveness of regulation in a foreign market impose significant burdens on the Commission and on applicants.[476] Our experience has shown that obtaining sufficiently reliable and timely information about a foreign regulatory regime is a difficult, resource-intensive, and time-consuming process. We find that the delay inherent in such a process would slow entry into our markets and the attendant benefits to our consumers. As a result, we conclude that we will apply dominant carrier regulation to all foreign-affiliated carriers on routes where their affiliates have market power, without conducting a separate analysis of the effectiveness of a foreign country's regulatory regime. In making a foreign market power determination, however, we will consider the presence and degree of barriers to entry or expansion, which may relate to the foreign regulatory regime.[477]

231. We adopt the proposal in the *Notice* to continue to classify any U.S. international carrier — whether U.S.- or foreign-owned — as dominant on a route where it is affiliated with a foreign carrier that has sufficient market power in a relevant market on the foreign end to affect competition adversely in the U.S. market.[478] We decline to adopt MCI's proposal to apply dominant carrier safeguards as a strong presumption that could be rebutted "by a clear demonstration that competitive distortion in the U.S. market would not occur."[479] Rather, if a carrier demonstrates that its foreign affiliate lacks market power on the foreign end, we will classify the U.S. carrier as non-dominant on that route.

232. As we discussed in the No Special Concessions section above, we believe that it is appropriate to adopt a rebuttable presumption to identify a category of foreign carriers that do not possess market power in any relevant market on the foreign end of an international route and, as a result, lack the ability to affect competition adversely in the U.S. market.[480] As we determined above, we find that carriers with less than 50 percent market share in each of the relevant markets on the foreign end generally do not

474 *See Notice* ¶ 87.

475 *See* AT&T Reply Comments at 40 n.67.

476 *See* Sprint Comments at 21-22.

477 This approach applies to all foreign market power determinations, including those that are conducted as part of the No Special Concessions rule. *See supra* Section V.B.1.

478 As noted above, the relevant markets on the foreign end of a U.S. international route generally include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end. *See supra* ¶ 145.

479 MCI Comments at 5.

480 *See supra* ¶ 161.

present a substantial risk of harm in the U.S. market.[481] We therefore adopt a rebuttable presumption that a U.S. affiliate of a foreign carrier with less than 50 percent market share in each of the relevant markets on the foreign end of a particular route should not be subject to dominant carrier safeguards on the affiliated route.[482]

233. This presumption of non-dominance is rebuttable. The Commission will entertain petitions to demonstrate that a foreign carrier with less than 50 percent market share has the ability — either unilaterally or in concert with other carriers — to distort the U.S. international services market, and its U.S. affiliate should be classified as dominant. Likewise, parties may make a showing that a foreign carrier with a market share of 50 percent or more in a relevant market does not have sufficient market power to harm competition and consumers in the U.S. market and its U.S. affiliate therefore should be classified as non-dominant. We will review such petitions under an appropriate economic analysis of market power.[483]

234. We find unpersuasive the claims by some commenters that dominant carrier safeguards are unnecessary. Deutsche Telekom and Cable & Wireless, for example, assert that safeguards are not needed because the *Notice* does not cite one case in which the Commission determined that a foreign-affiliated carrier engaged in anticompetitive conduct.[484] This argument fails to acknowledge that our existing dominant carrier safeguards, in conjunction with the *Foreign Carrier Entry Order*'s effective competitive opportunities (ECO) entry standard,[485] have prevented the leveraging of foreign market power into the U.S. market. Furthermore, it disregards the fact that we have imposed additional conditions on particular U.S. carriers whose equity relationships with foreign carriers presented a heightened risk of anticompetitive behavior.[486] Instead, we agree with the comments of the European Commission, which state that "the European Community and its Member States consider legitimate the classification of a carrier as dominant

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481 *See id*.

482 We will allow those foreign-affiliated carriers currently authorized under Section 214 and classified as dominant to file petitions to demonstrate that, pursuant to the presumption, they should be classified as non-dominant.

483 *See supra* note 317.

484 *See* DT Comments at 22; *see also* C&W Comments at 5; C&W Reply Comments at 3.

485 *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3989-94 ¶¶ 40-55.

486 *See, e.g.*, *Sprint Corporation, Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 11 FCC Rcd 1850 (1996); *see also MCI Communications Corporation, British Telecommunications plc, Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 9 FCC Rcd 3960 (1994) (classifying MCI as non-dominant on the U.S.-U.K. route but imposing specific safeguards on MCI as a result of the 20 percent investment by British Telecommunications plc).

in order to impose further obligations" to prevent competitive harms in the U.S. market.[487] The European Commission further notes that the Reference Paper expressly allows WTO Member countries to impose obligations "on carriers who are a major supplier."[488] We are not persuaded by Telia NA that the growing number of competitors, the increasingly global nature of the market, or the relative size of foreign-affiliated carriers should diminish our finding that dominant carrier safeguards are warranted where the foreign affiliate has sufficient market power to affect competition adversely in the U.S. market.[489]

235. We conclude that our dominant carrier safeguards are necessary to complement and support other Commission rules designed to address anticompetitive behavior. Deutsche Telekom and GTE assert that the International Settlements Policy and the *Flexibility Order* adequately address our concerns regarding competitive harms in the U.S. international market.[490] Cable & Wireless argues against retaining dominant carrier safeguards, asserting that even if a foreign carrier were to route excessive return traffic to its U.S. affiliate, its actions "would be totally obvious to everyone on the route . . . [and] would be brought to the attention of the Commission."[491] Such improper routing of traffic, however, would be transparent to all parties and more readily detected because we currently require dominant foreign-affiliated carriers to file quarterly traffic and revenue reports.[492] Our procompetitive policies such as the *Flexibility Order* rely on reporting requirements to establish a record of evidence available to the Commission as it monitors against competitive harms. With less timely reports, our ability to detect and deter such conduct would be significantly curtailed.

236. We also are not persuaded by Deutsche Telekom's claim that the Commission should eliminate all dominant carrier safeguards for U.S. affiliates of foreign carriers from WTO Member countries where the settlement rate is within the benchmark range.[493] Rather, we agree with Sprint and

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487 European Commission Comments at 5.

488 *See id.* at 5. The Reference Paper defines "major supplier" as "a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market."

489 *See* Telia NA Reply Comments at 10-11.

490 *See* DT Comments at 22-23; GTE Comments at 4.

491 C&W Comments at 5.

492 *See* 47 C.F.R. § 63.10(c)(4). In its comments, Telefónica Internacional also states that violations of the International Settlements Policy would be detected by the dominant carrier quarterly traffic and revenue report. *See* Telefónica Internacional Comments at 15.

493 *See* DT Comments at 30-31.

AT&T that achievement of settlement rates does not address all forms of anticompetitive conduct, such as non-price discrimination, that our dominant carrier safeguards are intended to address.[494]

237. We also decline to adopt the proposition by several commenters that dominant carrier safeguards are unnecessary given the WTO Basic Telecom Agreement and foreign countries' commitments to the procompetitive principles of the Reference Paper.[495] Telia NA, for example, states that the WTO Agreement will enable U.S. carriers to bypass incumbent foreign carriers, "either by corresponding with new entrants . . . or entering these markets themselves and providing end-to-end service through self-correspondence."[496] These options, Telia NA argues, will eliminate the ability of foreign carriers to discriminate against U.S. carriers in the provision of gateway international transport circuits and gateway switching services and facilities. We fully expect that operating agreements with new entrants and self-correspondence will soon become a global market reality. We would not have committed to open our basic telecommunications markets otherwise. We conclude, however, that removal of foreign entry barriers alone will be insufficient to prevent foreign carriers with market power from seeking to leverage their market power into the U.S. market, especially in the short term. The Reference Paper, moreover, expressly provides that governments have the right to adopt rules to prevent anticompetitive behavior by carriers that, alone or together, control "essential facilities or otherwise have the ability to affect the market adversely."[497] We adopt our open entry policy for carriers from WTO Member countries with an understanding that the public interest mandates that we ensure against the leveraging of foreign market power into the U.S. market.

238. We fully expect that, as competitive conditions develop in foreign markets, the need for our dominant carrier safeguards may diminish. We therefore anticipate that in the future we will be able to modify some of our dominant carrier safeguards to reflect a more competitive environment.

239. We discuss below each of the competitive safeguards proposed in the *Notice* and decide which to adopt as part of our dominant carrier regulatory framework.

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494 *See* Sprint Comments at 26; AT&T Comments at 45-46; AT&T Reply Comments at 32-33.

495 *See* DT Comments at 22-23; C&W Comments at 4-5; GTE Comments at 8-9; NTT Reply Comments at 3; Telia NA Reply Comments at 4.

496 Telia NA Reply Comments at 4.

497 Reference Paper, Section 1.1.

b. Competitive Safeguards

(i) Modified Tariffing Requirements

240. We proposed in the *Notice* to replace the fourteen-day advance notice period imposed on dominant foreign-affiliated U.S. carriers' international tariff filings with a one-day notice period and to accord such tariff filings a presumption of lawfulness.[498]

241. Telia NA asserts that the proposal to modify the tariffing requirement will benefit consumers by allowing carriers to respond promptly to competitive pressures by lowering prices.[499] PanAmSat opposes the proposal, asserting that it runs contrary to the fundamental purposes of the tariff filing requirement and that it will not provide benefits to competition.[500] In particular, PanAmSat asserts that one day's notice does not provide the public with an opportunity to comment nor does it provide the Commission a realistic opportunity to enforce the requirement that the carrier's rates be just, reasonable, and nondiscriminatory. It also claims that a presumption of lawfulness makes the burden of rebutting virtually impossible to sustain.

242. As part of the *Foreign Carrier Entry Order*, we modified the tariff filing requirements imposed on dominant foreign-affiliated carriers by adopting a fourteen-day advance notice period, consistent with the notice period governing non-dominant international carriers at that time.[501] We subsequently adopted a rule to allow non-dominant international carriers to file tariffs on one day's notice.[502] We found that a one-day filing period would help accelerate the introduction of new international services.[503]

243. We recognize that retaining the existing tariff filing requirements possibly could constrain the ability of a dominant foreign-affiliated carrier to engage in anticompetitive conduct. Nevertheless, the fact that these requirements might help to deter anticompetitive behavior is not, by itself, sufficient to retain these measures. We should also consider whether and to what extent these regulations would dampen competition and whether other regulatory provisions accomplish the same objectives.[504]

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498 *See Notice* ¶ 94.

499 *See* Telia NA Reply Comments at 10; *see also* European Commission Comments at 5; Sprint Comments at 20; GTE Comments at 20.

500 *See* PanAmSat Comments at 3.

501 *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3974 ¶ 262.

502 *See Streamlining the International Section 214 Authorization Process and Tariff Requirements*, IB Docket No. 95-118, Report and Order, 11 FCC Rcd 12,884, 12,916 ¶ 80 (1996).

503 *See id*.

504 *Cf. LEC Regulatory Treatment Order* ¶¶ 87-89 (concluding that it is not necessary to impose an advance notice tariff filing requirement on BOC interLATA affiliates).

244. We conclude here that retaining the fourteen-day notice period significantly inhibits a dominant foreign-affiliated carrier's incentive to reduce prices, because competitors can respond to pro-consumer price and service changes before the tariff would become effective.[505] We agree with those commenters that contend that a one-day notice period, coupled with a presumption of lawfulness, will provide carriers with additional flexibility to respond to customer demands.[506] To the extent that a foreign-affiliated carrier has the ability to engage in a predatory price squeeze, we find that the existence of a tariff filing requirement, regardless of the length of the advance notice, will serve to deter such behavior. These benefits, we find, outweigh the claims raised by PanAmSat.[507]

245. We find, moreover, that in the unlikely event that a foreign-affiliated dominant carrier files an unlawful tariff, remedial action can be taken after the tariff becomes effective. Aggrieved parties can avail themselves of the Commission's complaint process to seek a determination of the lawfulness of any tariff filing.[508] The Commission, on its own initiative, also may investigate any tariff to determine whether it is unlawful.[509] PanAmSat, furthermore, does not demonstrate why a presumption of lawfulness would make a challenge "virtually impossible to sustain." We therefore find that the existing tariffing safeguards are not necessary, and we adopt our proposal to allow dominant foreign-affiliated carriers to file tariffs on one-day's notice with a presumption of lawfulness.

(ii) Removal of Prior Approval of Circuit Additions and Discontinuances

246. We proposed in the *Notice* to eliminate the prior approval requirement for circuit additions and discontinuances from the basic dominant carrier safeguards framework and instead to require quarterly notification of circuit additions on the dominant route, specifying the joint owner of the circuit. We requested comment on whether the quarterly notification requirement should identify the particular facilities

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505 *See Tariff Filing Requirements for Nondominant Common Carriers*, CC Docket No. 93-96, Memorandum Opinion and Order, FCC 93-401, 8 FCC Rcd 6752, 6756 ¶ 21 (1993) (*Non-dominant Tariff Order*), *vacated in part* Southwestern Bell Corp. v. FCC, 43 F.3d 1515 (D.C. Cir. 1995), Order, 10 FCC Rcd 13653 (1995).

506 *See* GTE Comments at 18; European Commission Comments at 5; Telia NA Reply Comments at 3 & 10; MCI Reply Comments at 5; Sprint Comments at 20.

507 PanAmSat also claims that the difference between one and fourteen days has no meaningful impact on the effort required to file and maintain the tariff. *See* PanAmSat Comments at 3. Further, PanAmSat asserts, as long as rates are tariffed, carriers that are committed to engaging in tacit price coordination have the means to do so, regardless of whether the notice period is reduced from fourteen days to one day. Finally, PanAmSat disputes the tentative conclusion that a fourteen-day filing period encourages competitors to challenge a carrier's rates. *See id*. Regardless of the merits of these claims, however, we are not persuaded that they outweigh the benefits of reducing the notice period and providing dominant foreign-affiliated U.S. carriers with the ability to respond quickly to changes in the marketplace.

508 *See* 47 U.S.C. § 208.

509 *See Non-dominant Tariff Order*, 8 FCC Rcd at 6756-57 ¶ 23.

on which each circuit is added.[510] We proposed to retain the prior approval requirement, however, as a supplemental safeguard on a route where a U.S. carrier is affiliated with a foreign carrier that does not face international facilities-based competition.[511]

247. GTE, Cable & Wireless, and Telia NA observe that eliminating the prior approval requirement will benefit consumers by allowing carriers to respond promptly to competitive pressures through the addition of new or expanding services.[512] AT&T supports the proposal to eliminate the prior approval requirement as a basic dominant carrier safeguard, provided the Commission requires notification of *each* circuit addition or discontinuation on the dominant route, rather than a quarterly notification, as well as identification of the facility on which the circuit is added or discontinued.[513] Cable & Wireless and Telefónica Internacional oppose the proposal to retain the prior approval requirement as a supplemental safeguard, arguing that it would limit a foreign-affiliated carrier's ability to respond to customer demands and would place foreign-affiliated carriers at a significant disadvantage in the U.S. market.[514] Telefónica Internacional also claims that a prior approval requirement is a significant barrier to entry that is unnecessary given the Commission's other rules and policies.[515]

248. PanAmSat argues that elimination of the prior approval process would be premature, asserting that it "serves as an important tool permitting the Commission to monitor and detect, on a timely basis, deviations in traffic flows."[516] Reliance on reporting requirements, PanAmSat argues, would permit only after-the-fact remedies. WorldCom contends that the prior approval process is a meaningful safeguard that allows the Commission to monitor traffic and circuit growth and respond promptly to any anticompetitive behavior.[517]

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510 *See Notice* ¶ 96.

511 *See id*. ¶ 107.

512 *See* GTE Comments at 19-20; C&W Reply Comments at 8; Telia NA Reply Comments at 10; *see also* European Commission Comments at 5; Sprint Comments at 20.

513 *See* AT&T Comments at 47; AT&T Reply Comments at 35.

514 *See* C&W Comments at 7; Telefónica Internacional Comments at 14-15.; *see also* GTE Comments at 20.

515 *See* Telefónica Internacional Comments at 15. In addition, Telefónica Internacional argues that Section 402(b)(2)(A) of the Act restricts the ability of the Commission to require prior approval to increase capacity. *See id*. at 5 n.10. We note that the Commission has sought comment on this issue in another proceeding. *See Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996*, CC Docket No. 97-11, Notice of Proposed Rulemaking, FCC 97-6 (rel. Jan. 13, 1997). Accordingly, this issue will be addressed in that proceeding.

516 PanAmSat Comments at 4.

517 *See* WorldCom Comments at 11.

249. We agree with PanAmSat and WorldCom that the prior approval requirement allows the Commission to monitor traffic and circuit growth and to respond to potential anticompetitive behavior before it occurs. On balance, however, we are persuaded by the comments of GTE that "quarterly reporting requirements," which we adopt below, will be "sufficient to allow the Commission to detect anticompetitive practices."[518] Replacing the prior approval rule with reporting requirements will allow us to monitor conduct while permitting carriers to respond promptly to developments in the global telecommunications market. We acknowledge that this approach limits our ability to address potential concerns in advance, but because our quarterly reports will provide a timely and running account of traffic and revenue, provisioning and maintenance, and circuit status,[519] we conclude that they will provide specific evidence of whether harms to competition and competitors have occurred in the U.S. market. We believe that the existence of a monitoring scheme, coupled with effective enforcement, will deter anticompetitive behavior. We find that a prior approval requirement, therefore, is not necessary absent evidence of anticompetitive behavior. Should we find evidence of anticompetitive conduct, however, we will consider imposing a prior approval requirement for circuit additions and discontinuances on the dominant route. We decline to adopt a quarterly notification of circuit additions or discontinuances requirement or AT&T's proposed circuit-by-circuit notification requirement, given the quarterly circuit status report and other safeguards we adopt below.

250. Although we eliminate our prior approval requirement here, we are concerned about the potential for concentration of capacity on U.S. international routes. This concern, however, extends to potential conduct by all U.S. international carriers, not just dominant foreign-affiliated carriers. We find that the prior approval requirement, which applies only to dominant foreign-affiliated carriers, is not the appropriate means to address this concern. We direct the International Bureau to study this issue further and recommend any rule changes it deems necessary.[520]

251. Finally, we requested comment in the *Notice* on whether we should continue to apply the prior approval requirement to dominant foreign-affiliated carriers that obtained their Section 214 authorization to serve a non-WTO Member country prior to adoption of the ECO test in the *Foreign Carrier Entry Order*.[521] As Cable & Wireless noted in its petition for reconsideration of that order, the ECO test applies to applications from dominant carriers when they seek to add circuits on their authorized dominant routes.[522] In its comments filed in this proceeding, Cable & Wireless asserts that any prior approval requirement "would hinder, not enhance, achievement of the Commission's goals in this

[518] GTE Comments at 20.

[519] *See infra* Sections V.C.2.b.(iv)-(vi).

[520] *See infra* ¶ 285.

[521] *See Notice* ¶ 97.

[522] C&W Comments at 8 n.11.

proceeding."[523] Given the general policy we adopt here regarding existing carriers, we conclude that it would be unnecessarily onerous to require particular carriers to continue to seek prior approval. We thus find that it is in the public interest to allow these carriers to add or discontinue circuits without first obtaining prior approval. Of course, if we find that these affiliated carriers are engaged in anticompetitive behavior, we may apply the prior approval requirement on that route.

(iii) Separation Requirements

252. In the *Notice*, we sought comment on whether to adopt, as an additional dominant carrier safeguard, some level of structural separation between a U.S. carrier and its affiliated foreign carrier. We sought comment on whether the approach the Commission has taken either toward Bell operating company (BOC) or independent local exchange carrier (LEC) provision of in-region interexchange service is an appropriate model, or whether some other level of separation is appropriate.[524]

253. In the past, structural separation has been imposed on vertically integrated U.S. carriers that have control over an upstream input necessary for the provision of service in a downstream market. The 1996 Act imposes a detailed separation requirement on BOC provision of in-region interLATA service in Section 272 of the Act.[525] The Commission also imposed strict structural separation on AT&T and BOC provision of enhanced services under the *Computer II* regulatory regime.[526] The Commission imposed a lesser degree of structural separation on incumbent independent LEC provision of in-region interstate, domestic interexchange service in the *Competitive Carrier Fifth Report and Order* in order for such LECs to qualify for non-dominant treatment.[527] The Commission recently amended its rules to require all incumbent independent LECs to provide domestic interstate interexchange and international service

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523 *Id*.

524 *Notice* ¶¶ 111-113.

525 47 U.S.C §§ 271, 272; *see also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and FNPRM, 11 FCC Rcd 21,905 (1996) (*Non-Accounting Safeguards Order*).

526 Under *Computer II*, AT&T, and later the BOCs, were required to provide enhanced services through a separate affiliate. *See Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384 (1980) (*Computer II Final Order*), *recon.*, 84 FCC 2d 50 (*Computer II Recon. Order*), *further recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Recon. Order*), *affirmed sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). Upon divestiture, this requirement was extended to the BOCs. *See Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services, and Cellular Communications Services by the Bell Operating Companies*, 95 FCC 2d 1117 (1983) (*BOC Separation Order*), *aff'd sub nom. Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984).

527 *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Fifth Report and Order*).

originating in the LEC's local exchange service areas to comply with the *Fifth Report and Order* separation requirements, with minor modifications.[528] Finally, the Commission recently affirmed the importance of a similar level of separation in the *LEC/CMRS Safeguards Order*, governing LEC in-region provision of commercial mobile radio service (CMRS).[529]

254. Our adoption of separation requirements in each of those proceedings addressed the risk that a U.S. carrier would be able to use its market power in an upstream market in the United States (*i.e.*, local exchange and exchange access services) to harm competition in the downstream market (*e.g.*, enhanced services, domestic and international interexchange services, or commercial mobile radio service). These safeguards aid in the prevention and detection of anticompetitive conduct in the downstream market.[530] We are concerned in this proceeding that a foreign carrier that possesses market power in a relevant market on the foreign end of an international route could leverage its market power into the downstream U.S. international services market.

255. The Commission has generally applied structural separation to address discriminatory provision of service, cost misallocation, and the possibility of a predatory price squeeze.[531] For incumbent independent LEC provision of domestic interstate interexchange and international service, the Commission imposes a minimal level of separation in order to guard against harms to consumers, competition and production efficiency.[532] In the *LEC Regulatory Treatment Order*, the Commission required such carriers to provide these services through separate corporate affiliates that maintain separate books of account, do not jointly own switching and transmission facilities with their affiliated LECs, and acquire any services from the affiliated LECs at tariffed rates, terms, and conditions, or pursuant to an interconnection agreement negotiated pursuant to Section 251 of the Act.[533] The Commission also imposed a similar level of separation on incumbent LEC provision of in-region CMRS.[534]

256. Several parties responded to our request for comment with varying degrees of specificity. AT&T, the Telecommunications Resellers Association and PanAmSat support imposing structural

528 *See LEC Regulatory Treatment Order* ¶¶ 144-175; *see infra* ¶ 255.

529 *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162, Report and Order, FCC 97-352 ¶¶ 37-63 (rel. Oct. 3, 1997) (*LEC/CMRS Safeguards Order*).

530 *LEC Regulatory Treatment Order* ¶ 163.

531 *Id.* ¶¶ 159-162; *see also Fifth Report and Order*, 98 FCC 2d at 1198.

532 *See LEC Regulatory Treatment Order* ¶ 159.

533 *Id.* ¶¶ 156-173.

534 *See LEC/CMRS Safeguards Order* ¶¶ 37-63; *see also id.* ¶¶ 42-43 (defining "in-region" for purposes of the LEC/CMRS proceeding).

separation.[535] AT&T supports a high level of separation for "supplemental dominant" carriers, urging the Commission to require separate officers, directors and employees in order to assist in "identifying cost misallocation and cross subsidization."[536] Sprint also supports a more limited structural separation, one that is based on existing international borders.[537] A number of commenters support imposing structural separation only as a remedial measure and in limited circumstances.[538] Others oppose requiring any form of structural separation on the basis that it would "impede innovations that would lower prices and create new ways of organizing the supply and distribution of international communications services."[539]

257. We find it necessary to require as a dominant carrier safeguard a minimal level of structural separation between the U.S. international carrier and its foreign carrier affiliate that possesses market power in a foreign market for international services. We find that more stringent requirements are unnecessary and could pose a significant burden on foreign-affiliated carriers that operate in the U.S. market. We find that the same concerns that led the Commission to impose a separation requirement on incumbent independent LEC provision of in-region interstate interexchange and international service and incumbent LEC provision of in-region CMRS also apply to the provision of U.S. international service by a foreign-affiliated carrier to a destination market in which its affiliate has market power. We find that discrimination, cost misallocation, and the possibility of a predatory price squeeze by such a foreign-affiliated carrier has the potential to cause substantial harm to consumers, competition, and production efficiency in the U.S. international services market. We therefore adopt a separation requirement generally consistent with that which we apply to incumbent independent LEC provision of in-region interstate

535 AT&T Comments at 51-52; TRA Comments at 8; PanAmSat Comments at 5.

536 AT&T Comments at 51-52.

537 Sprint Comments at 26-27. Sprint states that the existence of international borders provides "a natural and straightforward basis" for structural separation. Sprint supports requiring a separate corporate entity, separate books and accounts, a requirement that the U.S. affiliate deal on an arm's length basis with the foreign affiliate, and a requirement that the foreign affiliate not disclose carrier information received from the U.S. affiliate's competitors. *See* Sprint Comments at 27 n.32.

538 *See* GTE Reply Comments at 29 (arguing that structural separation requirements should be narrowly constructed to address a specific concern, because otherwise they are burdensome for no legitimate purpose); BTNA Comments at 4 (arguing that structural separation should be imposed in extraordinary circumstances as a remedy against proven anticompetitive conduct); U S WEST Comments at 10 ("Structural separation is an onerous requirement that should be imposed only if there are clearly articulated anticompetitive concerns which cannot be resolved with the adoption of less intrusive regulatory measures."); *see also* NTT Reply Comments at 4.

539 Telia NA Reply Comments at 9; *see* SBC Reply Comments at 2-3 (arguing that the Commission should not adopt rules that are "prophylactic and unfocused," but rather respond to specific instances of misconduct); *see also* U S WEST Comments at 8-10; NYNEX Reply Comments at 1-3.

interexchange and international service[540] and incumbent LEC provision of in-region CMRS.[541] We require a foreign-affiliated U.S. international carrier, regulated as dominant, to provide service in the U.S. market through a corporation that is separate from the foreign carrier affiliate, maintain separate books of account, and not jointly own switching and transmission facilities with its foreign carrier affiliate. We find that these requirements will not pose a significant burden on such carriers because most foreign-affiliated carriers operating in the United States do so in a manner that is consistent with the requirements we adopt here.

258. We find that price and non-price discrimination by a foreign carrier in favor of its U.S. affiliate has the potential to disadvantage an unaffiliated U.S. international carrier, and could hurt U.S. consumers. Our safeguards that apply to incumbent independent LEC provision of in-region interstate interexchange and international service and incumbent LEC provision of in-region CMRS are aimed at preventing discriminatory conduct by requiring that service be provided to an affiliate at tariffed rates, terms and conditions, pursuant to an approved interconnection agreement, or, in the case of incumbent LEC provision of in-region CMRS, on a compensatory arms-length basis, consistent with the Commission's affiliate transaction rules.[542] Discrimination in pricing and provisioning is also a potential concern in the market for international services in that the carrier with market power in the upstream input market can raise the costs of its downstream rivals by discriminating in pricing or by providing a lower quality of service to its rivals.[543]

259. In general, we find that our provisioning and maintenance reports and our No Special Concessions rule will guard against instances of non-price discrimination, and our No Special Concessions rule and the International Settlements Policy (ISP) will guard against price discrimination.[544] Also, our proportionate return policy ensures that U.S. carriers receive back return traffic in the same proportion that

[540] *LEC Regulatory Treatment Order* ¶¶ 144-175; *see also Fifth Report and Orde*r, 98 FCC 2d 1191. In the *LEC Regulatory Treatment Order*, the Commission required such carriers to maintain separate books of account, not jointly own switching and transmission facilities, and acquire any services from its affiliated exchange companies at tariffed rates, terms, and conditions, or pursuant to an interconnection agreement negotiated pursuant to Section 251 of the Act. *LEC Regulatory Treatment Order* ¶¶ 158-167.

[541] *LEC/CMRS Safeguards Order* ¶¶ 37-63.

[542] *See LEC Regulatory Treatment Order* ¶ 163; *LEC/CMRS Safeguards Order* ¶¶ 38, 55-56.

[543] *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986); *see also supra* Section V.A.

[544] *See infra* Section V.C.2.b.(v) (adopting quarterly provisioning and maintenance reports for dominant foreign-affiliated carriers); *supra* Section V.B.1 (modifying the No Special Concessions rule); *Implementation and Scope of the International Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (Feb. 7, 1986) (*ISP Order*), *modified in part on recon.*, 2 FCC Rcd 1118 (1987) (*ISP Reconsideration*), *further recon.*, 3 FCC Rcd 1614 (1988); *see also Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992).

they send to a foreign carrier.[545] In addition, our contract filing requirement in Section 43.51 of the Commission's rules enables us to detect instances where carriers enter into arrangements that are inconsistent with our rules and policies.[546]

260. We are concerned, however, that, absent a structural separation requirement, a vertically integrated carrier operating in U.S. and foreign markets could potentially circumvent our rules. A single corporate entity providing services in the U.S. market that owns facilities on each end of the international route would be not be subject to our Section 43.51 contract filing requirement or our No Special Concessions rule. We also find that our requirement that a U.S. international carrier and its foreign affiliate not jointly own switching and transmission facilities, together with our separate affiliate requirement, will help ensure that there is sufficient transparency to determine whether the foreign carrier has discriminated in favor of its affiliate in violation of our rules and policies.[547]

261. We also find that cost misallocation by a foreign-affiliated carrier has the potential to harm competition in the U.S. market for international services. The Commission, in the *LEC Regulatory Treatment Order*, has expressed two concerns about cost misallocation by incumbent independent LECs providing in-region interstate interexchange and international service.[548] It noted first that, a carrier with market power in the upstream exchange and exchange access markets has the ability and incentive to use ratepayer revenues to subsidize its competitive operations in the downstream interstate interexchange and international services markets. This practice may allow the independent LEC to recover costs of its competitive operations from captive ratepayers in the upstream market, who, as a result, may face rate increases. Second, the Commission observed that cost misallocation may also distort competition in the competitive downstream market by allowing the vertically integrated carrier to charge a lower price than its rivals, which is made possible by a subsidy from captive ratepayers, rather than by greater production efficiencies.[549] The Commission's requirement of separate books of account and the prohibition on joint ownership of switching and transmission facilities is intended to detect and deter such conduct.[550] Although it is not within the Commission's statutory mandate to protect foreign ratepayers from use of ratepayer revenues to subsidize a foreign carrier's U.S. operations, we find that cost misallocation by a foreign-affiliated international carrier can distort price signals in the U.S. international services market and, under certain circumstances, give the affiliate an unfair advantage over its competitors.[551]

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545 *See Flexibility Order*, 11 FCC Rcd at 20,089-90 ¶¶ 63-67.

546 47 C.F.R. § 43.51.

547 *See supra* Section V.B.1.

548 *See LEC Regulatory Treatment Order* ¶ 103.

549 *See id.* ¶¶ 103, 108.

550 *Id.* ¶ 163.

551 *Id.* ¶ 103.

262. We find that the requirement we adopt here that a foreign carrier provide service in the U.S. market through an affiliate with separate books of account and separate switching and transmission facilities is necessary to assist the Commission in identifying instances of cost misallocation more easily. The requirement that the U.S. and foreign affiliate maintain separate books allows the Commission to identify when improper allocation of costs might harm competition in the U.S. market. This might occur, for example, if the inter-affiliate price for goods or services paid by the U.S. affiliate to the foreign affiliate appears to be far below the prevailing market price.[552] The requirement of separate switching and transmission facilities also prevents undetected cost misallocation by subjecting any arrangement for the use of foreign facilities or services by the U.S. affiliate to the Commission's contract filing requirement.[553] We also find that our No Special Concessions rule will also prohibit special arrangements that would constitute an improper allocation of costs.

263. We clarify that, consistent with the traditional practice of dividing an international circuit into U.S. and foreign halves, we consider U.S. and foreign half-circuits to be separate facilities for the purposes of our requirement that a dominant foreign-affiliated carrier operating in the U.S. market not jointly own switching and transmission facilities with its foreign affiliate. A U.S. carrier and its foreign affiliate are not, however, precluded from entering into a correspondent relationship or otherwise jointly provisioning international transmission facilities. A U.S. dominant, foreign-affiliated carrier is also not precluded from entering into an agreement to provide service over the foreign affiliate's facilities, as long as the arrangement entered into by the U.S. and foreign affiliates is filed pursuant to the Commission's rules and made available to other U.S. international carriers, pursuant to our No Special Concessions Rule.[554]

264. Although we recognize that there may continue to be a danger of a predatory price squeeze from a foreign-affiliated carrier,[555] we do not find that a requirement that foreign-affiliated U.S. carriers

[552] We note that our ability to effectively monitor a carrier's books to detect a cross-subsidy is impeded in the international services context because the foreign affiliate's books are not readily available to the Commission. *But see* 47 U.S.C. § 218.

[553] *See* 47 C.F.R. § 43.51.

[554] *See id.*; *see also supra* Section V.B.1.

[555] In the *Benchmarks Order*, we found that foreign affiliated carriers operating in the United States on a facilities-basis have the incentive and ability to engage in a price squeeze. We found that while the benchmark settlement rate condition on facilities-based entry by a foreign carrier would aid in the prevention of a price squeeze and protection of competition in the U.S. market, it would not completely eliminate a foreign-affiliated carrier's incentive and ability to engage in a price squeeze. *Benchmarks Order* ¶¶ 213-218, 222. We also recognized in the *LEC Regulatory Treatment Order* and in the *Access Charge Reform Order* that an incumbent LEC's control of local exchange and exchange access facilities may give it the incentive and ability to engage in a price squeeze. *Access Charge Reform*, CC Docket 96-262, First Report and Order, FCC 97-158, ¶¶ 275-282 (rel. May 16, 1997) (*Access Charge Reform Order*); *LEC Regulatory Treatment Order* ¶ 161. In the *LEC Regulatory Treatment Order*, we found that the requirement that independent LECs providing interexchange service take service from their affiliates at tariffed rates, terms, and conditions would deter somewhat the risk of a price squeeze to the extent that

take service at tariffed rates, terms and conditions is necessary or practical in the international services context. We currently require that all U.S. carriers file with the Commission contracts entered into with foreign carriers.[556] These contracts are made publicly available in the International Bureau's reference room. In addition, our No Special Concessions rule prohibits a U.S. international carrier from accepting any special concessions granted by a foreign carrier with market power.[557] We find that these requirements are sufficient to ensure that transactions affecting the provision of basic telecommunications service between the U.S. and foreign affiliate are conducted in a transparent and nondiscriminatory manner. We also find, as a practical matter, that many foreign carriers do not tariff international services in the same manner as we require of U.S. carriers. Since U.S. carriers are already prohibited from accepting a special concession from a foreign affiliate with market power and are required to file their contracts with the Commission, we do not find that it is necessary at this time to require a dominant U.S. international carrier to take service from its affiliate at tariffed rates, terms and conditions as we require for an independent LEC in its dealings with an interexchange affiliate.[558]

265. We adopt these separation requirements as a dominant carrier safeguard only, and do not apply them to all foreign-affiliated carriers because we do not have the same concerns with foreign carriers that lack foreign market power. Such carriers are unlikely to have the ability to harm competition in the U.S. market even if they do engage in cost misallocation or discrimination, and would be unable to engage in a predatory price squeeze because they lack sufficient foreign market power. In addition, as discussed in our No Special Concessions section, allowing non-dominant international carriers to engage in certain exclusive arrangements with foreign carriers may have procompetitive benefits.[559]

266. Telia NA, SBC, and others argue that we should decline to adopt a structural separation requirement because it would impede innovation and that the Commission instead should seek to promote, rather than preclude, "innovative commercial arrangements that will lower the cost of international telecommunications services."[560] SBC argues that instead of applying structural separation, we should rely on our complaint process or on rules adopted in a later proceeding. As discussed above, we find that some structural separation is warranted to prevent anticompetitive conduct and also to ensure that our reporting

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an affiliate's long distance prices are required to exceed their costs for tariffed services. *Id.* ¶ 163.

556 *See* 47 C.F.R. § 43.51.

557 *See supra* Section V.B.1.

558 *See LEC Regulatory Treatment Order* ¶¶ 144-175. That order also allows an independent LEC to provide services to its interexchange affiliate under an interconnection agreement negotiated under Section 251 of the Act. *See id.* ¶ 164.

559 *See supra* Section V.B.1; *see also Foreign Carrier Entry Order*, 11 FCC Rcd at 3971-72 ¶¶ 257-258.

560 Telia NA Reply Comments at 9; *see also* SBC Reply Comments at 2-3; U S West Comments at 8-10; NYNEX Reply Comments at 1-3.

requirements and No Special Concessions safeguards are effective.[561] Moreover, we find that the minimal separation requirement we adopt here will neither impede innovation nor preclude innovative commercial arrangements because foreign-affiliated carriers, for the most part, already provide service in a manner that is consistent with the rules we adopt here. Currently, almost all foreign-affiliated carriers that are regulated as dominant and operating in the U.S. market maintain separate corporate affiliates in the United States and the foreign country.[562] Because such entities generally maintain separate corporate entities, switching and transmission facilities are generally separate as well. Further, as an entity operating in the U.S. market, it is in a foreign carrier's interest because of tax implications to maintain books of account to reflect the income of its U.S. operation separately from its foreign operation. Finally, to the extent that a foreign-affiliated carrier finds these requirements do indeed hamper its operations, and believes such integrated operations do not pose a potential threat to competition in the U.S. international services market, we are open to requests to waive these rules.

267. Telia NA also argues that we should not apply structural separation to dominant foreign-affiliated carriers operating in the U.S. market because it would be inconsistent with the Commission's treatment of out-of-region interexchange operations of BOCs and incumbent independent LECs, which are regulated as non-dominant and are not subject to structural separation for such services. It argues that since carriers originate traffic for both services outside the region where they control bottleneck facilities, the Commission should regulate both classes of carriers similarly. Although both kinds of carriers do lack market power in the originating market, we find that there are significant differences between the two types of carriers that preclude identical regulatory treatment. Our decision to remove the separation requirements that applied to BOCs and independent LECs prior to adoption of the *LEC Regulatory Treatment Order* rested in large part on our conclusion that there are minimal concerns of discrimination and cost misallocation due to regulatory oversight of the LEC along with geographic separation when the LEC provides interstate interexchange service on an out-of-region basis.[563] As discussed above, we find that a foreign carrier's ability to control foreign terminating facilities and services, over which we lack direct regulatory oversight, poses a risk of discrimination in the provision of U.S. international services that could harm competition in the U.S. market. As discussed in section V.B.1., our No Special Concessions rule is an important safeguard in preventing discrimination by a foreign carrier with market power in the foreign market. Our reporting requirements are also an important means of ensuring transparency in relations between U.S. and foreign carriers. Without a separation requirement, these rules would be less effective at

[561] *See supra* ¶ 260.

[562] We note that Telecom New Zealand Ltd., a corporation incorporated in New Zealand, was recently granted international Section 214 authority, but has yet to begin providing service. *See Telecom New Zealand Limited,* File No. I-T-C-96-097, DA 96-2182 (rel. Dec. 31, 1996).

[563] *See LEC Regulatory Treatment Order* ¶¶ 206-213 ("we believe that other applicable safeguards [than a structural separation requirement], coupled with the geographic separation between the BOCs' and independent LECs' in-region and out-of-region operations will prevent a BOC or independent LEC from favoring its out-of-region interexchange services through improper allocation of costs, discrimination, or other anticompetitive conduct.")

detecting and deterring anticompetitive conduct.[564] Moreover, our limited regulatory oversight over the foreign carrier's books of account reduces our ability to detect cost misallocation. As discussed above, we find that our minimal separation requirements will aid in addressing those concerns. We therefore do not find that foreign-affiliated carriers that offer U.S. international service to an affiliated market are sufficiently similar to the BOCs and incumbent independent LECs providing out-of-region interexchange service to accord them identical treatment.

268. We note that AT&T and PanAmSat urge us to adopt a detailed structural separation requirement as a part of our supplemental dominant safeguard proposal in order to guard against improper cost allocation.[565] Although we decline to adopt a second tier of supplemental dominant carrier safeguards,[566] we address AT&T's comments here as they are relevant to structural separation. AT&T argues that the foreign affiliate should be required to operate as a distinct entity with separate officers, directors, and employees, to maintain separate accounting systems and records identifying all payments and transfers from the foreign carrier and to receive no subsidy from the foreign carrier or any investment or payment not recorded as investment in debt or equity.[567] AT&T also urges the Commission to require carriers subject to "supplemental dominant carrier regulation" to submit to detailed affiliate transaction rules.[568]

269. We find that these types of detailed separation requirements are unnecessary at this time to guard against discrimination and cost misallocation and could create unnecessary inefficiencies on foreign-affiliated carriers operating in the U.S. market. We find that the dominant carrier safeguards we adopt here will help to guard against such conduct without being overly burdensome. Adopting AT&T's proposed separation requirements could significantly impede a foreign-affiliated carrier from engaging in "innovative commercial arrangements" that could stimulate competition in the U.S. international services market. Requiring separate officers, employees, and directors would preclude a foreign-affiliated carrier from taking advantage of economies of scale and scope that could allow it to provide better service at lower cost to consumers. AT&T urges the Commission to adopt detailed monthly reporting requirements, some of

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[564] *See supra* ¶ 260.

[565] AT&T Comments at 51-52; PanAmSat Comments at 5.

[566] *See supra* Section V.A.

[567] AT&T Comments at 51-52.

[568] *Id.* at 50 (requiring monthly reports showing prices, terms, and conditions of all products and services provided by a carrier's affiliate, including copies of all agreements, settlement rates and the methodology for proportionate return, details of provisioning and maintenance, including types of circuits and services provided, the average time intervals between order and delivery, the number of outages and intervals between fault report and service restoration, and, average number of circuit equivalents and percentage of 'busy hour' calls that failed to complete. In addition, AT&T suggests requiring that all affiliate transactions be reduced to writing and that such records be subject to a recordkeeping requirement). We address these proposed requirements *infra* Section V.C.2.b.(v).

which we adopt here on a quarterly basis.[569] Adopting AT&T's proposal could pose a regulatory burden that we believe is unnecessary given the reporting requirements we adopt below. In short, we do not find that the benefits of AT&T's proposals outweigh the burdens they would impose on U.S. international carriers. We do find, however, that the measures AT&T advocates are the types of measures the Commission could impose on a foreign-affiliated carrier engaging in anticompetitive conduct in the U.S. market in order to ensure that further misconduct does not occur.[570]

(iv) Quarterly Traffic and Revenue Reports

270. We proposed in the *Notice* to adopt as a basic safeguard the existing requirement that dominant foreign-affiliated carriers file quarterly traffic and revenue reports.[571] AT&T and the Telecommunications Resellers Association support the reporting requirement but contend that the Commission should require more detailed information. In particular, AT&T suggests that the Commission should clarify that dominant carriers must separately report originating and terminating traffic and must report the number of minutes in each service category for which different settlement rates apply, as well as the number of minutes, separately identified, that are included and excluded from proportionate return.[572] Other commenters respond that AT&T's proposal is excessive and unnecessarily burdensome.[573]

271. We retain the requirement that foreign-affiliated dominant carriers file quarterly traffic and revenue reports for their dominant routes. We find that these quarterly reports aid in the detection of, and help deter, anticompetitive conduct. In particular, these reports provide us, on a timely basis, with the ability to determine the source of any deviations in traffic flows, such as the flow of return traffic a U.S. carrier receives from its affiliated carrier. They will complement the quarterly traffic and revenue reports required by the *Benchmarks Order*, which are filed by carriers with a notable amount of international traffic.[574] The *Benchmarks Order's* quarterly reporting requirement is intended to identify on a route-

[569] *See infra* Sections V.C.2.b.(iv)-(vi).

[570] *See infra* ¶ 295.

[571] *See Notice* ¶ 99.

[572] *See* AT&T Comments at 47-48.

[573] *See* MCI Reply Comments at 4 & n.7; Telia NA Reply Comments at 4; KDD Reply Comments at 7-8.

[574] The *Benchmarks* reporting obligations require common carriers to file traffic reports for each quarter in which their traffic meets any of the following thresholds: (i) their aggregate U.S.-billed minutes of switched telephone traffic exceeds 1 percent of the total of such minutes of international traffic for all U.S. carriers (as published in the most recent Section 43.61 traffic data report); (ii) their aggregate foreign-billed minutes of switched telephone traffic exceeds 1 percent of the total of such minutes of international traffic for all U.S. carriers; (iii) their aggregate U.S.-billed minutes of switched telephone traffic for any country exceeds 2.5 percent of the total of such minutes for that country for all U.S. carriers; or (iv) their aggregate foreign-billed minutes of switched telephone traffic for any foreign country exceeds 2.5 percent of the total of such minutes for that country for all U.S. carriers. *See Benchmarks Order* ¶ 251.

specific basis whether inbound switched traffic is being diverted from the accounting rate system to facilities-based or resold private lines.[575] Under that reporting requirement, carriers must file data only for their provision of switched facilities-based telephone services and their provision of switched telephone services over facilities-based or resold private lines. These reports indicate whether distortions are occurring but do not necessarily identify the source of such distortions. The quarterly reports we adopt here, however, will help determine the source of such harms if any exist on a particular route. For example, these reports may assist in determining whether an apparent loss of U.S.-inbound traffic on a particular route is the result of an affiliated U.S. carrier receiving a disproportionate amount of return traffic from its foreign affiliate.[576]

272. We recognize AT&T's assertion that more detailed information is necessary to detect and deter competitive harms in the U.S. international services market. On their dominant routes, U.S. carriers affiliated with foreign carriers that have market power on the foreign end currently are required to file quarterly reports on the number of messages and the number of minutes of both originating and terminating traffic.[577] As an initial matter, we amend this rule to require all dominant foreign-affiliated carriers to file for their dominant route a quarterly version of the annual traffic and revenue report that all U.S. international carriers file pursuant to Section 43.61 of our rules.[578] Given the development of alternative routing and settlement arrangements in today's global international services market, however, we find that a comprehensive review of the Section 43.61 annual reporting requirements would be more appropriate than the adoption of a separate reporting manual exclusively for dominant foreign-affiliated carriers. We therefore direct the Common Carrier Bureau, in consultation with the International Bureau, to review AT&T's request for more detailed information than currently is required in the Section 43.61 reporting manual and, if warranted, revise the manual to ensure that we obtain relevant information to assist in the detection of competitive harms in the U.S. market. We direct the Common Carrier Bureau to propose modifications to the Section 43.61 reporting manual.

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[575] In the *Benchmarks Order*, we adopted a presumption that competitive distortions exist if the ratio of outbound (U.S.-billed) to inbound (foreign-billed) settled traffic increases 10 or more percentage points in two successive quarterly measurement periods. *See id*. ¶ 249.

[576] As discussed above, we are also requiring that quarterly traffic and revenue reports be filed by switched resale carriers for any international route where they are affiliated with a foreign carrier that possesses market power in a relevant market on the foreign end and that collects settlement payments from U.S. carriers. *See supra* ¶ 211. We note that switched resellers that provide such service on a particular route solely by reselling the switched services of unaffiliated U.S. facilities-based carriers are presumptively classified as non-dominant on that route. *See* 47 C.F.R. § 63.10(a)(4). We find, however, that the quarterly traffic and revenue we adopt above will assist us in detecting whether switched resellers are engaging in traffic distortion schemes on affiliated routes.

[577] *See* 47 C.F.R. § 63.10(c)(4).

[578] 47 C.F.R. § 43.61.

273. We adopt here AT&T's proposal[579] to require dominant foreign-affiliated carriers to file all dominant carrier reporting information with the Commission's vendor and to mark these filings as responsive to the relevant filing requirement.[580] We agree with AT&T that this action would facilitate public access to these reports. We note here that we direct the International Bureau to examine whether to require the electronic filing of summaries of agreements subject to Section 43.51 of our rules, a proposal in the *Notice*[581] that we decline to act on given the lack of comment or support in the record.

(v) Quarterly Provisioning and Maintenance Reports

274. We proposed in the *Notice* to adopt as a basic safeguard the existing requirement that each dominant foreign-affiliated carrier maintain complete records of the provisioning and maintenance of basic network facilities and services that it procures from its foreign affiliate, including, but not limited to, correspondent or other basic facilities procured on behalf of customers of joint venture offerings.[582] We sought comment on whether a recordkeeping requirement was sufficient and necessary to prevent discrimination. We also proposed that those carriers subject to supplemental dominant carrier regulation file quarterly reports summarizing their records of the provisioning and maintenance of facilities and services provided by their foreign affiliate.[583] In addition, we requested that commenters address the form and content of a provisioning and maintenance requirement.

275. AT&T supports retaining the existing requirement as a basic safeguard and recommends that it apply to all basic network services and facilities that may be jointly provided with a foreign affiliate.[584] AT&T contends, however, that the quarterly filing requirement for carriers subject to supplemental safeguards is not sufficient to protect against discriminatory behavior. AT&T asserts that these carriers should be required to file monthly, publicly available reports showing details of the provisioning and maintenance of all services and facilities provided, including the types of circuits and services provided, the average time intervals between order and delivery, the number of outages and intervals between fault report and service restoration, and, for circuits used to provide international switched service, the average number of circuit equivalents available to the U.S. affiliate and the percentage of "busy hour" calls that failed to complete.[585] AT&T also proposes that U.S. affiliates subject to the basic dominant carrier safeguard

579 *See* AT&T Comments at 52-53.

580 *See infra* Appendix C (to be codified at 47 C.F.R. § 63.10(d)).

581 *See Notice* ¶ 108.

582 *See id*. ¶ 103.

583 *See id*. ¶ 108.

584 *See* AT&T Comments at 48.

585 *See id*. at 50; *accord* TRA Reply Comments at 7. In addition, AT&T seeks public disclosure of other information as well, such as the prices, terms and conditions of all products and services provided by its

proposal be required to maintain the same information. Telia NA and KDD argue that AT&T's proposal is more burdensome than necessary.[586]

276. AT&T argues that public disclosure is necessary to ensure that affiliated U.S. carriers do not benefit from discrimination in violation of the No Special Concessions rule. Cable & Wireless argues that public reports would adversely affect competition by allowing competitors to use the information "for their own competitive purposes."[587] BTNA asserts that information pertaining to provisioning and maintenance of network facilities and services provided by a foreign affiliate is commercially sensitive.[588] BTNA observes that the Department of Justice addressed the commercially sensitive nature of provisioning and maintenance reports in the BT/MCI Modification of Final Judgment by limiting the purpose of disclosure "to ensure that information is not used for competitive sales or marketing purposes."[589]

277. We adopt a requirement that each dominant foreign-affiliated carrier file quarterly reports summarizing the provisioning and maintenance of all basic network facilities and services it procures from its foreign affiliate, including, but not limited to, correspondent or other basic facilities procured on behalf of customers of joint venture offerings.[590] The provisioning and maintenance of services and facilities necessary for the provision of U.S. international traffic can be a primary source of non-price discrimination by which a foreign carrier with market power can degrade unaffiliated U.S. carriers' quality of service. We find that a reporting requirement will allow unaffiliated carriers to monitor and detect whether U.S. carriers are receiving favorable treatment from their foreign carrier affiliates and to notify the Commission if undue discrimination exists.[591] Such a reporting requirement will serve as a strong deterrent from engaging in unduly discriminatory behavior. We find that AT&T's proposal that these reports be filed on a monthly basis is unnecessarily onerous and instead adopt a quarterly filing requirement.

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affiliated foreign carrier, including copies of all agreements, settlement rates and the methodology for proportionate return. It also suggests that all affiliated transactions be reduced to writing and that such records be subject to a recordkeeping requirement. *See id*. We find that our current filing requirements under Sections 43.51, 64.1001, and 64.1002 of our rules provide sufficient information with respect to affiliate transactions in light of the separate affiliate requirement adopted above. *See supra* Section V.C.2.b.(iii).

[586] *See* Telia NA Reply Comments at 4; KDD Reply Comments at 7-8.

[587] C&W Comments at 8.

[588] *See* Letter from James E. Graf II, BTNA to William Caton, Acting Secretary, FCC, IB Docket No. 97-142, filed Oct. 21, 1997 (BTNA October 21 Letter).

[589] *Id.*

[590] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3975 ¶ 266.

[591] This requirement extends to circumstances in which a dominant foreign-affiliated carrier acts as an agent on behalf of a U.S. customer to procure services and facilities from its foreign affiliate.

278. In response to our request for comment with regard to the content of a provisioning and maintenance requirement, AT&T submitted a detailed list of filing requirements. We find that, for the most part, these filing requirements provide a reasonable basis for determining whether facilities and services on the foreign end are provided to an affiliated U.S. carrier on a non-discriminatory basis.[592] The provisioning and maintenance reports should contain, at a minimum, the following: the types of circuits and services provided, the average time intervals between order and delivery, the number of outages and intervals between fault report and service restoration, and, for circuits used to provide international switched service, the percentage of "peak hour" calls that failed to complete. We do not include the average number of circuit equivalents available to the affiliated U.S. carrier because we collect information on circuit status in the quarterly circuit status report we adopt below. We do not dictate the format of the report at this time, although we delegate authority to the International Bureau to adopt a standardized reporting manual if it determines that a uniform format would be helpful. We also delegate authority to the International Bureau to modify the contents of the filing requirements as necessary.

279. With regard to the public disclosure of the provisioning and maintenance reports, we agree with BTNA's comments that requiring a limited class of carriers to file public reports creates information inequities that parties could exploit for commercial advantage. We also find, however, that public disclosure allows the Commission *and* competing carriers to monitor whether U.S. affiliates benefit from undue discrimination in violation of the No Special Concessions rule. To strike a balance, we will allow carriers subject to the provisioning and maintenance reporting requirement to seek a protective order, which essentially requires parties to whom confidential information is made available to limit the persons who will have access to the information and the purposes for which the information will be used.[593] Here, we will allow interested parties to review the reports for purposes of determining whether the affiliated U.S. carrier is receiving provisioning and maintenance on a discriminatory basis and, where appropriate, to file a complaint with the Commission.

280. In recent years, the Commission "has relied on special remedies such as . . . protective orders to balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials."[594] For example, the Commission recently adopted a standard protective order for use in review of local exchange carrier tariff filings submitted pursuant to Section 204(a)(3) of the Act.[595] As

[592] *See* AT&T Comments at 50; *accord* TRA Reply Comments at 7.

[593] *Cf.* U.S. v. MCI Communications Corp. and BT Forty-Eight Co. (NEWCO), Civil Action No. 94-1317 (TFH) (D.D.C. filed July 17, 1997), Modified Final Judgment and Stipulation (requiring provisioning and maintenance reports and allowing disclosure of that information to interested parties only if they sign confidentiality forms stating that they will use the information only with regard to a complaint).

[594] *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd 12,460 ¶ 25 (1996) (*Confidential Information Notice*).

[595] *See Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170, 2213 ¶ 91 (1997) (*LEC Streamlining Tariff Filing Order*).

in that decision, we will apply a standard protective order where the submitting party includes with its filing a showing by a preponderance of the evidence to support its case that the information should be accorded confidential treatment consistent with the provisions of the Freedom of Information Act (FOIA) or makes a sufficient showing that the information should be subject to a protective order. This is the standard found in Section 0.459 of our rules[596] that is applicable to requests that materials or information submitted to us be withheld from public disclosure.[597] In GC Docket No. 96-55, we have proposed a model protective order that is intended to create a standard for use in Commission proceedings generally.[598] In the *LEC Tariff Filing Order*, we refined the model order slightly, and we direct the International Bureau to use a standard protective order here that reflects these modifications.[599] This standard protective order will reflect the fact that these provisioning and maintenance reports are filed on a regular basis and are not a part of a proceeding. It also will reflect the fact that the appropriate use of the material involves the determination of whether a foreign carrier with market power on the foreign end of a U.S. international route is engaged in undue discrimination in the provisioning and maintenance of basic facilities and services in favor of its affiliated U.S. carrier.[600]

(vi) Quarterly Circuit Status Reports

281. We proposed in the *Notice* to require dominant foreign-affiliated carriers subject to supplemental dominant carrier regulation to file quarterly circuit status reports for their facilities-based circuits and resold private line circuits on their dominant route and to make these reports publicly available.[601] We requested comment on whether it is necessary to require carriers to specify the particular facility on which each of their circuits on the dominant route is either activated or idle. As noted above, we decline to adopt the proposal in the *Notice* to require a quarterly notification of circuit additions or discontinuances as a basic safeguard.[602]

282. In their comments, WorldCom and AT&T support the supplemental safeguard proposal to require carriers to file quarterly circuit status reports that specify the facility on which each circuit is

596 *See* 47 C.F.R. § 0.459.

597 *See LEC Streamlining Tariff Filing Order*, 12 FCC Rcd at 2213 ¶ 91.

598 *See Confidential Information Notice*, 11 FCC Rcd 12,460 App. A.

599 *See LEC Streamlining Tariff Filing Order*, 12 FCC Rcd at 2215 ¶ 94.

600 We note that the protective order is not intended to constitute a resolution of the merits concerning whether any confidential information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

601 *See Notice* ¶ 107.

602 *See id.* ¶ 96.

activated or idle.[603] This proposal, WorldCom asserts, would "allow the Commission and competitors to determine if foreign carriers with market power are warehousing capacity to the detriment of competing carriers, or unreasonably denying access to U.S. carriers by claiming a lack of corresponding facilities."[604] AT&T also supports facility identification as part of its proposal to require notification of each circuit on the dominant route.[605] BTNA comments that a requirement that a limited class of carriers submit for public disclosure information pertaining to operational practices could result in competitive harms.[606]

283. We adopt a quarterly circuit status filing requirement for all dominant foreign-affiliated facilities-based carriers. We adopt this report for these carriers' dominant foreign-affiliated routes in lieu of our basic safeguards proposal to require quarterly notifications of circuit changes. We find that a quarterly circuit status report imposes a comparable burden but provides information that can be more readily compared to the information provided by all U.S. international carriers on an annual basis pursuant to Section 43.82 of our rules.[607] We decline to adopt the proposal to require dominant foreign-affiliated private line resale carriers to file quarterly circuit status reports, given that they rely on underlying U.S. facilities-based carriers to make arrangements with their affiliated carriers.

284. We agree with WorldCom that the identification of dominant foreign-affiliated facilities-based carriers' circuit status information on a facility-by-facility basis is an important safeguard to determine if foreign carriers are unreasonably denying unaffiliated U.S. carriers access to corresponding foreign half-circuits on particular facilities.[608] The fact that a U.S. affiliate is able to obtain and activate circuits on a particular facility to an affiliated market while unaffiliated carriers cannot may be evidence of anticompetitive conduct. As a result, we require these dominant foreign-affiliated U.S. carriers to file quarterly reports for their dominant foreign-affiliated routes in the format set out by the International Bureau's Section 43.82 annual circuit status manual, with two exceptions: activated or idle circuits must be reported on a facility-specific basis; and the derived circuits need not be specified in the three quarterly reports due on June 30, September 30 and December 31 each year.[609] We direct the International Bureau

[603] *See* WorldCom Comments at 11; AT&T Reply Comments at 36-37.

[604] WorldCom Comments at 11; *see also* AT&T Reply Comments at 37.

[605] *See* AT&T Comments at 47.

[606] *See* BTNA October 21 Letter.

[607] *See* 47 C.F.R. § 43.82 (requiring facilities-based U.S. international carriers to file annual circuit status reports no later than March 31 each year).

[608] *See* WorldCom Comments at 11.

[609] We recognize that this information may be commercially sensitive because disclosure may reveal a carrier's efficiencies in deriving additional channel capacity. However, we continue to require that all U.S. international carriers file their derived circuit information in their annual circuit status report (filed March 31 each year), unless and until the International Bureau modifies or eliminates the requirement from the Section 43.82 manual. This information is submitted in data field #2 of the manual.

to modify the Section 43.82 reporting manual as necessary to accommodate our decision in this proceeding.

285. We also find that WorldCom's claim about the warehousing of cable capacity may be an issue of concern. More broadly, we are concerned with the potential for concentration of supply on U.S. international routes. In 1995, the Commission replaced the monthly circuit status reporting requirement imposed on all U.S. international facilities-based carriers with an annual report and eliminated the requirement that circuit status information be filed on a facility-by-facility basis in an effort to be "the least intrusive and burdensome . . . as possible."[610] We conclude here, however, that to the extent warehousing is a concern, it may be relevant to all U.S. international carriers, not just those with foreign affiliates that have market power. We therefore delegate authority to the International Bureau, pursuant to its authority under Section 43.82, to seek input on the risk of warehousing and, if necessary, modify the Section 43.82 reporting manual to require all U.S. international carriers to identify in their annual circuit status reports the facility on which each circuit is activated or idle.

286. Consistent with our finding regarding the commercial sensitivity of the information contained in the provisioning and maintenance reports we adopt above, we recognize that public disclosure of the quarterly circuit status reports we adopt here could result in the information being used for commercial advantage. These quarterly reporting requirements are designed to assist the Commission and competing carriers in determining whether a U.S. carrier is receiving favorable treatment from a foreign affiliate with market power. We therefore will allow dominant foreign-affiliated carriers to request the standard protective order adopted above for the three quarterly circuit status reports that dominant foreign-affiliated carriers must file.[611] To the extent there are information inequities between dominant foreign-affiliated carriers' final (*i.e.*, March 31) quarterly report and all U.S. international carriers' annual Section 43.82 report, we conclude that these foreign-affiliated carriers may apply for a standard protective order for those portions of the final report that warrant such an order.

(vii) Rejection of Ban on Exclusive Arrangements Involving Joint Marketing, Customer Steering, or Use of Foreign Market Telephone Customer Information

287. We proposed in the *Notice* to prohibit U.S. carriers subject to supplemental dominant carrier regulation from entering into exclusive arrangements with their foreign affiliates for the joint marketing of basic telecommunications services, the steering of customers by the foreign affiliate to the U.S. carrier, or the use of foreign market telephone customer information.[612]

610 *Rules for the Filing of International Circuit Status Reports*, CC Docket No. 93-157, Report and Order, 10 FCC Rcd 8605, 8606 ¶ 9 (1995).

611 *See supra* ¶¶ 279-280.

612 *See Notice* ¶ 105.

288. Cable & Wireless argues that the Commission should reject the proposal, arguing that "as long as a dominant foreign carrier makes fundamental network components and services available to all on a fair, reasonable and nondiscriminatory basis . . . the existence of exclusive arrangements with respect to other facilities and services should not be a concern."[613] Sprint concurs, noting that it "is prepared to market head to head against a joint marketing effort conducted by a foreign carrier and its U.S. affiliate," provided that the foreign carrier cannot discriminate in favor of its affiliate.[614] GTE argues that a ban on exclusive joint marketing is unnecessary because the *Flexibility Order* ensures that carriers controlling more than 25 percent of the traffic on an international route cannot enter into alternative settlement arrangements, including joint marketing agreements, that discriminate against competing carriers.[615] Cable & Wireless adds that the proposal fails to recognize that multinational companies demand one-stop shopping for international services and that no single carrier has the resources, marketing capability, or technical expertise to go it alone.[616]

289. BTNA and NTT also oppose the ban on exclusive joint marketing arrangements but propose instead that the Commission maintain the right to bar such arrangements as a remedial measure to address proven anticompetitive conduct.[617] This approach, BTNA maintains, would ensure that the premature imposition of a regulatory restriction does not slow the development of competitive international markets.

290. In contrast, AT&T and PanAmSat support adoption of the prohibition as proposed.[618] AT&T argues that "exclusivity is not a necessary feature of [end-to-end services], and exclusive arrangements . . . provide an unearned and unfair competitive advantage when the foreign carrier enjoys a protected status in its home market."[619] Sprint supports a prohibition against the exclusive steering of customers, although it believes that a strong commitment to enforce nondiscrimination rules would be an effective policy.[620]

291. We agree with Cable & Wireless that it is not necessary to prohibit U.S. carriers from entering into exclusive arrangements with their foreign affiliates for the provision of joint marketing or the steering of customers, provided the foreign carrier cannot discriminate in favor of its U.S. affiliate in the

613 C&W Comments at 9.

614 Sprint Comments at 22-23.

615 *See* GTE Comments at 20.

616 *See* C&W Comments at 8; C&W Reply Comments at 8.

617 *See* BTNA Comments at 3-4; NTT Reply Comments at 4.

618 *See* AT&T Comments at 49; AT&T Reply Comments at 35; PanAmSat Comments at 4.

619 AT&T Reply Comments at 36.

620 *See* Sprint Comments at 23.

provision of fundamental network components or basic services. The underlying premise guiding our dominant carrier safeguards is to ensure the nondiscriminatory access to basic telecommunications services for the provision of U.S. international services. The No Special Concessions rule prohibits any U.S. carrier from agreeing to accept exclusive arrangements involving fundamental network components and basic telecommunications services from a foreign carrier with market power. The dominant carrier safeguards we adopt monitor and detect anticompetitive behavior. We find that they will be effective in ensuring that U.S. carriers can obtain nondiscriminatory access to fundamental network components and basic services. Further proscriptive safeguards, we conclude, would be unduly burdensome and could impede unnecessarily the provision of one-stop shopping by injecting uncertainty with respect to the permissible scope of joint activities. We conclude, however, that if we find anticompetitive conduct, we have the authority to impose such a ban on exclusive arrangements, as BTNA and NTT contend.

292. We also decline to adopt a ban on exclusive arrangements between dominant foreign-affiliated carriers and their foreign affiliates involving the use of foreign market telephone customer information. MCI supports a ban on exclusive arrangements involving foreign market telephone customer information obtained by U.S. carriers from foreign affiliates that do not face competition.[621] As discussed above, however, we require all U.S. carriers to obtain U.S. customer approval if they intend to make use of foreign-derived U.S. customer information.[622]

D. Enforcement of Safeguards

293. We sought comment in the *Notice* on whether additional remedies are necessary to address anticompetitive conduct.[623] Several commenters contend that the Commission should adopt an expedited complaint procedure.[624] AT&T argues that the Commission should establish a procedure for complaints involving abuse of foreign market power by foreign carriers that do not face facilities-based competition.[625] MCI asserts that the Commission should adopt a complaint procedure to address and resolve complaints regarding distortion of competition by foreign-affiliated carriers.[626] BTNA claims that any remedy in response to a proven violation should be fashioned to address the particular circumstances of the case.[627]

621 *See* MCI Comments at 6-7.

622 *See supra* Section V.B.2.b.

623 *Notice* ¶ 127.

624 *See* AT&T Comments at 52; BTNA Comments at 4; MCI Comments at 7; GTE Reply Comments at 29.

625 *See* AT&T Comments at 52.

626 *See* MCI Comments at 7.

627 *See* BTNA Comments at 4.

294. As we observed in the *Notice*, we have ample authority to investigate allegations that a violation of our rules has occurred. Section 218 of the Act authorizes the Commission to inquire into the management of the business of all carriers subject to the Act and to "obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created."[628] For example, if a carrier's quarterly traffic and revenue report indicated that there may have been manipulation of the settlements process on a particular route, we may find it necessary to audit the revenue and traffic records of the U.S. carrier, or foreign carrier, or both.

295. In the event that we find anticompetitive conduct, moreover, we have several different remedies available to us. In addition to the specific Title II forfeitures that might apply to a carrier, Section 503 of the Act allows us to impose a forfeiture of up to $100,000 for each violation or each day of a continuing violation by a carrier.[629] We also may impose additional conditions on a Section 214 authorization or revoke the authorization in cases of adjudicated misconduct. We could impose strict structural separation, for example, in the event that an affiliated U.S. carrier knowingly receives technical network information from its foreign affiliate in advance of unaffiliated U.S. carriers. We also could require a U.S. carrier to terminate an arrangement with a foreign carrier if we found that the arrangement resulted in anticompetitive effects in the U.S. market.[630] Other potential remedies include, but are not limited to, freezing circuits, prohibiting the use of foreign-derived CPNI, and banning the joint marketing of basic services by a U.S. carrier and its foreign affiliate. We also adopt here a general rule that would enable us to review a carrier's authorization and, if warranted, impose additional requirements in circumstances where it appears that harm to competition is occurring on one or more U.S. international routes.[631]

296. At this time, we do not find that it is necessary to adopt an expedited procedure to prevent competitive harm in the U.S. market. We recognize that a policy of timely enforcement of our safeguards will put all carriers on notice that we will be vigorous in our efforts to promote competition and prevent anticompetitive behavior in the U.S. market. We also note that we have modified our rules to facilitate the prompt resolution of all formal complaints against telecommunications carriers involving claims of unreasonably discriminatory or otherwise unlawful conduct in violation of the Act or our rules.[632]

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[628] *See* 47 U.S.C. § 218.

[629] 47 U.S.C. § 503(b)(2)(B).

[630] *Cf. supra* ¶ 162.

[631] *See infra* Appendix C (to be codified at 47 C.F.R. § 63.21(g)).

[632] *See Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238, Report and Order, FCC 97-396, (rel. November 25, 1997).

E. Alternative Settlement Arrangements

Background

297. In the *Notice*, we sought comment on whether we should modify the framework adopted in our *Flexibility Order*[633] for approving alternative settlement arrangements. In the *Flexibility Order*, we authorized U.S. carriers to negotiate alternative settlement arrangements that deviate from the requirements of our International Settlements Policy (ISP)[634] with any foreign correspondent in a country that satisfies the ECO test. We also stated in the *Flexibility Order* that we would consider such alternative settlement arrangements between a U.S. carrier and a foreign correspondent in a country that does not satisfy the ECO test if the U.S. carrier can demonstrate that deviation from the ISP will promote market-oriented pricing and competition, while precluding the abuse of market power by the foreign correspondent.

298. We tentatively concluded in the *Notice* that, if we no longer apply the ECO test to international Section 214 applications filed by carriers from WTO Member countries, we should not conduct an ECO analysis for purposes of determining whether to permit a U.S. carrier to enter an alternative settlement arrangement with carriers from WTO Member countries. We further tentatively concluded that we should adopt a rebuttable presumption that flexibility is permitted for carriers from WTO Member countries which could be rebutted by a showing that market conditions in the country in question are not sufficiently competitive to prevent a carrier with market power in that country from discriminating against U.S. carriers. Specifically, we proposed that the presumption could be rebutted by a showing that the country has not opened its market to competition, either because the country has not complied with its market access commitment, its commitment has not taken effect, or it made no commitment. We also proposed that the presumption could be rebutted by a showing that the country does not, or will not in the near future, have in place fair rules of competition, such as those contained in the Reference Paper, to ensure viable opportunities for actual entry.[635] For alternative settlement arrangements with carriers from countries that are not WTO Members, we tentatively concluded that we should continue to apply the ECO test as the threshold standard for permitting flexibility.

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633 *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063 (1996) (*Flexibility Order*), *recon. pending*.

634 The ISP prevents foreign carriers from discriminating among U.S. carriers in bilateral accounting rate negotiations. It requires: (1) the equal division of accounting rates; (2) nondiscriminatory treatment of U.S. carriers; and (3) proportionate return of inbound traffic. *See Implementation and Scope of the International Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (1986), *modified in part on recon.*, 2 FCC Rcd 1118 (1987), *further recon.*, 3 FCC Rcd 1614 (1988); *see also Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), *on recon.*, 7 FCC Rcd 8049 (1992).

635 As we stated in the *Foreign Carrier Entry Order*, even if a country permits entry as a legal matter, to ensure viable opportunities for actual entry, the country must also have in place fair rules of competition. *Foreign Carrier Entry Order*, 11 FCC Rcd at 3890 ¶ 44.

Positions of the Parties

299. Several commenters agree with our tentative conclusion that we should no longer conduct an ECO analysis for purposes of determining whether to permit a U.S. carrier to enter an alternative settlement arrangement with carriers from WTO Member countries.[636] FCI, for example, states that, assuming WTO Member countries "honor their commitments and competitive forces fuel liberalization efforts," a rebuttable presumption in favor of flexibility for WTO Member countries will provide ample opportunity to address potential discriminatory behavior.[637] Telia NA states that the Commission should encourage carriers from WTO Member countries to enter into alternative settlement arrangements, including arrangements where one carrier provides end-to-end service without the use of accounting rates.[638]

300. France Telecom and Sprint agree that the ECO test should no longer be the threshold standard for permitting flexibility. However, they advocate different threshold standards to replace the ECO test. France Telecom argues that there should be a presumption that flexibility is permitted for WTO Member countries and that, to rebut the presumption, a party should have to show that: (i) there is no *de jure* openness in the foreign market and (ii) no competing carriers have been licensed. France Telecom further argues that for purposes of determining whether there is *de jure* openness in the foreign market, the Commission should consider solely whether the country has committed to the Reference Paper or equivalent provisions.[639] Sprint opposes the proposal in the *Notice* that the presumption in favor of flexibility may be rebutted by a showing that "market conditions in the country in question are not sufficient to prevent a carrier with market power from discriminating against U.S. carriers." Sprint argues that this standard is too vague and, like the ECO test, would involve the Commission in a detailed examination of regulatory conditions in another country.[640] As an alternative to the proposed standard, Sprint suggests that flexibility be permitted where a U.S. carrier can demonstrate that a former monopoly carrier in a foreign country has no more than approximately 65 percent of the traffic between the U.S. and that country. Sprint states that there is "no magic" to the 65 percent standard, but it would be objective and provide carriers with regulatory certainty.[641]

301. AT&T opposes our proposal to adopt a presumption that flexibility is permitted for carriers from WTO Member countries. AT&T contends that "even allowing 'easy rebuttal' of the presumption"

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636 *See, e.g.*, NYNEX LD Comments at 3; FCI Comments at 8; GTE Comments at 22; Telia NA Reply at 11.

637 FaciliCom Comments at 8.

638 Telia NA Reply at 11-12.

639 FT Comments at 19-20.

640 *See also* Japan Comments at 2 (arguing that the proposed rebuttable presumption leaves the Commission with too much discretion and is therefore inconsistent with GATS principles).

641 Sprint Comments at 32-34.

would not provide sufficient protection against competitive harm because of the difficulty of obtaining accurate information on regulatory conditions in other countries.[642] AT&T argues that we should adopt what it calls a "neutral presumption" with the burden of production on the proponent of the alternative settlement arrangement. The requirements for permitting flexibility, according to AT&T, should meet the same standards as the ECO test. AT&T proposes that the requirements be whether the relevant country has implemented WTO commitments to provide unrestricted market access, to allow controlling foreign ownership, and to satisfy the Reference Paper.[643] NYNEX LD opposes AT&T's proposal, arguing that it is "inappropriate in a global market being reshaped by the [WTO Basic Telecom] Agreement."[644]

Discussion

302. As discussed above, we will no longer apply the ECO test to international Section 214 applications filed by carriers from WTO Member countries.[645] In light of this fact, and because we expect substantial changes in the global telecommunications market due to the WTO Basic Telecom Agreement, we conclude that we should no longer apply the ECO test as the threshold standard for determining when to permit accounting rate flexibility with carriers from WTO Member countries. Instead, we conclude that we should adopt our proposal in the *Notice* to apply a rebuttable presumption that flexibility is permitted for carriers from WTO Member countries.

303. In the *Flexibility Order*, we adopted the ECO test as the standard for permitting alternative settlement arrangements because we believed it would be an appropriate indicator of whether the legal, regulatory and economic conditions in a foreign market support competition such that the ISP is no longer necessary to protect against abuse of market power by foreign carriers. We anticipated that, in many instances, a U.S. carrier would seek approval to enter an alternative arrangement with a foreign carrier in a country that had already been found to satisfy the ECO test in the context of a prior Section 214 facilities application to serve that country. Thus, we considered that the use of the already-established ECO test as the threshold standard for permitting flexibility would be administratively efficient and would provide consistent results and business certainty for U.S. carriers.[646]

304. As we stated in the *Notice*, we believe that it would be administratively inefficient for the Commission, and burdensome to carriers, to continue to conduct an ECO analysis to determine whether to permit flexibility when we no longer apply the test to applications for international Section 214 authorization from carriers in WTO Member countries. As discussed above, the ECO test requires a fact-

642 AT&T Comments at 53.

643 *Id*. at 56-57.

644 NYNEX LD Reply Comments at 3.

645 *See supra* Section III.A.

646 *See Flexibility Order*, 11 FCC Rcd at 20,079 ¶ 38.

specific, detailed review of competitive conditions on a given route.[647] We conclude that such a thorough review is not appropriate or necessary solely for purposes of determining whether to permit flexibility.

305. We adopted our flexibility policy in recognition of the fact that some telecommunications markets are shifting from the traditional monopoly model to a more competitive market structure.[648] Where competitive conditions exist, our flexibility policy is designed to encourage carriers to enter market-oriented agreements rather than maintain strict adherence to the ISP, which limits market conduct to prevent monopolists from causing harm to competition and U.S. consumers. We expect that countries' commitments to competition and fair regulatory principles as part of the WTO Basic Telecom Agreement will lead to more competitive conditions in many markets. As a result, we find that, with regard to carriers from WTO Member countries, flexibility should be more the rule than the exception. We agree with Telia NA that carriers from WTO Member countries should be encouraged to enter alternative settlement arrangements, including arrangements where one carrier provides end-to-end service without the use of accounting rates. As Telia NA notes, such alternative arrangements will promote competition and thus ensure that U.S. consumers have access to high-quality, affordable international telecommunications services.[649]

306. In the *Notice*, we acknowledged that WTO membership alone will not guarantee that conditions in a foreign market are sufficiently competitive to prevent foreign carriers with market power from discriminating among U.S. carriers. For that reason, we tentatively concluded that the presumption in favor of flexibility may be rebutted by a showing that market conditions in the country in question are not sufficiently competitive to prevent a carrier with market power in that country from discriminating among U.S. carriers.[650] Nonetheless, we are concerned that, as Sprint and France Telecom point out, this standard could be considered vague and could unnecessarily delay implementation of alternative settlement arrangements. We therefore revise the showing proposed in the *Notice* to rebut the presumption in favor of flexibility.

307. We agree with Sprint and France Telecom that we should adopt a straightforward, objective standard to rebut the flexibility presumption. We conclude that, in order to rebut the presumption in favor of permitting flexibility, a party must demonstrate that the foreign carrier is not subject to competition in its home market from multiple (more than one) facilities-based carriers that possess the ability to terminate international traffic and serve existing customers in the foreign market. Such a standard would be objective

[647] *See supra* ¶ 35.

[648] *See Flexibility Order*, 11 FCC Rcd at 20,069 ¶ 15.

[649] *See* Telia NA Reply at 11-12.

[650] *Notice* ¶ 151. Specifically, we proposed that the presumption could be rebutted by a showing that the country (i) has not opened its market to competition, either because the country has not complied with its market access commitment, its commitment has not taken effect, or it made no commitment; or (ii) does not, or will not in the near future, have in place fair rules of competition, such as those contained in the Reference Paper, to ensure viable opportunities for actual entry. *Id*.

and easy to apply. Moreover, the existence of actual competition from multiple facilities-based carriers serves as a good indicator of whether market conditions are conducive to allowing U.S. carriers to enter market-oriented arrangements.

308. Sprint expresses concern that a foreign carrier with market power may have the ability to discriminate among U.S. carriers in settlement rate negotiations, even if the foreign carrier is subject to competition in its home market. Sprint therefore suggests that we should consider the market share of the foreign carrier in determining whether to permit flexibility. We addressed this concern in the *Flexibility Order* and concluded that the safeguards we adopted there ensure that our flexibility policy does not have anticompetitive effects in the international market.[651] We retain these safeguards and find that they will effectively limit the ability of a carrier with market power to discriminate among U.S. carriers in circumstances where a grant of the alternative settlement arrangement is consistent with our flexibility policy.[652] These safeguards require that: (i) alternative settlement arrangements between affiliated carriers and those involved in non-equity joint ventures affecting the provision of basic services must be filed with the Commission and be publicly available and (ii) alternative arrangements affecting more than 25 percent of either the inbound or outbound traffic on a particular route must be filed with the Commission and be publicly available and must not contain unreasonably discriminatory terms and conditions.[653] We also note that, in the *Flexibility Order*, we reserved the right to review, and if need be, reject the terms and conditions of all alternative arrangements, regardless of whether they trigger our safeguards, to ensure that they meet our policy objectives and will not have a significant adverse impact on U.S. net settlement payments and resulting traffic volumes.[654] We retain this right here.

309. We stated in the *Flexibility Order* that, even where the ECO test is not satisfied, we would consider alternative settlement arrangements between a U.S. carrier and a foreign correspondent if the U.S. carrier can demonstrate that deviation from the ISP will promote market-oriented pricing and competition, while precluding the abuse of market power by the foreign correspondent. We noted, for example, that a departure from the ISP would likely be warranted where a non-dominant U.S. carrier seeks to negotiate an

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651 *See Flexibility Order*, 11 FCC Rcd at 20,081-83 ¶¶ 44-48.

652 NYNEX LD and SBC seek clarification that the flexibility safeguards will not be affected by our proposal to limit the no special concessions prohibition to apply only to concessions granted by foreign carriers with market power. NYNEX LD Comments at 4; SBC Comments at 2-3; *see also* Telstra Reply at 7-8. France Telecom, on the other hand, seeks confirmation that under our new flexibility framework, any carrier will be able to exchange traffic on all routes, regardless of its market power. FT Comments at 20. As discussed in note 308 above, the modifications to the No Special Concessions rule we adopt in this *Order* do not affect the application of our flexibility safeguards.

653 *Flexibility Order*, 11 FCC Rcd at 20,081-82 ¶ 45, 20,083-84 ¶ 48. Pursuant to the procedures we adopted in the *Flexibility Order*, a petitioning carrier must state whether an alternative arrangement triggers these safeguards. *Id*. at 20,087 ¶ 58.

654 *Flexibility Order*, 11 FCC Rcd at 20,087-88 ¶ 59.

alternative arrangement with a foreign entity that does not have market power on the foreign end.[655] We will also allow the proponent of an alternative settlement arrangement with a carrier from a WTO Member country to make this alternative showing where the presumption in favor of flexibility can be rebutted.

310. We are not persuaded by those commenters that seek a different threshold for allowing alternative settlement arrangements. France Telecom, for example, asserts that a party opposing an alternative settlement arrangement should have to demonstrate that no competing carriers have been licensed. We are concerned that the existence of a carrier in the foreign market that is merely licensed, but that lacks the ability to terminate international traffic and does not serve actual customers, would not have a sufficient presence in the market to afford U.S. carriers a reasonable opportunity to negotiate market-oriented arrangements.

311. We also disagree with AT&T's position that the proponent of an alternative settlement arrangement should have to satisfy the same standards as the ECO test. We find that the presumption we adopt here in favor of flexibility for carriers from WTO Member countries is appropriate because the commitments to competition and fair regulatory treatment made by WTO Member countries represent a transition to competitive telecommunications markets, a trend that we seek to encourage. We believe, moreover, that the standard we adopt for rebutting the flexibility presumption will serve as an effective surrogate for the detailed analysis of market conditions advocated by AT&T. In addition, the standard we adopt alleviates concern expressed by AT&T that obtaining detailed information about competitive conditions in a foreign country would be very difficult for parties opposing an alternative settlement arrangement.[656]

312. Under the procedures adopted in our *Flexibility Order*, U.S. carriers may obtain approval to enter an alternative payment arrangement by filing a detailed petition for declaratory ruling that the alternative payment arrangement is permitted under the criteria for deviating from the ISP adopted in that proceeding.[657] We adopt minor changes to these procedures to conform to our new standard for permitting flexibility. Where a U.S. carrier seeks approval to enter an alternative arrangement with a carrier from a WTO Member country, the requesting carrier will be required to demonstrate only that the carrier is operating in a WTO Member country rather than a full-fledged ECO showing. The burden would be on opposing parties to show that the foreign carrier that is a party to the alternative arrangement does not face competition from multiple facilities-based carriers that possess the ability to terminate international traffic and serve actual customers in its home market. The new policies and procedures we adopt here for alternative settlement arrangements with foreign carriers in WTO Member countries will be applied to all flexibility petitions pending before the Commission in any procedural status at the time our new rules become effective.

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[655] *See id*. at 20,080 ¶ 40.

[656] AT&T Comments at 55.

[657] The petition for declaratory ruling is put on public notice and interested parties are given an opportunity to file a formal opposition within twenty days.

313. Finally, we note that Telstra urges us to conform the procedural rules that apply to a request for modification of the ISP under Section 64.1001(f) with the procedures that apply to the filing of a petition for declaratory ruling to implement an alternative settlement arrangement.[658] Specifically, it argues that requests for modification of the ISP should be placed on public notice as petitions for declaratory ruling currently are. We reject Telstra's proposal in this proceeding. Modifications under Section 64.1001 are simply reductions in settlement rates that generally do not raise the broad concerns that are raised by petitions for declaratory ruling to approve alternative settlement arrangements. Further, the parties that might have concerns with the reductions, *i.e.,* those with operating agreements with the same carrier, are given notice of the filing directly by the applicant. Therefore, a public notice would only prove to delay a procedure for approving modifications that is designed to allow expeditious grants in most cases while giving those parties potentially affected a chance to respond. Although we reject Telstra's arguments here, we reserve the right to revisit in the future the whole issue of procedures to implement accounting rate changes.

VI. Procedures

A. Streamlined Application Procedures

Background

314. It has been, and continues to be, our goal to make streamlined procedures available to as many applicants as possible, consistent with ensuring that we can identify and address those applications that present particular risks. The new competitive conditions created by the WTO Basic Telecom Agreement and the rules we adopt here will reduce substantially the ability of any one carrier to distort competition in the U.S. market as a result of an affiliation with a foreign carrier that has market power on the foreign end of a U.S. international route. This situation presents us with an opportunity to reduce our scrutiny of many applications and afford those applications streamlined processing.

315. Our current rules generally permit streamlined processing of Section 214 applications filed by foreign carriers or their U.S. affiliates in circumstances where the foreign carrier is not a facilities-based carrier in the destination market. We proposed in the *Notice* to expand the class of foreign-affiliated applicants eligible for streamlined processing to include some that are affiliated with facilities-based carriers.[659] We invited commenters to submit specific proposals to expand the class of affiliated carriers eligible for streamlined processing, and we specifically proposed to include in that class carriers whose affiliate is from a WTO Member country and that seek to serve that country solely by reselling the switched services of unaffiliated U.S. international carriers.

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658 *See* Telstra Comments at 5-9.

659 We define "facilities-based carrier" as a carrier that "holds an ownership, indefeasible-right-of-user, or leasehold interest in bare capacity in an international facility, regardless of whether the underlying facility is a common or non-common carrier submarine cable, or an INTELSAT or separate satellite system." 47 C.F.R. § 63.18(h) note 2.

316. We also proposed to streamline the Section 214 application of any applicant whose affiliate is a foreign carrier in a WTO Member country that certifies that it would comply with all of the dominant carrier regulations that we proposed in the *Notice*. The carrier would then have the option of later demonstrating to the Commission that it qualifies to be regulated as non-dominant.[660] We also proposed that Commission staff exercise discretion to afford streamlined processing in circumstances where such an applicant certifies that it would comply with our "basic" dominant carrier safeguards and demonstrates clearly and convincingly that it should not be subject to the "supplemental" safeguards that we proposed in the *Notice*.[661]

317. Finally, we proposed to extend streamlined processing to applications for assignments and transfers of control of Section 214 authorizations by defining the class of eligible applicants in the same manner as for initial grants.[662]

Positions of the Parties

318. Deutsche Telekom states that we should clarify that we will not delay the processing of any Section 214 applications submitted by foreign carriers or their affiliates for "trade or other political reasons" at the request of other U.S. Government bodies or at our own initiative. Delay for those reasons, Deutsche Telekom argues, violates the principles of MFN and National Treatment as well as the GATS requirement that applications be acted upon within a "reasonable period of time."[663]

319. Deutsche Telekom argues that the streamlined processing standards proposed in the *Notice* discriminate between U.S.-owned and foreign-affiliated carriers in violation of the principle of National Treatment. Deutsche Telekom also argues that the proposals violate the MFN principle in that foreign carriers willing to certify that they will comply with the "supplemental" safeguards will receive immediate streamlined processing while foreign carriers who seek to demonstrate that supplemental safeguards do not apply will encounter delays before it is determined whether they are entitled to streamlined processing.[664]

320. NTT, the Government of Japan, and the European Union state that we should establish either a time limit or a "period of time normally required to reach a decision" for consideration of applications. The commenters cite the Reference Paper and Article VI of the GATS as suggesting the need to do so.

[660] *Notice* ¶ 135 & n.129.

[661] *Id.* ¶ 136.

[662] *Id.* ¶ 137.

[663] DT Comments at 34.

[664] DT Comments at 35.

321. BellSouth and SBC do not oppose the streamlining proposals contained in the *Notice* but argue that Bell Operating Companies should not have to meet much more detailed procedures and more stringent tests to enter the same U.S. market on an "in-region" basis pursuant to Section 271 of the Act.[665]

Discussion

322. No commenter submitted specific proposals to expand the class of foreign-affiliated carriers that should be deemed eligible for streamlined processing. In light of the approach we take in this *Order*, we conclude that it is appropriate to streamline the Section 214 applications of carriers that qualify for the presumption of non-dominance under the market share screen discussed in Section V.[666] Thus, we will streamline those applications that demonstrate clearly that the foreign carrier affiliate has less than a 50 percent market share in the international transport and local access markets in the destination foreign country.[667] Also, for the reasons expressed in the *Notice*,[668] we adopt our proposal to afford streamlined processing to the Section 214 application of any applicant whose foreign affiliate is from a WTO Member country if the applicant requests authority only to serve that country solely by reselling the switched services of unaffiliated U.S. international carriers. Finally, we will streamline the Section 214 application of any applicant not otherwise eligible for streamlined processing so long as the applicant's affiliate is a foreign carrier in a WTO Member country and the applicant certifies that it will comply with the dominant carrier regulations we adopt in Section V.C.2. This represents a finding that, in the great majority of cases, our No Special Concessions rule, benchmark condition, and dominant carrier regulations — rather than denying applications — will be sufficient to prevent anticompetitive effects in the U.S. market. We also adopt our proposal to streamline applications for assignments and transfers of control of Section 214 authorizations in circumstances where an initial Section 214 application filed by the assignee or transferee would be eligible for streamlined processing.[669]

323. Because we cannot envision a circumstance in which an indirect foreign investment by an investor from a WTO Member country in a common carrier radio licensee that does not result in a transfer of control will pose a very high risk to competition,[670] we conclude that we can streamline Section

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665 BellSouth Comments at 6-7; SBC Comments at 7.

666 *See supra* ¶¶ 232-233; *see also supra* ¶ 161.

667 The applicant should provide the information described *supra* in paragraph 163.

668 *Notice* ¶¶ 130-137.

669 In order to streamline applications for assignments and transfers of control, we must receive the information described in Section 63.18(h) of our rules regarding the assignee's or transferee's affiliates. *See* 47 C.F.R. § 63.18(h). The current rule inadvertently omitted paragraph (h) from the list of information required. We here amend Section 63.18(e)(5) of our rules to require that applicants provide this necessary information.

670 *See supra* ¶ 112.

310(b)(4) requests as well. When we receive applications that implicate only Section 310(b)(4), we will include those applications in the International Bureau's streamlined process. This will include (1) any petition for declaratory ruling that it would not serve the public interest to deny a Title III common carrier license to a particular entity; (2) permission for an existing common carrier radio licensee to exceed 25 percent indirect foreign ownership; and (3) permission to increase a licensee's level of non-controlling indirect foreign ownership when permission to exceed 25 percent has already been granted. It will not include applications that also involve an assignment of license or a transfer of control, which are evaluated under Section 310(d). It will also not include any initial licensing applications, which involve service-specific rules and other portions of Title III of the Act.

324. Pursuant to Section 63.20 of our rules, petitions to deny must contain specific allegations of fact sufficient to show that a grant of the application would not serve the public interest, convenience, and necessity.[671] In all circumstances, Commission staff will have the discretion to deem an application ineligible for streamlined processing either because it raises market power concerns or because an Executive Branch agency raises concerns with respect to issues within its expertise.

325. We disagree with Deutsche Telekom's assertion that the streamlined processing standards violate the principles of MFN and national treatment. We will treat all U.S. and foreign carriers with affiliations that raise similar market power concerns alike. Indeed, we note that the International Bureau did not afford streamlined processing to initial international Section 214 applications filed by affiliates of several Bell Operating Companies (BOCs) seeking to provide service originating in out-of-region states.[672] These applications raised the issue of whether the BOC affiliates could leverage the market power of their local exchange carrier affiliates in their in-region states to gain market power in the provision of international service originating from out-of-region states. Thus, non-streamlined processing has been, and continues to be, necessary in circumstances where we must evaluate applications in order to protect the U.S. market from anticompetitive effects. In any event, we note that nearly every applicant whose affiliate is from a WTO Member country will be able to obtain streamlined approval of its Section 214 authorizations by choosing, where necessary, to certify that it will comply with dominant carrier regulation for its traffic along an affiliated route. As we stated in the *Notice*,[673] these carriers can later petition the Commission to remove dominant carrier regulation.

326. BellSouth's and SBC's comments take issue with the Commission's approach to implementing Section 271(d)(3) of the Act, which sets forth basic statutory provisions that govern the Commission's approval or denial of BOC applications to provide in-region interLATA services. The issues

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[671] 47 C.F.R. § 63.20.

[672] *See, e.g., NYNEX Long Distance Co., Ameritech Communications, Inc., Bell Atlantic Communications, Inc., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Provide International Services from Certain Parts of the United States to International Points through Resale of International Switched Services*, Order, Authorization and Certificate, 11 FCC Rcd 8685 (Int'l Bur. 1996).

[673] *Notice* ¶ 135 n.129.

they raise are beyond the scope of this proceeding. We discuss above BellSouth's argument that it is irrational to apply different standards to foreign or foreign-affiliated carriers than we apply to BOCs.[674]

327. We agree with commenters who suggest that we establish a period of time normally required to reach a decision on an application. Our streamlined process, by which we expect to grant the great majority of applications, will continue to follow the procedure described in Section 63.12 of our rules:[675] After an initial review, an application deemed acceptable for filing and eligible for streamlined processing is listed on a public notice as streamlined. Applicants whose applications are listed on such a public notice may commence operations on the 36th day following the public notice unless notified by the Commission within 28 days after the date of the public notice that the application is not eligible for streamlined processing. It will therefore normally take 35 days to reach a decision on an application from the date the International Bureau places the application on public notice.

328. We now amend Section 63.12 to provide for situations where an application is deemed ineligible for streamlined processing. In those cases, we will issue a public notice that the application has been removed from the streamlined process. Within 90 days of the public notice, we will issue an order acting upon the application or provide public notice that, because the application raises questions of extraordinary complexity, an additional 90-day period for review is needed. Each successive 90-day period may be so extended, subject to this high standard. This procedure should reassure applicants and potential applicants that their applications will be handled expeditiously and should give them guidance on the amount of time within which they may expect a decision on an application even if an application is deemed ineligible for streamlined processing.

329. Parties should be aware that we intend to apply the rules and policies adopted in this *Order* to all applications pending before the Commission in any procedural posture at the time they become effective.[676]

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[674] *See supra* ¶ 58.

[675] 47 C.F.R. § 63.12.

[676] *See Notice* ¶¶ 44, 74, 152. Telstra urges the Commission to waive the ECO test before the effective date of this *Order* for applications filed by carriers from WTO Member countries that already permit U.S. companies to provide facilities-based international services. *See* Telstra Comments at 3. We deny Telstra's specific request because we believe it could create the potential for anticompetitive effects if implemented without the safeguards contained elsewhere in this *Order*, but we note that our existing framework permits a showing that effective competitive opportunities will be available in the near future. *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3891 ¶ 46; *e.g.*, *MAP Mobile Communications*, 12 FCC Rcd 6109 (1997).

B. Notifications of Foreign-Carrier Affiliations

Background

330. Paragraph (b) of Section 63.11 of the Commission's rules requires that any U.S. international carrier that knows of a planned investment by a foreign carrier of a 10 percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier shall notify the Commission 60 days prior to the acquisition of the interest.[677] Paragraph (e) provides that, where the Commission finds that the planned investment by the foreign carrier raises a substantial and material question of fact as to whether the investment serves the public interest, convenience and necessity, the U.S. carrier shall not consummate the investment until it has submitted an application under Section 63.18.

331. In the *Notice*, we proposed to maintain the Section 63.11(b) prior notification requirement for U.S. carriers with planned investments by foreign carriers (and their affiliated companies) regardless of whether or not the foreign carrier is from a WTO Member country.[678] We stated that we could not rule out the possibility that a particular investment might present a very high threat of anticompetitive harm.

Discussion

332. In light of the approach we take in this *Order*, we conclude that we can revise our rules to require fewer investments in authorized carriers to be reported to the Commission. The European Union is concerned that the existing requirement could result in a disguised market access barrier. We find that a foreign carrier's investment in an authorized carrier will very rarely raise any public interest issues unless it creates an affiliation pursuant to Section 63.18(h)(1)(i) of the Commission's rules. We therefore conclude that we need not require authorized carriers to notify the Commission before accepting total foreign carrier investments of 25 percent or less. That is, we amend Section 63.11(b) to raise the level of foreign carrier investment (whether by a single carrier or by multiple carriers that are parties to a contractual relationship) that requires prior notification from 10 percent to greater than 25 percent.[679]

333. Notifications pursuant to Section 63.11(b) will give the Commission the opportunity to evaluate new affiliations under the entry standards that we adopt in this *Order* in order to determine whether it continues to serve the public interest to allow the authorized carrier to serve the markets where it

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677 47 C.F.R. § 63.11(b). The provision applies also to planned investments by any entity "that directly or indirectly controls or is controlled by a foreign carrier, or that is under direct or indirect common control with a foreign carrier." *See Notice* ¶ 141. Section 63.11(b) also requires that the notification certify to certain information specified in Section 63.11(c).

678 *Notice* ¶ 143.

679 *See infra* Appendix C (to be codified at 47 C.F.R. § 63.11(a)). We retain our policy, however, of scrutinizing investments of 25 percent or less that present a significant potential impact on competition in the U.S. market for international telecommunications services. *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3906 ¶ 89.

has an affiliation with a foreign carrier. The notifications will give us the opportunity to impose any conditions that we might deem necessary in a particular case. We might, for example, find in a particular case that an affiliation raises anticompetitive concerns that must be addressed by imposing our benchmarks condition or the dominant safeguards we adopt here.

334. In order to implement the standards that we adopt in this *Order*, including our decision to apply our entry policies (whether the open entry policies for WTO Members or the ECO test for non-WTO Members) to U.S. carriers' investments in foreign carriers, we find that it is necessary to require an authorized carrier to notify the Commission 60 days before it, or a company that owns more than 25 percent of it, acquires a direct or indirect controlling interest in a foreign carrier.[680] We now amend Section 63.11(b) to add this requirement.

VII. Compliance with U.S. Commitments under the WTO Basic Telecom Agreement

Background

335. In the *Notice,* we described the results of the WTO Basic Telecom Agreement and the obligations imposed on WTO Members by the GATS.[681] We proposed a new standard for foreign carrier entry in light of these results and obligations. Many commenters addressed the consistency of our proposed rules with the GATS. In order to put these comments — and our responses — in context, we provide a brief description of GATS obligations.

336. The GATS is composed of three major components. The first component consists of general obligations and disciplines which apply to all WTO Members. The second component is comprised of specific commitments relating to market access, national treatment, and other commitments, which are embodied in individual WTO Member Schedules of Specific Commitments.[682] The final component sets out exemptions from the general obligations embodied in Lists of Article II (Most-Favored-Nation (MFN)) Exemptions.[683]

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[680] These affiliations previously have been reported to the Commission by the authorized carrier pursuant to paragraphs (a) and (c) of Section 63.11.

[681] *Notice* ¶¶ 20-24.

[682] The Schedules of Specific Commitments form an integral part of the GATS pursuant to Article XX of the GATS. The Schedules containing commitments on basic telecommunications services are available on the WTO web page at www.wto.org.

[683] The Annex on Article II Exemptions specifies the conditions under which a WTO Member is exempted from its MFN obligations under paragraph 1 of Article II. The United States excluded from its market access commitments and national treatment obligations and took an MFN exemption for the provision of direct-broadcast satellite services, direct-to-home satellite services and digital audio radio satellite services.

337. The most important of the general obligations and disciplines that apply to all WTO Members is the requirement in Article II of the GATS to accord MFN treatment to like services and service suppliers of all other WTO Members, no matter what specific commitments a WTO Member has made. MFN is essentially a nondiscrimination rule that requires each WTO Member to treat like services and service suppliers from all other WTO Members similarly.[684] In addition to the MFN obligation, all WTO Members undertake transparency obligations in accordance with Article III (Transparency) of the GATS, which requires prompt publication of all laws and regulations applicable to the provision of services.[685]

338. Many WTO Members, including the United States, undertook specific commitments with respect to market access and national treatment as a result of the WTO negotiations on basic telecommunications. GATS Article XVI (Market Access) requires each WTO Member to accord services and service suppliers of any other WTO Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule and to refrain from imposing certain types of quantitative restrictions, economic needs tests or local incorporation requirements, in those sectors where the WTO Member has undertaken specific market access commitments.[686] This means that a Member may not maintain limits such as the number of service suppliers or the corporate form in which a service can be provided, unless the Member has specifically listed such limitations in its Schedule.[687] Article XVII (National Treatment) is a nondiscrimination rule that requires a WTO Member to treat like services and service suppliers from other WTO Members no less favorably than it treats its own services and service suppliers.[688] Under GATS Articles II (MFN) and XVII (National Treatment), treatment of domestic and foreign service suppliers need not be identical to accord MFN or national treatment. The critical aspect of an MFN or national treatment analysis is whether the treatment accorded modifies the conditions of competition in favor of certain foreign or domestic suppliers.[689] Thus, dissimilar treatment can be consistent with MFN or national treatment obligations if it does not put the foreign supplier at a competitive disadvantage to another foreign supplier or a domestic supplier.

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684 Article II of the GATS requires WTO Members to accord "to services and service suppliers of any other [WTO] Member treatment no less favorable than that it accords to like services and service suppliers of any other country."

685 *See* GATS art. III.

686 A quantitative restriction is a cap on the number of permitted suppliers; an economic needs test is a limitation on the number of service suppliers based on an assessment of whether the market will be able to absorb new service suppliers without harm to existing service suppliers.

687 USTR Reply Comments at 7.

688 Article XVII states that "[i]n the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers."

689 *See* USTR Reply Comments at 11 n.16.

339. Those WTO Members that undertook market access commitments in basic telecommunications services also became subject to the requirements relating to domestic regulation of those services contained in Article VI (Domestic Regulation). Pursuant to Article VI(1), in sectors where specific commitments are undertaken, domestic regulation must be administered in a reasonable, objective and impartial manner. Article VI(4) provides that a WTO Member could be in contravention of its commitments if it applies measures that are not based on objective and transparent criteria, are more burdensome than necessary or that restrict the supply of the service. A WTO Member arguing, however, that a measure does contravene Article VI(4) also must show that application of the measure could not have been reasonably expected at the time specific commitments were made.[690]

340. The United States and 54 other countries also undertook additional specific commitments as a result of the negotiations in accordance with Article XVIII of the GATS.[691] These additional commitments are the procompetitive regulatory principles contained in a document known as the "Reference Paper."[692] The Reference Paper contains principles relating to competition safeguards, interconnection, universal service, transparency of licensing criteria, independence of the regulator and allocation of scarce resources. The relevant provisions for purposes of this *Order* refer to competition safeguards and licensing. Section 1 of the Reference Paper obligates a WTO Member to "maintain appropriate measures for the purposes of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices."[693] With regard to licensing, the Reference

[690] Article VI(5)(a) states that a Member "shall not apply licensing and qualification requirements and technical standards that nullify or impair [its] specific commitments in a manner which . . . could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made." *See also* USTR Reply Comments at 9.

[691] Article XVIII states that "Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule."

[692] The Reference Paper was distributed by the WTO Secretariat but never formally issued as a WTO document. The text has been published in 36 I.L.M. 367 (1997). Another ten countries either agreed to adopt the Reference Paper principles in the future or inscribed their own regulatory principles in their Schedules.

[693] "Major supplier" is defined in the Reference Paper as a "supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market." Anticompetitive practices include (a) engaging in anticompetitive cross-subsidization; (b) using information obtained from competitors with anticompetitive results; and (c) not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

Paper requires that all licensing criteria and the terms and conditions of individual licenses be made publicly available.[694]

341. The GATS also allows for exceptions to a WTO Member's obligations. Where these exceptions apply, a WTO Member may act inconsistently with its MFN, national treatment or market access commitments or any other GATS obligation. Article XIV (General Exceptions) establishes a limited set of exceptions, including for measures necessary to protect public morals and order, protect human and animal health or secure compliance with nondiscriminatory laws and regulations.[695] Article XIV *bis* (Security Exceptions) permits a WTO Member to deviate from its GATS obligations in order to protect its national security interests or to carry out any obligations under the U.N. Charter to maintain international peace and security.[696]

342. The United States committed to provide market access to all basic telecommunications services and national treatment to service suppliers of WTO Members.[697] In addition, as noted above, the United States incorporated the Reference Paper into its Schedule of Specific Commitments.

Positions of the Parties

343. The Office of the U.S. Trade Representative (USTR) asserts that the proposals contained in our *Notice* are consistent with U.S. commitments under the WTO Basic Telecom Agreement.[698] USTR agrees that the Commission can apply the public interest test, as proposed, and that no WTO Members

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694 The Reference Paper also requires that the period of time normally required to reach a decision concerning an application for a license be made publicly available. The Government of Japan, the European Commission, and NTT all requested the Commission to establish time limits for review of an application. We have done so in this *Order*. *See supra* Section VI.A.

695 Article XIV states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement. . . ."

696 Article XIV *bis* states that "[n]othing in this Agreement shall be construed . . . (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests . . . or (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

697 The U.S. Schedule of Specific Commitments limits direct access to INTELSAT and Inmarsat to Comsat for the provision of basic telecommunications services and limits direct foreign ownership of a common carrier radio license to 20 percent. In addition, the United States made no market access commitments and took an MFN exception for direct-broadcast satellite services, direct-to-home satellites services and digital audio radio satellite services.

698 USTR Comments at 2, Reply Comments at 14.

participating in the WTO basic telecom negotiations can claim surprise at its continued use.[699] USTR and other Executive Branch agencies also support consideration of competition issues and other public interest factors, as well as imposition of competition safeguards. Many other commenters, however, contend that these U.S. commitments prohibit the Commission not only from applying the ECO test, but also from applying a public interest analysis generally or safeguards to applicants from or affiliated with carriers from WTO Members.[700] As described below, they argue that the proposed rules violate U.S. obligations regarding market access, domestic regulation, transparency, MFN, and national treatment, and that application of the public interest test and safeguards are not otherwise permitted by the Reference Paper or the general exceptions to the GATS. Further, the European Commission and Deutsche Telekom complain that the *Notice* fails to present evidence that the rules are consistent with the GATS.[701]

Discussion

344. We consider carefully but find unpersuasive arguments that the measures we adopt today violate U.S. obligations under the GATS or any other international agreement to which the United States is a party. Although we do not believe we are required to explain the GATS-consistency of our proposals, as argued by the European Commission and Deutsche Telekom, we take this opportunity to do so. We conclude that a public interest analysis is a valid exercise of U.S. domestic regulatory authority, required by the Communications Act and consistent with U.S. international obligations. Our implementation of the public interest test with respect to Section 214 and Section 310 authorizations and cable landing licenses is similarly permitted by the GATS. We find that the Commission not only is entitled to apply competitive safeguards consistent with U.S. obligations but is obligated to do so under the Reference Paper. In reaching these conclusions, we find persuasive the comments of the Executive Branch, particularly the views of USTR, which has primary responsibility for issuing and coordinating guidance on interpretation of U.S. international trade obligations.[702]

345. The Public Interest Analysis. KDD claims that application of a public interest analysis is precisely the type of entry restriction prohibited by the GATS.[703] Moreover, KDD asserts that the analysis specifically violates the national treatment obligation because the Commission applies a different test, or

[699] USTR Reply Comments at 9.

[700] *See, e.g.*, European Commission Comments at 2-5; DT Comments at 5-19, 22-31; KDD Comments at 3-7, 7-11.

[701] European Commission Comments at 2; DT Comments at 7.

[702] 19 U.S.C. § 2171(c)(1) (The USTR "shall issue and coordinate policy guidance to departments and agencies on basic issues of policy and interpretation arising in the exercise of international trade functions including any matters considered under the auspices of the World Trade Organization.").

[703] KDD Comments at 4.

none at all, to U.S. carriers.[704] Deutsche Telekom, KDD, Sprint and ETNO argue that the public interest analysis violates MFN because it discriminates against foreigners, and violates the requirements of GATS Articles III (Transparency) and VI (Domestic Regulation) because it is vague, unclear and inherently subjective.[705] ETNO and Deutsche Telekom contend that the ability to analyze the public interest or deny a license violates the U.S. market access commitments because the United States has not specifically reserved the right to apply such an analysis in its Schedule of Specific Commitments, as required by Article XVI (Market Access) of the GATS.[706] Furthermore, according to Deutsche Telekom, the public interest analysis is not justified by the Reference Paper and cannot qualify as an exception to GATS obligations under Article XIV (General Exceptions) of the GATS.[707]

346. We conclude that the WTO Basic Telecom Agreement does not affect the Commission's statutory obligation to apply a public interest analysis.[708] The Commission has applied a public interest analysis as part of its regulatory structure since the Communications Act was passed in 1934. In fact, consideration of the public interest is fundamental in carrying out the general powers of the Commission.[709] We apply the public interest test in a number of different contexts to domestic and foreign applicants.[710] We thus find unconvincing the arguments that consideration of the public interest violates the U.S. national treatment or the MFN obligation.

347. The argument that a public interest analysis is invalid under GATS Articles III (Transparency) and VI (Domestic Regulation) is equally unconvincing. We agree with AT&T that Article VI does not prohibit all regulatory standards that involve any element of judgment or discretion, but requires that the standard be neutral as regards all parties and applied in an objective manner.[711] We also agree with the FBI's conclusion that the public interest analysis comports fully with Article VI because it

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704 *Id.* at 5; *see also* Government of Japan Comments at 1-2; Telefónica Internacional Reply Comments at 5-6; DT Comments at 10-11; Sprint Comments at 9.

705 DT Comments at 11-12, 32; KDD Comments at 4; Sprint Comments at 9; ETNO Reply Comments at 2-3; s*ee also* Government of Japan Comments at 1-2; Telefónica Internacional Reply Comments at 5-6.

706 DT Comments at 3, 7-8, 12, n.8; ETNO Reply Comments at 2.

707 DT Comments at 13-14, 16. KDD also argues that the public interest analysis is not justified by the Article XIV exceptions. KDD Comments at 14.

708 *See* USTR Reply Comments at 5.

709 *See* 47 U.S.C. § 303. As the Federal Bureau of Investigation (FBI) points out, under Sections 214 and 309(a), all common carrier radio station license applicants — including U.S.-based and -controlled applicants — are subject to a full-scale public interest review as a condition precedent to obtaining a license. FBI Reply Comments at 2.

710 *See, e.g.*, 47 U.S.C. §§ 214, 307, 271, 309(a).

711 AT&T Comments at 15.

does not "nullify or impair" the specific commitments of the United States.[712] Article VI, as noted above, requires that domestic regulations be objective, transparent, impartial, and reasonable. The Commission is not adopting an *ad hoc* approach with respect to foreign carrier entry similar to that it applied before 1995.[713] Rather, this *Order* establishes the parameters of the Commission's review of applications to provide international services. This *Order* spells out in great detail how the public interest test is applied to Section 214 and Section 310 authorizations and cable landing licenses. It provides an explicit description of all the factors the Commission will consider in reviewing license applications and investment authorizations. Moreover, the Commission is subject to the Administrative Procedures Act (APA), which subjects all Commission regulations to judicial review and requires the Commission to follow standard procedures.[714]

348. We also find without merit commenters' complaints about the GATS consistency of the public interest analysis under Article VI(4). The requirements of Article VI(4) regarding domestic licensing are applicable only if the measure — in this case, the public interest analysis — could not have been reasonably expected at the time specific commitments were made. We agree with USTR and the FBI that other WTO Members not only should have expected, but knew that the Commission would continue to consider the public interest.[715] The Commission's intention was made clear to all our negotiating partners in bilateral and multilateral sessions during the negotiations.[716] Thus, even if a WTO Member considers the public interest analysis to be subjective or to lack impartiality, there is no GATS violation since it was abundantly clear that the Commission intended to continue to use it.

349. Article III (Transparency) does not impose any specific obligations with regard to the content of national laws or regulations. It merely requires the publication of national laws and regulations. In fact, the Commission's actions are much more "transparent" than Article III requires. The Commission is required by law to conduct its rulemakings in a very open manner.[717] Consequently, we publish all of our regulations — both as proposals for public comment and as final rules — and request public comment on all applications for licenses, as well as proposals for rulemakings.

350. Deutsche Telekom's argument that the public interest analysis is invalid because it does not fit within one of the exceptions listed in Article XIV (General Exceptions) lacks merit. As shown above,

[712] FBI Reply Comments at 4.

[713] Prior to the issuance of the *Foreign Carrier Entry Order*, the Commission considered each foreign carrier application for entry on a case-by-case basis.

[714] *See* 5 U.S.C. § 553(b).

[715] USTR Reply Comments at 9.

[716] *Id.*; FBI Reply Comments at 3.

[717] *See* Administrative Procedure Act § 4, 5 U.S.C. § 553; 47 C.F.R. §§ 1.411-.429 (governing procedures for rulemakings).

the public interest analysis does not violate any GATS obligations and therefore reference to provisions of the GATS excepting a measure from its application is unnecessary.[718] In addition, since the public interest analysis is consistent with GATS obligations, there is no need to refer to the Reference Paper as justification for application of the analysis.

351. We also disagree that the public interest analysis cannot be maintained because it violates the U.S. market access commitments or is not listed as a limitation in the U.S. Schedule of Specific Commitments. We note USTR's comment that the negotiating history of the GATS shows that, rather than prohibiting all domestic regulation of basic telecommunications services, Article XVI (Market Access) only prohibits WTO Members from maintaining or adopting the types of quantitative or economic-needs based limitations and measures listed in Article XVI (unless such limitations are included in a WTO Member's Schedule of Specific Commitments).[719] We find that because the public interest analysis is not the kind of quantitative or economic-needs based limitation set out in Article XVI, it is not the type of impermissible limitation envisioned by the GATS. Therefore, there is no need for the United States to have included the test as a limitation on its market access commitments in its Schedule of Specific Commitments.[720]

352. Review of Applications under Section 214, Section 310 and the Submarine Cable Landing License Act. AT&T argues that denial of market access to carriers posing risks to competition that could not be addressed by safeguards is fully consistent with the GATS. Denial in these circumstances would meet the Article VI requirements and would not be contrary to MFN or national treatment obligations. According to AT&T, a licensing decision that is dependent upon a carrier's market power, rather than its national origin, and that is based solely upon the potential adverse impact of that carrier's entry upon competition in the United States, is consistent with MFN.[721] USTR states that nothing in the GATS prohibits the Commission from consideration of competition issues.[722]

353. Sprint, Deutsche Telekom, KDD and ETNO argue that the entry standard relating to Section 214, cable landing licenses and Section 310 potentially does not provide national treatment because the *Notice* is silent as to whether the same standard applies to U.S. carriers.[723] France Telecom makes this

[718] USTR agrees with this analysis. USTR Reply Comments at 12.

[719] *Id.* at 7 n.13 (citing GATS Secretariat, "Initial Commitments in Trade in Services: Explanatory Note," MTN.GNS/W/164 (Sept. 3, 1994)).

[720] *Id.* at 8.

[721] AT&T Comments at 16-17.

[722] USTR Reply Comments at 5.

[723] Sprint Comments at 9, 16; DT Comments at 10-11, 32-33; KDD Comments at 5; ETNO Reply Comments at 3; *see also* GTE Reply Comments at 28.

same argument with respect to Section 310(b)(4) authorizations below 50 percent.[724] The European Commission objects to the Commission retaining its ability to deny Section 214 and Section 310 authorizations and cable landing licenses in order to protect competition in the U.S. market. It argues that general antitrust law is sufficient to safeguard against anticompetitive practices and that an authorization should not be denied to a carrier that might, at a later date, pose a competitive risk.[725] The European Commission also expresses concern that the standard of a "very high risk to competition" imposes additional burdens on foreign companies, which would be subject to challenge based on unclear conditions and criteria.[726] Deutsche Telekom and the European Commission question the compatibility with MFN of a denial of market access on the basis of foreign affiliation.[727] The European Commission also questions the compatibility with GATS of requiring foreign companies to notify the Commission of investments above ten percent.[728] Deutsche Telekom argues that the Reference Paper does not justify the Commission's proposals because it applies only to domestic carriers.[729] NTT and GTE argue that the Commission should rely on the Reference Paper and on enforcement of WTO Member's commitments through WTO dispute settlement to preserve competition.[730]

354. We agree with USTR that nothing in the WTO Basic Telecom Agreement prohibits the Commission from reviewing and possibly denying applications that pose a risk of anticompetitive harm in the U.S. market.[731] The GATS does not specify a single mechanism for addressing potential anticompetitive practices in the telecommunications services sector.[732] The United States has traditionally relied on regulatory enforcement and antitrust actions, and remains free to do so. We therefore disagree with the European Commission that we must depend on general antitrust law to safeguard against anticompetitive activity. In fact, the Commission's statutory obligation to serve the public interest both encompasses and extends beyond the traditional parameters of review under the U.S. antitrust laws.[733]

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[724] FT Comments at 25.

[725] European Commission Comments at 2-3.

[726] *Id*. at 4-5. DT agrees, arguing that the standard violates Articles III and VI because there is no objective content to the standard. DT Comments at 11; s*ee also* Telefónica Internacional Reply Comments at 5.

[727] DT Comments at 9, 32; European Commission Comments at 4; s*ee also* GTE Comments at 11.

[728] European Commission Comments at 7.

[729] DT Comments at 14.

[730] NTT Comments at 2; GTE Comments at 10, 13; s*ee also* DT Comments at 15.

[731] USTR Reply Comments at 5.

[732] *Id.* at 8.

[733] *See e.g., Application of NYNEX Corp. Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, FCC 97-286 (rel. Aug. 14,

When the United States entered into the WTO Basic Telecom Agreement, it did so with the understanding that its obligations would be carried out consistent with U.S. law.[734]

355. The standard of review we adopt is fully consistent with the Commission's historical exercise of its mandate to consider the public interest. The Act charges the Commission with "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[735] In carrying out that charge over more than 60 years, the Commission has long considered competition issues in applying the public interest standard.[736] The WTO Basic Telecom Agreement does not alter this responsibility. We remain concerned with the ability of carriers with market power to leverage that power and engage in anticompetitive conduct in the U.S. market. We expect that the safeguards we propose to apply will be sufficient to prevent anticompetitive behavior.[737] As a result, we are not denying the market access that the United States promised in the WTO Basic Telecom Agreement. We are not willing, however, to foreclose entirely the possibility that if an exceptional case arises in which entry is likely to harm consumers in a concrete way (such as through increased rates or decreased service options) we may protect the U.S. market by denying entry.[738] While the European Commission may be willing to wait until after the harm occurs in its market, nothing in the WTO or the GATS requires that all WTO Members regulate in exactly the same way.

356. We also disagree that the standard we adopt today for Section 214 authorizations erects additional barriers for foreigners or discriminates against foreigners, inconsistent with national treatment obligations. In response to the many concerns that the proposed rules discriminate against foreign applicants, we have clarified in this *Order* that the Section 214 analysis — including the possibility of denial of a license — applies to all applicants, regardless of nationality. Thus it is consistent with U.S. national treatment obligations. To the extent that we differentiate among domestic and foreign carriers with

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[734] The U.S. final offer in the WTO basic telecom negotiations included a cover note that stated that "foreign investors will receive national treatment in accordance with U.S. law." Communications from the United States, "Conditional Offer" (Feb. 12, 1997).

[735] 47 U.S.C. § 151.

[736] *See, e.g.*, *Policy & Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report & Order, 85 FCC 2d 1 (1980); Second Report & Order, 91 FCC 2d 59 (1982); *recon.* 93 FCC 2d 54 (1983); Third Report & Order, 48 Fed. Reg. 46,791 (1983); Fourth Report & Order, 95 FCC 2d 554 (1983), *vacated*, AT&T v. FCC, 978 F.2d 727 (1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 113 S. Ct. 3020 (1993); *Fifth Report & Order*, 98 FCC 2d 1191 (1984); *Sixth Report & Order*, 99 FCC 2d 1020 (1985), *rev'd*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

[737] *See supra* Section V.

[738] *See supra* Section III.A.

regard to cable landing licenses and foreign investment, such differentiation is based on statutory distinctions founded on national security and law enforcement concerns.

357. Likewise, our procedures to review applications under Section 214 and Section 310 of the Act and the Submarine Cable Landing License Act do not discriminate impermissibly among foreigners in a manner inconsistent with our MFN obligations. In deciding whether a measure accords less favorable treatment within the meaning of GATS Article II (MFN), the analysis focuses not on whether the treatment of like foreign or like domestic suppliers is identical, but rather whether the treatment modifies the conditions of competition in favor of foreign service suppliers of a particular origin or domestic service suppliers.[739] In this case, the Commission is not discriminating among like service suppliers. The Commission is treating similarly all carriers that have the ability to harm competition, whether they are foreign or domestic, and treating carriers that do not have that ability similarly. Examining the ability of a carrier to affect competition in the U.S. market is not an impermissible examination of foreign market conditions, as Deutsche Telekom claims, but an essential factor in our licensing decisions. Rather than modifying the conditions of competition in favor of domestic or certain foreign suppliers, we are making the conditions of competition level by ensuring that dominant carriers cannot adversely distort competition in the U.S. market, whether their ability to do so derives from market power in the United States or foreign markets.

358. By this *Order,* we are carrying out Section 1 of the Reference Paper, which requires us to maintain measures that would prohibit anticompetitive activity of suppliers, which alone or together, constitute a "major supplier." We disagree with Deutsche Telekom that a major supplier can only be a domestic carrier.[740] The definition of major supplier does not limit the term to domestic suppliers or to a supplier with control over domestic facilities. Nor does Section 1 limit the requirement to take steps to prevent anticompetitive activities to activities of only domestic suppliers. Rather, the definition of major supplier is neutral and Section 1 focuses on any carrier's ability to act in an anticompetitive manner. Thus, we find unconvincing Deutsche Telekom's arguments.

359. We do not accept the notion that we should depend on other countries' implementation of their commitments in lieu of applying competition factors in our regulatory process. There is nothing in the GATS that requires us to refrain from regulating because other WTO Members have an obligation to regulate. Access to WTO dispute settlement does not eliminate the need for and the appropriateness of our regulation of telecommunications services in order to safeguard competitive opportunities.[741] WTO dispute settlement is an effective remedy, but one that takes some time to obtain. In addition, it is not a remedy that the Commission can seek directly, but depends on Executive Branch action. We have a separate statutory

[739] USTR Reply Comments at 10-11.

[740] Deutsche Telekom makes this same argument with respect to the Commission's proposed safeguards. For the reasons discussed here, we find Deutsche Telekom's argument equally unpersuasive with regard to safeguards.

[741] *See id.* at 9.

obligation to regulate and enforce our rules that cannot be stayed while the Executive Branch seeks relief in an international tribunal.

360. Finally, we do not accept Deutsche Telekom's argument that we should rely on enforcement of WTO Members' obligations under Articles VIII (Monopolies and Exclusive Service Suppliers) and IX (Business Practices) to prevent anticompetitive actions by foreign dominant carriers.[742] We disagree with Deutsche Telekom's interpretation of these articles of the GATS. In fact, we conclude that Articles VIII and IX provide no adequate remedy for Commission concerns. Article VIII applies only to actions of monopolies. It does not apply in cases where a WTO Member made market access commitments, which the United States along with 68 other WTO Members did. Article IX provides for consultations on unfair business practices but imposes no obligation enforceable in WTO dispute settlement. We agree with USTR's comment that Articles VIII and IX were never intended to place limits on a government's ability to ensure competition in domestic or international markets.[743]

361. We also disagree with the European Commission and Deutsche Telekom's argument that Commission consideration of "actionable misconduct" as a factor in determining the effect on competition of a carrier's entry into the U.S. market is inconsistent with MFN or national treatment obligations.[744] There is nothing in the GATS that prevents the Commission from looking at the qualifications of an applicant, including its financial, legal, and technical capabilities, as well as its ability to abide by the law. We intend to look at those factors in connection with all applications, whether foreign or domestic, as we do now in granting licenses to domestic operators.[745]

362. Other Public Interest Factors. The Department of Defense (DOD) and FBI both conclude that the Commission can consider, consistent with the GATS, issues of national security and law enforcement raised by the Executive Branch in determining whether to grant Section 214 and Section 310 authorizations and cable landing licenses.[746] DOD disagrees that national security concerns are subjective, vague and undefined.[747] Sprint, NTT, and France Telecom acknowledge the validity of national security and law enforcement concerns, while GTE notes that these concerns should be implemented in a manner

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742 DT Comments at 15.

743 *See* USTR Reply Comments at 8.

744 European Commission Comments at 5; DT Comments at 18.

745 *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1195-97, 1200-03 (1986), *modified*, 5 FCC Rcd 3252 (1990); *MCI Telecommunications Corp*., 3 FCC Rcd 509, 515 n.14 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context).

746 DOD Comments at 8; FBI Comments at 2-4; DOD Reply Comments at 4; FBI Reply Comments at 5.

747 DOD Comments at 4-5.

consistent with the GATS.[748] Deutsche Telekom, without offering an explanation, states that the GATS national security exception is narrower than the Commission's proposal.[749]

363. USTR also supports Commission consideration of other public interest factors raised by the Executive Branch, including national security, law enforcement, foreign policy and trade policy concerns.[750] Deutsche Telekom says consideration of these other public interest factors is invalid because the United States did not reserve any such authority in its Schedule of Specific Commitments.[751] Other commenters argue that market access cannot be denied on the basis of foreign policy or trade concerns consistent with GATS obligations.[752]

364. We agree with comments of the Executive Branch and AT&T supporting consideration of other public interest factors, such as national security, law enforcement, foreign policy and trade policy concerns. We conclude that nothing in the GATS precludes us from considering such concerns. There is no bar in Article VI (Domestic Regulation) as long as our consideration is objective, transparent, impartial, and reasonable. Nor does the MFN obligation automatically bar consideration of any particular factor. It provides merely that like service suppliers have to receive like treatment. Similarly, the national treatment obligation does not exclude consideration of these other public interest factors. Finally, contrary to Deutsche Telekom's argument that GATS Article XIV *bis* is not broad enough to allow us to consider national security, we note that Article XIV *bis* contains no such limiting language.

365. In a particular case, where we do consider these other public interest factors, we will be mindful of U.S. WTO obligations to the extent that the exemptions in the GATS specifically do not apply.[753] On its face, GATS Article XIV *bis* allows measures to protect essential security interests. Accordingly, we find it difficult to understand Deutsche Telekom's argument that Article XIV *bis* is not broad enough to enable the Commission to review any national security concerns raised by the Executive Branch. We do not expect to receive recommendations from the Executive Branch in connection with these other public interest factors that are inconsistent with U.S. international obligations.[754]

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[748] Sprint Reply Comments at 2; NTT Comments at 2; FT Comments at 5; GTE Comments at 13-16.

[749] DT Comments at 18.

[750] USTR Reply Comments at 6.

[751] DT Comments at 18.

[752] NTT Comments at 2, Reply Comments at 2-3; Government of Japan Comments at 2; DT Comments at 17; FT Comments at 2, 5-6; GTE Comments at 16; KDD Comments at 5; Sprint Comments at 9-10; European Commission Comments at 1; Telefónica Internacional Reply Comments at 7; GTE Reply Comments at 13.

[753] *See* GATS Art. XIV and Art. XIV *bis*.

[754] *See* USTR Reply Comments at 6.

366. Safeguards. AT&T defends the MFN-consistency of the Commission's proposed competition safeguards,[755] citing USTR comments that the Commission is free to take measures to protect competition in the United States.[756] AT&T also argues that the WTO Basic Telecom Agreement plainly recognizes the right of the Commission to prevent anticompetitive practices. AT&T states that Article VI of the GATS recognizes a basic right to regulate, including the adoption and implementation of licensing qualifications designed to achieve legitimate objectives, such as the prevention of anticompetitive conduct. It goes on to say that Section 1.1 of the Reference Paper requires the Commission to maintain measures to prevent carriers with market power from engaging in or continuing anticompetitive practices.[757] Sprint agrees that the proposed safeguards are consistent with MFN because dominant carrier classification does not depend on national identity but on market power.[758]

367. Many commenters argue that the safeguards are inconsistent with the GATS.[759] A number of commenters contend that safeguard measures are unnecessary because the Commission can rely on WTO Member commitments to implement the regulatory principles contained in the Reference Paper. If WTO Members fail to implement their commitments, the United States can use the established WTO dispute settlement process to ensure compliance.[760] GTE suggests that the Commission eliminate or modify those proposed safeguards that are redundant of protections offered by other countries' full implementation and enforcement of the Reference Paper.[761] Telstra argues that the Commission should rely on general competitive safeguards and antitrust law.[762] It goes on to say that the Commission's proposal to apply a No Special Concessions rule violates MFN because it differentiates among carriers based on their market

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755 *See supra* Section V.

756 AT&T Reply Comments at 15-16 (citing USTR Comments at 3).

757 AT&T Comments at 14-16.

758 Sprint Comments at 20 n.25.

759 *See, e.g.*, DT Comments at 24; ETNO Reply Comments at 3; GTE Comments at 19-20; Government of Japan Comments at 3; C&W Reply Comments at 8; Telefónica Internacional Reply Comments at 2-3, 14-16. Many of the concerns raised by these commenters have been rendered moot by our decision to apply a single tier of dominant carrier safeguards. *See supra* Section V. Other concerns relating to prior approval of additional circuits, prohibitions on joint marketing or customer steering are also moot because of our decision not to impose these types of safeguards.

760 NTT Comments at 2; GTE Comments at 7-9; Telmex Comments at 6-7; C&W Comments at 5; FT Comments at 11; European Commission Comments at 5; NTT Reply Comments at 3; Telia NA Reply Comments at 6-7.

761 GTE Comments at 8.

762 Telstra Reply Comments at 10.

power.[763] Telstra and Deutsche Telekom assert that the No Special Concessions rule also violates the national treatment obligation.[764]

368. Cable & Wireless and Deutsche Telekom argue that the proposed dominant carrier safeguards are unnecessary barriers to trade and, therefore, violate Article VI (Domestic Regulation),[765] while ETNO and GTE argue that the safeguards raise national treatment questions.[766] Deutsche Telekom and Telia note that the *Notice* singles out foreign carriers for safeguards, but is silent as to the treatment of U.S.-owned carriers.[767] To comply with the GATS national treatment obligation, Deutsche Telekom says the Commission must impose safeguards on U.S. carriers with an ownership interest in a foreign carrier with market power and dominant U.S. carriers that have an ownership interest in a foreign carrier without market power.[768] GTE argues that the Reference Paper cannot be used as a basis for deviating from MFN and national treatment requirements.[769] Deutsche Telekom states that the Reference Paper does not provide authority to regulate a carrier based on its market power in another market.[770] KDD argues that several aspects of the Commission's proposals do not constitute "appropriate" measures pursuant to the Reference Paper but offers no explanation as to why.[771] Finally, ETNO also argues that the Commission cannot adopt safeguards because the United States has not specifically reserved that right in its Schedule of Specific Commitments.[772]

369. We find that the safeguards we adopt in this *Order* are consistent with all of our GATS obligations. The GATS permits a WTO Member to pursue legitimate policy objectives, such as the protection against anticompetitive conduct in the U.S. market.[773] The safeguards we adopt do not render our market access commitments meaningless. In the past two years, we have granted approximately 140

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[763] *Id.* at 5. The European Commission also makes the same argument. European Commission Comments at 6.

[764] DT Comments at 29, n.23; Telstra Comments at 5.

[765] C&W Comments at 9; DT Comments at 26-27.

[766] ETNO Reply Comments at 3; GTE Comments at 19.

[767] DT Comments at 25; Telia NA Reply Comments at 8.

[768] DT Comments at 26 n.21.

[769] GTE Reply Comments at 6; s*ee also* Telefónica Internacional Reply Comments at 13.

[770] DT Comments at 14.

[771] KDD Comments at 8.

[772] ETNO Comments at 3.

[773] *See* USTR Reply Comments at 5.

Section 214 authorizations to carriers with foreign ownership. We expect to grant an increasing number of authorizations in the coming years as carriers take advantage of the new market opening rules adopted in this *Order*.

370. Further, we disagree with the arguments that our competition safeguards violate GATS Article VI (Domestic Regulation). Article VI, as noted above, requires that domestic regulations be objective, transparent, impartial, and reasonable. As with the public interest analysis, this *Order* spells out the safeguards and the reasons for them in great detail.[774] It provides an explicit description of when the safeguards will apply that is objective and based on articulated concerns. Moreover, the Commission is subject to the Administrative Procedures Act, which subjects all Commission regulations to judicial review. By law, the Commission cannot act in an arbitrary and capricious manner but must seek public comment and take that comment into account when reaching its decisions.[775]

371. Again, we disagree with the arguments that our safeguards must be scheduled as market access limitations in order to be maintained and are not justified by the Reference Paper. These safeguards, as with the public interest analysis, are not the types of quantitative or economic needs-based limitations envisioned by Article XVI (Market Access) and therefore there is no need for the United States to have included them as limitations on its market access commitment in its Schedule of Specific Commitments.

372. The argument that competition safeguards are not justified by the Reference Paper is equally unconvincing. In fact, the Reference Paper explicitly imposes an obligation on WTO Members which adopted it to take actions to prohibit anticompetitive behavior. The competition safeguards we adopt here are designed to do exactly that — deter anticompetitive behavior by carriers that, alone or together, control "essential facilities or otherwise have the ability to affect the market adversely."[776] We agree with GTE that the Reference Paper does not justify regulation inconsistent with other provisions of the GATS. Since the Reference Paper does not limit measures against anticompetitive conduct to domestic carriers and, as described in this section, the safeguards we adopt are consistent with the GATS, we conclude that we have acted consistently with the Reference Paper.

373. We also conclude that our decision to adopt a No Special Concessions rule[777] is consistent with all U.S. international obligations. Contrary to what Telstra argues, the No Special Concessions rule does not discriminate among services and service suppliers of different countries nor, contrary to other arguments, does it discriminate between U.S. and foreign-owned carriers. The fact that a universally applied condition will have different effects on different carriers does not automatically render it illegitimate

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[774] *See supra* Section V.

[775] *See* 5 U.S.C. § 553(b).

[776] Reference Paper, Section 1.1.

[777] *See supra* Section V.B.1.

under the GATS.[778] Rather, the question is whether the proposed safeguards alter the competitive conditions for some suppliers in contrast to others. Because the No Special Concessions rule applies to all similarly situated U.S. carriers in their dealings with foreign carriers with market power in the destination market, the rule does not alter the competitive conditions for those similarly situated carriers. In light of the requirement not to discriminate among like service suppliers, we cannot accept SOSCo's suggestion that we relax the safeguards for carriers from WTO Members that have adopted the Reference Paper.[779]

374. Since we do not adopt our proposal to differentiate among carriers based on the extent of competition in their home market, we need not respond to comments that such differentiation is inconsistent with the GATS. We have clarified that the dominant safeguards apply to all carriers, whether foreign or domestic, that are affiliated with a foreign carrier that possesses market power on the foreign end of a U.S. international route. Contrary to the contentions of the European Commission and Deutsche Telekom, we can distinguish among foreign carriers, among domestic carriers and between foreign and domestic carriers based on their market power consistent with our MFN and national treatment obligations. The distinction is not based on nationality but on objective economic analysis. We emphasize that this analysis focuses on whether a carrier's market power in an input market -- whether U.S. or foreign -- enables it to adversely impact competition in a relevant downstream U.S. market. The same logic applies in the international services market as in the domestic market.

375. We find that the conditions we adopt in this *Order* are necessary to deter anticompetitive conduct in the U.S. market for international services. As we discuss in Section V, distortion of competition in the U.S. market is not merely hypothetical. We have eliminated those safeguards not necessary to deter anticompetitive conduct, thus applying the minimum regulatory measures necessary to achieve our procompetitive market-opening objectives. As a result, we conclude that the safeguards conditions contained in this *Order* are consistent with U.S. international obligations, including those contained in the GATS.

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[778] *See* USTR Reply Comments at 11.

[779] *See* SOSCo Comments at 8.

VIII. Petitions for Reconsideration in IB Docket No. 95-22

376. We have pending several petitions for reconsideration of the *Foreign Carrier Entry Order* and one issue raised in the *Flexibility* proceeding.[780] We address the majority of those issues in this *Order* because of their close relationship with the substance of IB Docket No. 97-142.

377. Cable and Wireless seeks reconsideration of our decision in the *Foreign Carrier Entry Order* to apply an ECO analysis to foreign-affiliated carriers seeking prior approval to add circuits on routes that they are already authorized to serve on a dominant carrier basis. In Section V.C.2.b.(ii) above, we conclude that we will no longer require as a general rule that foreign-affiliated carriers regulated as dominant on particular routes seek prior approval of circuit additions and discontinuances. We also decline, in that Section, to apply a prior approval requirement specifically to dominant foreign-affiliated carriers that obtained their Section 214 authorizations to serve a non-WTO Member country prior to adoption of the ECO test.

378. MCI and BTNA ask that we impose a requirement that carriers entering into non-equity business relationships with foreign carriers either file those agreements or otherwise notify the Commission of their execution. In Section V.C.2.a above, we decide to continue our regulatory treatment of non-equity relationships and decide not to impose a requirement such as that requested by MCI and BTNA.

379. TLD seeks reconsideration of our decision to apply the ECO test to destination markets where an affiliation results only from an affiliated foreign carrier's (or its holding company's) control of a third country's dominant carrier while not applying the ECO test where an affiliation results only from a U.S. carrier's ownership of a foreign carrier. BTNA, too, seeks reconsideration of our decision not to apply the ECO test where a U.S. carrier has an interest in a foreign carrier. This issue is moot in WTO Member countries because of our decision in Section III.B above no longer to apply the ECO test as part of our Section 214 public interest analysis when the applicant's foreign affiliate is from a WTO Member country. In Section IV.B above, we declare that we will henceforth apply the ECO test to U.S. carriers' interests in foreign countries' dominant carriers but that we will continue to apply the ECO test to third-country carriers.

380. NYNEX urges the Commission to eliminate our equivalency requirement as a condition of the resale of private lines for the provision of switched basic services by any carrier that is not affiliated

[780] BT North America Inc. Petition for Reconsideration (IB Docket No. 95-22) [hereinafter BTNA Petition]; Cable & Wireless, Inc., Petition for Reconsideration (IB Docket No. 95-22) [hereinafter CWI Petition]; MCI Telecommunications Corporation Petition for Reconsideration (IB Docket No. 95-22) [hereinafter MCI Petition]; Telefónica Larga Distancia de Puerto Rico, Inc., Petition for Reconsideration (IB Docket No. 95-22) [hereinafter TLD Petition]; WorldCom, Inc., Petition for Reconsideration (IB Docket No. 95-22) [hereinafter WorldCom Petition]; *see also* Reply Comments of NYNEX Corp., Regulation of International Accounting Rates (CC Docket No. 90-337) [hereinafter NYNEX *Flexibility* Reply Comments]; *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063, 20,072 ¶ 23 n.25 (1996) (*Flexibility Order*), *recon. pending*.

with a foreign carrier having market power at the foreign end.[781] NYNEX argues that eliminating that requirement would enable such a carrier to compete for U.S.-bound traffic by offering lower rates to customers in the foreign country. The resulting competitive pressure, NYNEX argues, could force the dominant carrier to lower its own rates for service to the United States and negotiate a lower accounting rate on the U.S. route.

381. We decline to adopt NYNEX's suggestion. NYNEX concedes that its proposal would increase the net settlements deficit, and we observe that it also would not put downward pressure on settlement rates. Although the scenario NYNEX presents might increase retail competition in the foreign market, it would be at the expense of U.S. IMTS ratepayers because, without allowing U.S.-outbound traffic to be carried over private lines, there would be no offsetting benefit to U.S. consumers. We recognize that such arrangements may be beneficial in some circumstances, and our *Flexibility* policies will allow some such arrangements subject to case-by-case Commission scrutiny. We decline, however, to adopt a general rule favoring arrangements that would increase the settlements deficit without putting downward pressure on settlement rates. We will therefore continue to require the showings we describe in this *Order* before allowing any carrier, including a carrier not affiliated with a carrier with market power in the destination market, to provide switched services over interconnected private lines.

382. MCI, in its petition, states that the Commission erred in not permitting U.S. facilities-based carriers to provide switched services over private lines, interconnected to the public switched network at one end only, in circumstances where the foreign half-circuit is provided by a foreign carrier with which the U.S. carrier has a correspondent relationship.[782] As we stated in our *Flexibility Order*,[783] MCI has misunderstood our rule. Our current rule is properly read to permit U.S. facilities-based carriers to offer switched services over international private lines that are interconnected to the public switched network at one end only, provided that the U.S. carrier corresponds with a foreign carrier that resells rather than owns the foreign half-circuit. That is, the U.S. facilities-based carrier may carry switched traffic over its private lines interconnected at one end where the foreign correspondent with which the U.S. carrier is interchanging switched traffic is not the owner of the underlying foreign private line half-circuit. This rule is a limited exception to our general rule on the provision of switched services over international private lines.

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781 NYNEX makes this argument in its reply comments in the *Flexibility* proceeding. NYNEX *Flexibility* Reply Comments at 9. (NYNEX recognizes the dangers in allowing a carrier with market power in the foreign country to route U.S.-bound traffic over private lines.) Because its request was outside the scope of that proceeding, we incorporated it into the *Foreign Carrier Entry Order* reconsideration proceeding. *See Flexibility Order*, 11 FCC Rcd at 20,072 ¶ 23 n.25.

782 MCI Petition at 8-11.

783 *See Flexibility Order*, 11 FCC Rcd at 20,072 ¶ 23 n.25.

383. BTNA and WorldCom filed petitions for reconsideration related to this limited exception to our rule on the provision of switched services over international private lines.[784] We defer these requests to the pending *Flexibility Order* reconsideration proceeding, CC Docket No. 90-337, because of their integral relationship to the issues in that proceeding. In the meantime, carriers wishing to enter into arrangements of the sort described by those parties may file requests to approve alternative settlement arrangements under our *Flexibility* policies.[785]

IX. Administrative Matters

384. The Commission has reviewed its rules governing the provision of international telecommunications services by authorized carriers and has amended the rules to reflect both the policy decisions made in this *Order* and necessary technical corrections. Technical corrections not discussed in the text of this *Order* are minor corrections to conform our rules to current practice and were justified in earlier rulemaking proceedings. We also eliminate provisions of Section 63.13 of the Commission's rules that are no longer necessary. We therefore find good cause to conclude that notice and comment procedures are unnecessary.[786] The amendments appear in Appendix C to this *Order*. Carriers should review these rule changes.

385. The analysis pursuant to the Regulatory Flexibility of 1980, 5 U.S.C. § 608, is contained in Appendix D.

386. *Paperwork Reduction Act of 1995 Analysis.* This *Report and Order* contains new and modified information collections. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this *Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from date of publication of this *Order* in the Federal Register. Comments may address the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or

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[784] *See* BTNA Petition at 2-4; WorldCom Petition; *see also* AT&T Opposition to Petitions for Reconsideration (IB Docket No. 95-22) at 2-6; Response of Sprint to Petitions for Reconsideration (IB Docket No. 95-22) at 3-4; Impsat Comments (IB Docket No. 95-22) at 3; BTNA Reply to Opposition to Petitions for Reconsideration (IB Docket No. 95-22) at 2-4; Reply of WorldCom (IB Docket No. 95-22) at 1-3.

[785] *See* 47 C.F.R. § 64.1002.

[786] *See* 5 U.S.C. § 553(b)(B) (providing that notice and comment is not required "when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

other forms of information technology. Written comments on the proposed and/or modified information collections must be submitted on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information concerning the information collections contained in the Report and Order contact Judy Boley at 202-418-0214.

X. Ordering Clauses

387. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 2, 4(i), 201, 203, 205, 214, 303(r), 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201, 205, 214, 303(r), 309, 310, and the Submarine Cable Landing License Act, 47 U.S.C. §§ 34-39, the policies, rules, and requirements discussed herein ARE ADOPTED and Parts 43 and 63 of the Commission's rules, 47 C.F.R. pts. 43, 63, ARE AMENDED as set forth in Appendix C.

388. IT IS FURTHER ORDERED that authority is delegated to the Chief, International Bureau and the Chief, Common Carrier Bureau, as specified herein, to effect the decisions as set forth above.

389. IT IS FURTHER ORDERED that the petitions for reconsideration in IB Docket No. 95-22 ARE GRANTED in part, DENIED in part, and DEFERRED in part as set forth herein.

390. IT IS FURTHER ORDERED that the Commission's Office of Managing Director shall send a copy of this *Report and Order and Order on Reconsideration*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

391. IT IS FURTHER ORDERED that the policies, rules, and requirements established in this decision shall take effect thirty days after publication in the Federal Register or in accordance with the requirements of 5 U.S.C. § 801(a)(3) and 44 U.S.C. § 3507. The Commission will publish a document at a later date announcing the effective date. The Commission reserves the right to reconsider the effective date of this decision if the WTO Basic Telecom Agreement does not take effect on January 1, 1998.

Federal Communications Commission

Magalie Roman Salas
Secretary

APPENDIX A
Lists of Commenters and Reply Commenters
in IB Docket No. 97-142

Commenters

Aeronautical Radio, Inc. (ARINC)
Ameritech
AT&T Corporation (AT&T)
BellSouth Corporation
BT North America Inc. (BTNA)
Cable & Wireless, plc (C&W)
Department of Defense (DOD)
Deutsche Telekom AG & Deutsche Telekom, Inc. (DT)
European Union, Delegation of the European Commission (European Commission)
FaciliCom International, L.L.C. (FaciliCom)
Federal Bureau of Investigation (FBI)
France Telecom (FT)
Frontier Corporation (Frontier)
Guatemala
GTE Service Corporation (GTE)
Indus, Inc. (Indus)
Embassy of Japan (Japan)
Kokusai Denshin Denwa Co., Ltd. (KDD)
MCI Telecommunications Corporation (MCI)
NextWave Personal Communications, Inc. (NextWave)
New T&T Hong Kong Ltd.
Nippon Telegraph and Telephone Corporation (NTT)
Pacific Communications Services Company (Pacific Communications)
NYNEX Long Distance Company (NYNEX LD)
PanAmSat Corporation (PanAmSat)
SBC Communications (SBC)
Shell Offshore Service Company (SOSCo)
Societe Internationale de Telecommunications Aeronautiques (SITA)
Sprint Communications Company, L.P. (Sprint)
Telecom Finland, Ltd. (Telecom Finland)
Telecommunication Authority of Singapore (TAS)
Telefónica Internacional de Espana, S.A. (Telefónica Internacional)
Telephone and Data Systems, Inc.
Telefonos de Mexico, S.A. de C.V. (Telmex)
Telstra, Inc. (TI)
United States Telephone Association (USTA)
United States Trade Representative (USTR)
US West, Inc.

Viatel, Inc.
WinStar Communications, Inc. (WinStar)
Wireless Cable Association International, Inc. (WCA)
WorldCom, Inc.

Reply Commenters

Aeronautical Radio, Inc. (ARINC)
AirTouch Communications, Inc.
AT&T Corporation (AT&T)
Cable & Wireless, plc (C&W)
Department of Defense (DOD)
European Public Telecommunications Network Operators Association (ETNO)
Federal Bureau of Investigation (FBI)
GTE Service Corporation (GTE)
Kokusai Denshin Denwa Co., Ltd. (KDD)
MCI Telecommunications Corporation (MCI)
Department of Commerce, National Telecommunications and Information Administration (NTIA)
Nippon Telegraph and Telephone Corporation (NTT)
NYNEX Long Distance Company (NYNEX LD)
SBC Communications Inc. (SBC)
J. Gregory Sidak (Sidak)
Societe Internationale de Telecommunications Aeronautiques (SITA)
Sprint Communications Company, L.P. (Sprint)
Telecommunications Resellers Association (TRA)
Telefónica Internacional de Espana, S.A. (Telefónica Internacional)
Telia North America, Inc. (Telia NA)
Telstra, Inc. (Telstra)
United States Telephone Association (USTA)
United States Trade Representative (USTR)
Viatel, Inc. (Viatel)

APPENDIX B
Petitions for Reconsideration in IB Docket No. 95-22

Petitions for Reconsideration or for Clarification

BT North America Inc. Petition for Reconsideration (BTNA Petition)
Cable & Wireless, Inc., Petition for Reconsideration (CWI Petition)
MCI Telecommunications Corporation Petition for Reconsideration (MCI Petition)
Telefónica Larga Distancia de Puerto Rico, Inc., Petition for Reconsideration (TLD Petition)
WorldCom, Inc. Petition for Clarification or, in the Alternative, for Reconsideration (WorldCom Petition)

Subsequent Filings

AT&T Corp. Opposition to Petitions for Reconsideration (AT&T Opposition)
MCI Telecommunications Corporation Opposition (MCI Opposition)
Response of Sprint to Petitions for Reconsideration (Sprint Response)
Opposition of WorldCom, Inc. (WorldCom Opposition)

BTNA Reply to Opposition to Petition for Reconsideration (BTNA Reply)
CWI Reply to Opposition to Petition for Reconsideration (CWI Reply)
Comments of Impsat USA Inc. on WorldCom's Petition and AT&T's Opposition Thereto (Impsat Comments)
TLD Reply to Oppositions to Petition for Reconsideration (TLD Reply)
Reply of WorldCom, Inc. (WorldCom Reply)

APPENDIX C
Final Rules

Parts 43 and 63 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) is amended as follows:

PART 43 -- REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

1. The authority citation for Part 43 continues to read as follows:

   Authority: 47 U.S.C. 154; Telecommunications Act of 1996, Public Law 104-104, Sections 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted. 47 U.S.C. 211, 219, 220 as amended.

2. § 43.51 is amended by revising paragraph (d) to read as follows:

§ 43.51 Contracts and concessions.

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(d) Any U.S. carrier that interconnects an international private line to the U.S. public switched network, at its switch, including any switch in which the carrier obtains capacity either through lease or otherwise, shall file annually with the Chief of the International Bureau a certified statement containing the number and type (e.g., a 64-kbps circuit) of private lines interconnected in such a manner. The certified statement shall specify the number and type of interconnected private lines on a country specific basis. The identity of the customer need not be reported, and the Commission will treat the country of origin information as confidential. Carriers need not file their contracts for such interconnections, unless they are specifically requested to do so. These reports shall be filed on a consolidated basis on February 1 (covering international private lines interconnected during the preceding January 1 to December 31 period) of each year. International private lines to countries for which the Commission has authorized the provision of switched basic services over private lines at any time during a particular reporting period are exempt from this requirement.

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3. § 43.61 is amended by adding paragraph (c) to read as follows:

§ 43.61 Reports of international telecommunications traffic.

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(c) Each common carrier engaged in the resale of international switched services that has an affiliation with a foreign carrier that has sufficient market power on the foreign end of an international route to affect competition adversely in the U.S. market and that collects settlement payments from U.S. carriers shall file a quarterly version of the report required in paragraph (a) of this section for its switched resale services on the dominant route within 90 days from the end of each calendar quarter. For purposes of this paragraph, "affiliation" is defined in § 63.18(h)(1)(i) and "foreign carrier" is defined in § 63.18(h)(1)(ii).

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PART 63 -- EXTENSION OF LINES AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. The authority citation for Part 63 continues to read as follows:

   Authority: Sections 1, 4(i), 4(j), 201-205, 218 and 403 of the Communications Act of 1934, as amended, and Section 613 of the Cable Communications Policy Act of 1984, 47 U.S.C. 151, 154(i), 154(j), 201-205, 218, 403, 533 unless otherwise noted.

2. § 63.10 is revised to read as follows:

§ 63.10 Regulatory classification of U.S. international carriers.

(a) Unless otherwise determined by the Commission, any party authorized to provide an international communications service under this part shall be classified as either dominant or non-dominant for the provision of particular international communications services on particular routes as set forth in this section. The rules set forth in this section shall also apply to determinations of regulatory status pursuant to §§ 63.11 and 63.13. For purposes of paragraphs (a)(1) through (a)(3) of this section, "affiliation" and "foreign carrier" are defined as set forth in § 63.18(h)(1)(i) and (ii), respectively. For purposes of paragraphs (a)(2) and (a)(3) of this section, the relevant markets on the foreign end of a U.S. international route include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end of a particular route.

(1) A U.S. carrier that has no affiliation with, and that itself is not, a foreign carrier in a particular country to which it provides service (i.e., a destination country) shall presumptively be considered non-dominant for the provision of international communications services on that route;

(2) Except as provided in paragraph (a)(4) of this section, a U.S. carrier that is, or that has or acquires an affiliation with a foreign carrier that is a monopoly provider of communications services in a relevant market in a destination country shall presumptively be classified as dominant for the provision of international communications services on that route; and

(3) A U.S. carrier that is, or that has or acquires an affiliation with a foreign carrier that is not a monopoly provider of communications services in a relevant market in a destination country and that seeks to be regulated as non-dominant on that route bears the burden of submitting information to the Commission sufficient to demonstrate that its foreign affiliate lacks sufficient market power on the foreign

end of the route to affect competition adversely in the U.S. market. If the U.S. carrier demonstrates that the foreign affiliate lacks 50 percent market share in the international transport and the local access markets on the foreign end of the route, the U.S. carrier shall presumptively be classified as non-dominant.

(4) A carrier that is authorized under this part to provide to a particular destination country a particular international communications service, and that provides such service solely through the resale of an unaffiliated U.S. facilities-based carrier's international switched services (either directly or indirectly through the resale of another U.S. resale carrier's international switched services), shall presumptively be classified as non-dominant for the provision of the authorized service. The existence of an affiliation with a U.S. facilities-based international carrier shall be assessed in accordance with the definition of affiliation contained in § 63.18(h)(1)(i), except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(b) Any party that seeks to defeat the presumptions in paragraph (a) of this section shall bear the burden of proof upon any issue it raises as to the proper classification of the U.S. carrier.

(c) Any carrier classified as dominant for the provision of particular services on particular routes under this section shall comply with the following requirements in its provision of such services on each such route:

(1) File international service tariffs on one day's notice without cost support;

(2) Provide services as an entity that is separate from its foreign carrier affiliate, in compliance with the following requirements:

(i) The authorized carrier shall maintain separate books of account from its affiliated foreign carrier. These separate books of account do not need to comply with Part 32 of this chapter; and

(ii) The authorized carrier shall not jointly own transmission or switching facilities with its affiliated foreign carrier. Nothing in this section prohibits the U.S. carrier from sharing personnel or other resources or assets with its foreign affiliate;

(3) File quarterly reports on traffic and revenue, consistent with the reporting requirements authorized pursuant to § 43.61, within 90 days from the end of each calendar quarter;

(4) File quarterly reports summarizing the provisioning and maintenance of all basic network facilities and services procured from its foreign carrier affiliate or from an allied foreign carrier, including, but not limited to, those it procures on behalf of customers of any joint venture for the provision of U.S. basic or enhanced services in which the authorized carrier and the foreign carrier participate, within 90 days from the end of each calendar quarter. These reports should contain the following: the types of circuits and services provided; the average time intervals between order and delivery; the number of outages and intervals between fault report and service restoration; and for circuits used to provide international switched service, the percentage of "peak hour" calls that failed to complete;

(5) In the case of an authorized facilities-based carrier, file quarterly circuit status reports within 90 days from the end of each calendar quarter in the format set out by the § 43.82 annual circuit status manual, with two exceptions: activated or idle circuits must be reported on a facility-by-facility basis; and the derived circuits need not be specified in the three quarterly reports due on June 30, September 30, and December 31. For purposes of this paragraph, "facilities-based carrier" is defined in § 63.18 note 2.

(d) A carrier classified as dominant under this section shall file an original and two copies of each report required by paragraphs (c)(3), (c)(4), and (c)(5) of this section with the Chief, International Bureau. The carrier shall include with its filings separate computer diskettes for the reports required by paragraphs (c)(3) and (c)(5), in the format specified by the section 43.61 and section 43.82 filing manuals, respectively. The carrier shall also file one paper copy of these reports, accompanied by the appropriate computer diskettes, with the Commission's copy contractor. The transmittal letter accompanying each report shall clearly identify the report as responsive to the appropriate paragraph of § 63.10(c).

3. § 63.11 is amended by revising the section heading and text to read as follows:

§ 63.11 Notification by and prior approval for U.S. international carriers that have or propose to acquire an affiliation with a foreign carrier.

(a) Any carrier authorized to provide international communications service under this part shall notify the Commission sixty days prior to the consummation of either of the following acquisitions of direct or indirect controlling interests in or by foreign carriers:

(1) acquisition of a direct or indirect controlling interest in a foreign carrier (as defined in § 63.18(h)(1)(ii)) by the authorized carrier, or by any entity that directly or indirectly controls the authorized carrier, or that directly or indirectly owns more than 25 percent of the capital stock of the authorized carrier; or

(2) acquisition of a direct or indirect interest in the capital stock of the authorized carrier by a foreign carrier or by an entity that directly or indirectly controls a foreign carrier where the interest would create an affiliation within the meaning of § 63.18(h)(1)(i)(B).

(b) Any carrier authorized to provide international communications service under this part that becomes affiliated with a foreign carrier within the meaning of § 63.18(h)(1) that has not previously notified the Commission pursuant to this section or § 63.18 shall notify the Commission within thirty days after acquiring the affiliation. In particular, acquisition by an authorized carrier (or by any entity that directly or indirectly controls, is controlled by, or is under direct or indirect common control with the authorized carrier) of a direct or indirect interest in a foreign carrier that is greater than 25 percent but not controlling is subject to this paragraph but not to paragraph (a).

(c) The notification required under paragraphs (a) and (b) of this section shall contain a list of the affiliated foreign carriers named in paragraphs (a) and (b) of this section and shall state individually the country or countries in which the foreign carriers are authorized to provide telecommunications services to the public. It shall additionally specify which, if any, of these countries is a Member of the World Trade Organization; which, if any, of these countries the U.S. carrier is authorized to serve under this part; what services it is authorized to provide to each such country; and the FCC File No. under which each such authorization was granted. The notification shall certify to the information specified in this paragraph.

(1) The carrier also should specify, where applicable, those countries named in paragraph (c) of this section for which it provides a specified international communications service solely through the resale of the international switched services of U.S. facilities-based carriers with which the resale carrier does not have an affiliation. Such an affiliation is defined in § 63.18(h)(1)(i), except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(2) The carrier shall also submit with its notification:

(i) The ownership information as required to be submitted pursuant to § 63.18(h)(2); and

(ii) A "special concessions" certification as required to be submitted pursuant to § 63.18(i).

(d) In order to retain non-dominant status on the affiliated route, the carrier notifying the Commission of a foreign carrier affiliation under paragraph (a) or (b) of this section should provide information to demonstrate that it qualifies for non-dominant classification pursuant to § 63.10.

(e) After the Commission issues a public notice of the submissions made under this section, interested parties may file comments within 14 days of the public notice.

(1) In the case of a notification filed under paragraph (a) of this section, the Commission, if it deems it necessary, will by written order at any time before or after the submission of public comments impose dominant carrier regulation on the carrier for the affiliated routes based on the provisions of § 63.10.

(2) The Commission will, unless it notifies the carrier in writing within 30 days of issuance of the public notice that the investment raises a substantial and material question of fact as to whether the investment serves the public interest, convenience and necessity, presume the investment to be in the public interest. If notified that the investment raises a substantial and material question, then the carrier shall not consummate the planned investment until it has filed an application under § 63.18 and submitted the information specified under § 63.18(h)(5) or (6) as applicable, and § 63.18(h)(7)-(8), as applicable, and the Commission has approved the application by formal written order.

(f) All authorized carriers are responsible for the continuing accuracy of certifications with regard to affiliations with foreign carriers made under this section and under § 63.18. Whenever the substance of any such certification is no longer accurate, the carrier shall as promptly as possible, and in any event within thirty days, file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided, *except that* the carrier shall immediately inform the Commission if at any time the representations in the "special concessions" certification provided under paragraph (c)(2)(ii) of this section or § 63.18(i) are no longer true. *See* § 63.18(i). This information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

Note: "Control" as used in this section includes actual working control in whatever manner exercised and is not limited to majority stock ownership.

4. § 63.12 is revised to read as follows:

§ 63.12 Processing of international Section 214 applications.

(a) Except as provided by paragraph (c) of this section, a complete application seeking authorization under § 63.18 shall be granted by the Commission 35 days after the date of public notice listing the application as accepted for filing.

(b) Issuance of public notice of the grant shall be deemed the issuance of § 214 certification to the applicant, which may commence operation on the 36th day after the date of public notice listing the application as accepted for filing, but only in accordance with the operations proposed in its application and the rules, regulations, and policies of the Commission.

(c) The streamlined processing procedures provided by paragraphs (a) and (b) of this section shall not apply where:

(1) The applicant has an affiliation within the meaning of § 63.18(h)(1)(i) with a foreign carrier in a destination market, and the Commission has not yet made a determination as to whether that foreign carrier lacks sufficient market power in that destination market to affect competition adversely in the U.S. market, unless the applicant clearly demonstrates in its application at least one of the following:

(i) The applicant qualifies for a presumption of non-dominance under § 63.10(a)(3);

(ii) The affiliated destination market is a WTO Member country and the applicant qualifies for a presumption of non-dominance under § 63.10(a)(4); or

(iii) The affiliated destination market is a WTO Member country and the applicant agrees to be classified as a dominant carrier to the affiliated destination country under § 63.10, without prejudice to its right to petition for reclassification at a later date; or

(2) The applicant has an affiliation within the meaning of § 63.18(h)(1)(i) with a dominant U.S. carrier whose international switched or private line services the applicant seeks authority to resell (either directly or indirectly through the resale of another reseller's services), unless the applicant agrees to be classified as a dominant carrier to the affiliated destination country under § 63.10 (without prejudice to its right to petition for reclassification at a later date); or

(3) The applicant seeks authority to provide switched basic services over private lines to a country for which the Commission has not previously authorized the provision of switched services over private lines; or

(4) The application is formally opposed by a pleading meeting the following criteria: (i) the caption and text of the pleading make it unmistakably clear that the pleading is intended to be a formal opposition; (ii) the pleading is served upon the other parties to the proceeding; and (iii) the pleading is filed within the time period prescribed for the filing of objections or comments; or

(5) The Commission has informed the applicant in writing, within 28 days after the date of public notice accepting the application for filing, that the application is not eligible for streamlined processing under this section.

(d) Any complete application that is subject to paragraph (c) of this section will be acted upon only by formal written order, and operation for which such authorization is sought may not commence except in accordance with such order. The Commission will issue public notice that the application is ineligible for streamlined processing. Within 90 days of the public notice, the Commission will issue an order acting upon the application or provide public notice that, because the application raises questions of extraordinary complexity, an additional 90-day period for review is needed. Each successive 90-day period may be so extended.

5. § 63.13 is revised to read as follows:

§ 63.13 Procedures for modifying regulatory classification of U.S. international carriers from dominant to non-dominant.

Any party that desires to modify its regulatory status from dominant to non-dominant for the provision of particular international communications services on a particular route should provide information in its application to demonstrate that it qualifies for non-dominant classification pursuant to § 63.10.

6. § 63.14 is revised to read as follows:

§ 63.14 Prohibition on agreeing to accept special concessions.

(a) Any carrier authorized to provide international communications service under this part shall be prohibited from agreeing to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market, as described in paragraph (c) of this section, and from agreeing to accept special concessions in the future. For purposes of this section, "foreign carrier" is defined in § 63.18(h)(1)(ii).

(b) For purposes of this section and §§ 63.11(c)(2)(ii) and 63.18(i), a special concession is defined as an exclusive arrangement involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services where the arrangement is not offered to similarly situated U.S.-licensed carriers and involves:

(1) operating agreements for the provision of basic services;

(2) distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; or

(3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers.

(c) A U.S. carrier that seeks to enter a special concession with a foreign carrier bears the burden of submitting information, as part of the requirement to file the agreement with the Commission pursuant to § 43.51, sufficient to demonstrate that the foreign carrier lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. If the U.S. carrier makes a showing that the foreign carrier lacks 50 percent market share in the international transport and the local access markets on the foreign end of the route, the U.S. carrier will presumptively be allowed to agree to accept the special concession.

(d) Any party that seeks to defeat the presumption in paragraph (c) of this section shall bear the burden of proof upon any issue it raises as to the ability of the foreign carrier to affect competition adversely in the U.S. market.

7. § 63.17 is amended by revising paragraph (b) to read as follows:

§ 63.17 Special provisions for U.S. international common carriers.

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(b) Except as provided in paragraph (b)(4) of this section, a U.S. common carrier, whether a reseller or facilities-based carrier, may engage in "switched hubbing" to countries for which the Commission has not authorized the provision of switched basic services over private lines provided the carrier complies with the following conditions:

(1) U.S.-outbound switched traffic shall be routed over the carrier's authorized U.S. international private lines to a country for which the Commission has authorized the provision of switched services over private lines (i.e., the "hub" country), and then forwarded to the third country only by taking at published rates and reselling the international message telephone service (IMTS) of a carrier in the hub country;

(2) U.S.-inbound switched traffic shall be carried to a country for which the Commission has authorized the provision of switched services over private lines (i.e., the "hub" country) as part of the IMTS traffic flow from a third country and then terminated in the United States over U.S. international private lines from the hub country;

(3) U.S. common carriers that route U.S.-billed traffic via switched hubbing shall tariff their service on a "through" basis between the United States and the ultimate point of origination or termination;

(4) No U.S. common carrier may engage in switched hubbing to or from a third country where it has an affiliation with a foreign carrier unless and until it has received authority to serve that country under § 63.18(e)(1), (e)(2), or (e)(6).

8. § 63.18 is amended to revise paragraph (e)(1)(ii)(A); to redesignate paragraphs (e)(2)(ii)(A) through (C) as paragraphs (e)(2)(ii)(B) through (D) and add new paragraph (e)(2)(ii)(A); to revise paragraph (e)(2)(ii)(C); to revise paragraph (e)(3); to remove paragraphs (e)(3)(i) and (e)(3)(ii); to redesignate paragraphs (e)(3)(i)(A) through (D) as paragraphs (e)(3)(i) through (iv); to revise paragraph (e)(4); to revise paragraph (e)(5); to remove paragraph (h)(4); to redesignate and revise paragraphs (h)(5) through (7) as paragraphs (h)(4) through (6); to add a new paragraph (h)(7); to revise paragraph (h)(8); to revise paragraph (i); and to add paragraph (k) to read as follows:

§ 63.18 Contents of applications for international common carriers.

*****

(e) ***

(1) ***

(i) ***

(ii) ***

(A) Authority to provide services to all international points under this part extends to those countries for which the applicant qualifies for non-dominant regulation as set forth in § 63.10, except in the following circumstance: If an applicant is affiliated with a foreign carrier in a destination market and the Commission has not determined that the foreign carrier lacks sufficient market power in the destination market to affect competition adversely in the U.S. market (see § 63.10(a)), the applicant shall not commence service on any such route until it receives specific authority to do so under paragraph (e)(6) of this section.

*****

(2) ***

(i) ***

(ii) ***

(A) Authority to provide resold services to all international points under this part extends to those countries and services for which the applicant qualifies for non-dominant regulation as set forth in § 63.10, except in the following circumstances, in which case an applicant shall not commence service until it receives specific authority to do so under paragraph (e)(6) of this section:

(*1*) An application to provide switched resold services to a non-WTO Member country where the applicant is affiliated with a foreign carrier; and

(*2*) An application to resell private line services to a destination market where the applicant is affiliated with a foreign carrier and the Commission has not determined that the foreign carrier lacks sufficient market power in the destination market to affect competition adversely in the U.S. market (see § 63.10(a)).

(B) ***

(C) The applicant may resell private line services for the provision of international switched basic services only in circumstances where the Commission has specifically authorized the provision of switched basic services over private lines to the particular country at the foreign end of the private line. In making determinations about particular destination countries, the Commission will follow the policies adopted in IB Docket Nos. 96-261 and 97-142. The Commission will provide public notice of its decisions to authorize the provision of switched basic services over private lines to particular countries.

(D) ***

(3) If applying for authority to provide international switched basic services over resold private lines between the United States and a WTO Member country for which the Commission has not previously authorized the provision of switched services over private lines, the applicant shall demonstrate either that settlement rates for at least 50 percent of the settled U.S.-billed traffic between the United States and the country at the foreign end of the private line are at or below the benchmark settlement rate adopted for that country in IB Docket No. 96-261 or that the country affords resale opportunities equivalent to those available under U.S. law. If applying for authority to provide international switched basic services over resold private lines between the United States and a non-WTO Member country for which the Commission has not previously authorized the provision of switched services over private lines, the applicant shall demonstrate that settlement rates for at least 50 percent of the settled U.S.-billed traffic between the United States and the country at the foreign end of the private line are at or below the benchmark settlement rate adopted for that country in IB Docket No. 96-261 and that the country affords resale opportunities equivalent to those available under U.S. law. With regard to showing that a destination country affords resale opportunities equivalent to those available under U.S. law, an applicant shall include evidence demonstrating that equivalent resale opportunities exist between the United States and the subject country, including any relevant bilateral or multilateral agreements between the administrations involved. Parties must demonstrate that the foreign country at the other end of the private line provides U.S.-based carriers with:

(i) [formerly paragraph (e)(3)(i)(A)]

(ii) [formerly paragraph (e)(3)(i)(B)]

(iii) [formerly paragraph (e)(3)(i)(C)]

(iv) [formerly paragraph (e)(3)(i)(D)]

(4) Any carrier authorized under this section to acquire and operate international private line facilities other than through resale may use those private lines to provide switched basic services only in circumstances where the Commission has previously authorized the provision of switched services over private lines to the particular country at the foreign end of the private line. The Commission will provide public notice of its decisions to authorize the provision of switched services over private lines to particular countries pursuant to its policies adopted in IB Docket Nos. 96-261 and 97-142. This provision is subject to the following exceptions and conditions:

(i) The applicant shall not initiate such service on a particular route absent a grant of specific authority under paragraph (e)(6) of this section in circumstances where the applicant is affiliated with a carrier in the country at the foreign end of the private line and the Commission has not determined that the foreign carrier lacks sufficient market power in the country at the foreign end of the private line to affect competition adversely in the U.S. market. See § 63.10(a).

(ii) ***

(A) Except as provided in paragraph (e)(4)(ii)(B) of this section, any carrier that seeks to provide international switched basic services over its authorized private line facilities between the United States and a WTO Member country for which the Commission has not previously authorized the provision of switched services over private lines shall demonstrate that settlement rates for at least 50 percent of the settled U.S.-billed traffic between the United States and the country at the foreign end of the private line are at or below the benchmark settlement rate adopted for that country in IB Docket No. 96-261 or that the country affords resale opportunities equivalent to those available under U.S. law. Except as provided in paragraph (e)(4)(ii)(B) of this section, any carrier that seeks to provide international switched basic services over its authorized private line facilities between the United States and a non-WTO Member country for which the Commission has not previously authorized the provision of switched services over private lines shall demonstrate that settlement rates for at least 50 percent of the settled U.S.-billed traffic between the United States and the country at the foreign end of the private line are at or below the benchmark settlement rate adopted for that country in IB Docket No. 96-261 and that the country affords resale opportunities equivalent to those available under U.S. law. With regard to showing that a destination country affords resale opportunities equivalent to those available under U.S. law, an applicant shall include the information required by paragraph (e)(3) of this section.

(B) ***

(5) If applying for authority to acquire facilities through the transfer of control of a common carrier holding international Section 214 authorization, or through the assignment of another carrier's existing authorization, the applicant shall complete paragraphs (a) through (d) of this section for both the transferor/assignor and the transferee/assignee. Paragraph (g) of this section is not applicable, and only the transferee/assignee needs to complete paragraphs (h) through (k) of this section. At the beginning of the application, the applicant should also include a narrative of the means by which the transfer or assignment will take place. The Commission reserves the right to request additional information as to the particulars of the transaction to aid it in making its public interest determination.

(6) ***

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(h) ***

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(4) Each applicant and carrier authorized to provide international communications service under this part is responsible for the continuing accuracy of the certifications required by paragraphs (h)(1)-(3) of this section. Whenever the substance of any such certification is no longer accurate, the applicant/carrier shall as promptly as possible and in any event within thirty days file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided. The information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

(5) Any applicant that seeks to operate as a U.S. facilities-based international carrier to a particular country and that is a foreign carrier in that country, or directly or indirectly controls a foreign carrier in that country, or has an affiliation within the meaning of paragraph (h)(1)(i)(B) of this section with a foreign carrier in that country shall provide the following information:

(i) The named foreign country (i.e., the destination foreign country) is a Member of the World Trade Organization; or

(ii) The applicant's affiliated foreign carrier lacks sufficient market power in the named foreign country to affect competition adversely in the U.S. market; or

(iii) The named foreign country provides effective competitive opportunities to U.S. carriers to compete in that country's international facilities-based market. An effective competitive opportunities demonstration should address the following factors:

(A) [formerly paragraph (h)(6)(A)(*1*)]

(B) [formerly paragraph (h)(6)(A)(*2*)]

(C) [formerly paragraph (h)(6)(A)(*3*)]

(D) [formerly paragraph (h)(6)(A)(*4*)]

(E) [formerly paragraph (h)(6)(A)(*5*)]

(6) Any applicant that proposes to resell the international switched or non-interconnected private line services of another U.S. carrier for the purpose of providing international communications services to the named foreign country and that is a foreign carrier in that country, or directly or indirectly controls a foreign carrier in that country, or has an affiliation within the meaning of paragraph (h)(1)(i)(B) of this section with a foreign carrier in the destination country shall provide the following information (see also paragraph (h)(7) of this section):

(i) The named foreign country (i.e., the destination foreign country) is a Member of the World Trade Organization; or

(ii) The applicant's affiliated foreign carrier lacks sufficient market power in the named foreign country to affect competition adversely in the U.S. market; or

(iii) The named foreign country provides effective competitive opportunities to U.S. carriers to resell international switched or non-interconnected private line services, respectively. An effective competitive opportunities demonstration should address the following factors:

(A) [formerly paragraph (h)(7)(A)(*1*)]

(B) [formerly paragraph (h)(7)(A)(*2*)]

(C) [formerly paragraph (h)(7)(A)(*3*)]

(D) [formerly paragraph (h)(7)(A)(*4*)]

(E) [formerly paragraph (h)(7)(A)(*5*)]

(7) Any applicant that proposes to resell the international switched services of an unaffiliated U.S. carrier for the purpose of providing international communications services to the named foreign country and that is a foreign carrier in that country or has an affiliation with a foreign carrier in that country shall either provide in its application a showing that would satisfy § 63.10(a)(3) or state that it will file the quarterly traffic reports required by § 43.61(c).

(8) With respect to regulatory classification under § 63.10, each applicant that certifies that it has an affiliation with a foreign carrier in a named foreign country and that desires to be regulated as non-dominant for the provision of particular international communications services to that country should provide information in its application to demonstrate that it qualifies for non-dominant classification pursuant to § 63.10.

(i) Each applicant shall certify that the applicant has not agreed to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market and will not enter into such agreements in the future. This certification shall be viewed as an ongoing representation to the Commission, and applicants/carriers shall immediately inform the Commission if at any time the representations in their certifications are no longer true. Failure to so inform the Commission will be deemed a material misrepresentation to the Commission. For purposes of this section, "special concession" is defined in § 63.14(b) and "foreign carrier" is defined in paragraph (h)(1)(ii) of this section.

(j) ***

(k) If the applicant desires streamlined processing pursuant to § 63.12, a statement of how the application qualifies for streamlined processing.

9. § 63.21 is amended to revise paragraph (a); to redesignate paragraph (e) as paragraph (h); and to add paragraphs (e), (f), and (g) to read as follows:

§ 63.21 Conditions applicable to international Section 214 authorizations.

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(a) Carriers may not use their authorized facilities-based or resold international private lines for the provision of switched basic services between the United States and a WTO Member country unless and until the Commission has determined that the country at the foreign end of the private line provides equivalent resale opportunities or that settlement rates for at least 50 percent of the settled U.S.-billed traffic between the United States and that country are at or below the benchmark settlement rate adopted for that country in IB Docket No. 96-261. Carriers may not use their authorized facilities-based or resold international private lines for the provision of switched basic services between the United States and a non-WTO Member country unless and until the Commission has determined that the country at the foreign end of the private line provides equivalent resale opportunities and that settlement rates for at least 50 percent of the settled U.S.-billed traffic between the United States and that country are at or below the benchmark settlement rate adopted for that country in IB Docket No. 96-261. *See* § 63.18(e)(3)-(4). If at any time the Commission finds, after an initial determination of compliance for a particular country, that the country no longer provides equivalent resale opportunities or that market distortion has occurred in the routing of traffic between the United States and that country, carriers shall comply with enforcement actions taken by the Commission. This condition shall not apply to a carrier's use of its authorized facilities-based private lines to provide service as described in § 63.18(e)(4)(ii)(B).

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(e) Authorized carriers may not access or make use of specific U.S. customer proprietary network information that is derived from a foreign network unless the carrier obtains approval from that U.S. customer. In seeking to obtain approval, the carrier must notify the U.S. customer that the customer may require the carrier to disclose the information to unaffiliated third parties upon written request by the customer.

(f) Authorized carriers may not receive from a foreign carrier any proprietary or confidential information pertaining to a competing U.S. carrier, obtained by the foreign carrier in the course of its normal business dealings, unless the competing U.S. carrier provides its permission in writing.

(g) The Commission reserves the right to review a carrier's authorization, and, if warranted, impose additional requirements on U.S. international carriers in circumstances where it appears that harm to competition is occurring on one or more U.S. international routes.

(h) *****

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation of Part 64 is amended to read as follows:

Authority: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Public Law 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 226, 228, 254(k) unless otherwise noted.

2. § 64.1001 is amended by revising paragraphs (b), (c), and (d) to read as follows:

§ 64.1001 International settlements policy and modification requests.

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(b) If the accounting rate referred to in § 43.51(e)(1) of this chapter is lower than the accounting rate in effect in the operating agreement of another carrier providing service to or from the same foreign point, and there is no modification in the other terms and conditions referred to in § 43.51(e)(1) of this chapter, the carrier must file a notification letter under paragraph (e) of this section.

(c) If the amendment referred to in § 43.51(e)(2) of this chapter is a simple reduction in the accounting rate, and there is no modification in the other terms and conditions referred to in § 43.51(e)(2) of this chapter, the carrier must file a notification letter under paragraph (e) of this section.

(d) If the operating agreement or amendment referred to in §§ 43.51(e)(1) and (e)(2) of this chapter is not subject to notification under paragraphs (b) and (c) of this section, the carrier must file a modification request under paragraph (f) of this section.

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3. § 64.1002 is revised to read as follows:

§ 64.1002 Alternative settlement arrangements.

(a) A communications common carrier engaged in providing switched voice, telex, telegraph, or packet switched service between the United States and a foreign point may seek approval to enter into an operating agreement with a foreign telecommunications administration containing an alternative settlement arrangement that does not comply with the requirements of § 43.51(e)(1) and § 63.14 of this chapter and § 64.1001 by filing a petition for declaratory ruling in compliance with the requirements of this section.

(b) A petition for declaratory ruling must contain the following:

(1) Information to demonstrate that:

(i) The alternative settlement arrangement is on a route between the United States and a World Trade Organization Member; or

(ii) For an alternative settlement arrangement on a route between the United States and a non-World Trade Organization Member:

(A) The Commission has made a previous determination that the effective competitive opportunities test in § 63.18(h)(5)(iii) of this chapter has been satisfied on the route covered by the alternative settlement arrangement; or

(B) The effective competitive opportunities test in § 63.18(h)(5)(iii) of this chapter is satisfied on the route covered by the alternative settlement arrangement; or

(iii) The alternative settlement arrangement is otherwise in the public interest.

(2) A certification as to whether the alternative settlement arrangement affects more than 25 percent of the outbound traffic or 25 percent of the inbound traffic on the route to which the alternative settlement arrangement applies.

(3) A certification as to whether the parties to the alternative settlement arrangement are affiliated, as defined in § 63.18(h)(1)(i) of this chapter, or involved in a non-equity joint venture affecting the provision of basic services on the route to which the alternative settlement arrangement applies.

(4) A copy of the alternative settlement arrangement if it affects more than 25 percent of the outbound traffic or 25 percent of the inbound traffic on the route to which the alternative settlement arrangement applies, or if it is between parties that are affiliated, as defined in § 63.18(h)(1)(i) of this chapter, or that are involved in a non-equity joint venture affecting the provision of basic services on the route to which the alternative settlement arrangement applies.

(5) A summary of the terms and conditions of the alternative settlement arrangement if it does not come within the scope of paragraph (b)(4) of this section. However, upon request by the International Bureau, a full copy of such alternative settlement arrangement must be forwarded promptly to the International Bureau.

(c) If the petition for declaratory ruling contains a certification under paragraph (b)(1)(i) of this section that the proposed alternative settlement arrangement is for service on a route between the United States and a World Trade Organization Member, a party may oppose the petition under paragraph (f) of this section with a showing that the participating carrier on the foreign end of the route does not have multiple (more than one) international facilities-based competitors. In such a case, the petitioning party may make a showing under paragraph (b)(1)(iii) of this section, pursuant to paragraph (g) of this section.

(d) An alternative settlement arrangement filed for approval under this section cannot become effective until the petition for declaratory ruling required by paragraph (a) of this section has been granted under paragraph (f) of this section.

(e) On the same day the petition for declaratory ruling has been filed, the filing carrier must serve a copy of the petition on all carriers providing the same or similar service with the foreign carrier identified in the petition.

(f) All petitions for declaratory ruling shall be subject to a 21-day pleading period for objections or comments, commencing the day after the date of public notice listing the petition as accepted for filing. A petition for declaratory ruling shall be deemed granted as of the 28th day without any formal staff action provided that:

(1) The petition is not formally opposed by a pleading meeting the following criteria:

(i) The caption and text of the pleading make it unmistakably clear that the pleading is intended to be a formal opposition;

(ii) The pleading is served upon the other parties to the proceeding; and

(iii) the pleading is filed within the time period prescribed; or

(2) The International Bureau has not notified the filing carrier that grant of the petition may not serve the public interest and that implementation of the proposed alternative settlement arrangement must await formal staff action on the petition.

(g) If objections or comments are filed, the petitioning carrier may file a response pursuant to § 1.45 of this chapter. Petitions that are formally opposed must await formal action by the International Bureau before the proposed alternative settlement arrangement may be implemented.

APPENDIX D
Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was included in the *Notice of Proposed Rulemaking* in this proceeding.[2] The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3] This analysis also serves as the FRFA for the issues disposed of here on reconsideration of the *Foreign Carrier Entry Order*.[4]

Need for, and Objectives of, the Rules and Policies Adopted Here

2. This *Report and Order and Order on Reconsideration* adopts a liberalized standard for participation by foreign and foreign-affiliated entities in the U.S. telecommunications markets. This open entry standard will apply to the provision of international telecommunications services under Section 214 of the Communications Act, indirect foreign ownership of common carrier radio licensees under Section 310(b)(4), and cable landing licenses under the Submarine Cable Landing License Act. It also revises the Commission's regulatory safeguards governing the provision of international telecommunications services in light of recent changes in the world's telecommunications market and the Commission's liberalized standard for participation by foreign and foreign-affiliated entities. The Commission has deemed these changes appropriate in light of the recent World Trade Organization (WTO) Basic Telecommunications Services Agreement and the worldwide trend toward deregulation and competition in the provision of telecommunications services. Our objective is to increase competition in the U.S. telecommunications markets while minimizing the risk of anticompetitive harm and encouraging foreign governments to open their telecommunications markets. In light of the changed circumstances that will result from the WTO Basic Telecom Agreement and our nearly two years of experience with our current rules on market entry and regulation of foreign-affiliated entities, we find that reducing entry barriers for applicants affiliated with entities from WTO Member countries is the appropriate way to accomplish that objective. The Commission believes that it is no longer necessary to apply the "effective competitive opportunities" (ECO)

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1 *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et seq.*, was amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

2 *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Order and Notice of Proposed Rulemaking, 12 FCC Rcd 7847, 7908–7920 ¶¶ 156–192 (1997) (*Notice*).

3 *See* 5 U.S.C. § 604.

4 *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*); *see also id.* at 3994 app. C (Final Regulatory Flexibility Analysis).

test developed in the 1995 *Foreign Carrier Entry Order*[5] to countries that are Members of the WTO. Instead, we will rely primarily on regulatory safeguards and benchmark settlement rates to reduce the potential for anticompetitive conduct in the U.S. market. We revise some of those safeguards in this *Order*.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. No comments were submitted specifically in response to the IRFA. Nevertheless, we have considered, in developing these rules and policies, any potential significant economic impact on small entities. We have attempted to minimize the burdens imposed on all entities, including small entities, in order to promote participation by new entrants in the U.S. telecommunications markets.

4. NextWave raised comments in response to the *Notice* specific to the impact of our policy toward indirect foreign investment in C-block and F-block licensees. Those blocks, known as "entrepreneur" blocks, are reserved for small businesses and entrepreneurs. NextWave states that it and other entrepreneurial carriers are dependent on financing from a variety of sources, including foreign investment, and that access to foreign capital is vital to their financial viability.[6] NextWave argues that indirect foreign investment in C-block and F-block licensees presents "no conceivable risk to competition" because those licenses are held by entrepreneurs who are new entrants into the markets.[7] NextWave proposes that, for that reason, the Commission should conclude that indirect foreign investment in C-block and F-block personal communications systems (PCS) licensees by any entity whose home market is a WTO Member country serves the public interest and should not be subject to prior Commission approval. NextWave also urges the Commission, in the alternative, to establish an expedited process and timetable for addressing applications to exceed the 25 percent benchmark for indirect foreign ownership of common carrier wireless licensees.

5. Telephone and Data Systems (TDS) proposed that the Commission permit without prior approval any amount of indirect foreign ownership of common carrier radio licensees held in the form of registered securities when the foreign investor is not a carrier and comes from one of the 64 other WTO Member countries that has committed to enforce fair rules of competition for basic telecommunications. Under TDS's proposal, the Commission would continue to require prior approval for investors from other WTO Member countries, for investors from non-WTO countries, and from all foreign carriers. TDS suggested that we scrutinize filings with the Securities and Exchange Commission to monitor foreign ownership of registered securities and that we rely on revocation, instead of prior approval, to protect the public interest pursuant to Section 310(b)(4). TDS states that adoption of its proposal would significantly reduce burdens on common carrier radio licensees, who currently must research the nationalities of their individual shareholders in order to remain in compliance with the restrictions on foreign ownership.

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[5] *See id.* at 3882–94 ¶¶ 22–55.

[6] NextWave Comments at 4.

[7] *Id.* at 6.

Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

6. We received no comments in response to our estimates in the IRFA of the number of small entities to which the proposed rules would apply. We conclude that the IRFA's estimates are the best available estimates of the number of small entities that the rules we adopt here will affect and that those estimates are sufficiently useful in enabling us to attempt to minimize the economic impact of our rules on small entities.

7. The RFA generally defines *small entity* as having the same meaning as the terms *small business, small organization*, and *small governmental jurisdiction* and defines *small business* as having the same meaning as the term *small business concern* under section 3 of the Small Business Act unless the Commission has developed one or more definitions that are appropriate for its activities.[8] The Small Business Act defines *small business concern* as one that (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[9]

8. The rules adopted in this *Order* apply only to entities providing international common carrier services pursuant to Section 214 of the Communications Act; entities providing domestic or international wireless common carrier, aeronautical enroute, or aeronautical fixed services under Section 309 of the Act; and entities licensed to construct and operate submarine cables under the Cable Landing License Act.

9. Because the small incumbent local exchange carriers (LECs) subject to these rules are either dominant in their fields of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definitions of *small entity* and *small business concern*.[10] Accordingly, our use of the terms *small entities* and *small businesses* does not encompass small incumbent LECs. Out of an abundance of caution, however, for the purposes of this FRFA, we will consider small incumbent LECs to be within this analysis, where a small incumbent LEC is any incumbent LEC that arguably might be defined by the SBA as a "small business concern."[11]

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[8] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[9] Small Business Act, 15 U.S.C. § 632.

[10] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15,499, ¶¶ 1328–1330, 1342 (1996), *partial stay granted, Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996), *vacated in part and affirmed in part*, 120 F.3d 753 (8th Cir. 1997).

[11] *See id.*

a. Section 214 International Common Carrier Services

10. Entities providing international common carrier service pursuant to Section 214 of the Act fall into the SBA's Standard Industrial Classification (SIC) categories for Radiotelephone Communications (SIC 4812) and Telephone Communications, Except Radiotelephone (SIC 4813). The SBA's definition of *small entity* for those categories is one with fewer than 1,500 employees.[12] We discuss below the number of small entities falling within these two subcategories that may be affected by the rules adopted in this *Order*.

11. The most reliable source of information regarding the number of international common carriers is the data that we collect annually in connection with the *Telecommunications Industry Revenue: Telecommunications Relay Service Fund Worksheet Data* (*TRS Worksheet*). In 1995, 445 toll carriers filed TRS fund worksheets. We believe that between 50 and 200 carriers failed to file TRS fund worksheets. We believe also that fewer than 10 toll carriers had 1,500 or more employees. Thus, at most 635 international carriers would be classified as small entities. Many TRS filers, however, are affiliated with other carriers, and therefore the number of aggregated carriers is far fewer than the preceding estimate. Of the 445 toll filers, 239 reported no carrier affiliates. Adding 50 non-filers gives a lower estimate of 289 international carriers that would be classified as small entities. Thus, our best estimate of the total number of small entities is between 289 and 635. We are unable at this time to estimate with greater precision the number of international carriers that would qualify as small business entities under the SBA's definition. While not all of these entities may have provided international service in 1995, we expect that many of these entities will seek to do so in the future, as will additional entrants into the market.

b. Title III Common Carrier Services

12. *Cellular licensees.* Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. The closest applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies (SIC 4812). The most reliable source of information regarding the number of cellular services carriers nationwide of which we are aware appears to be the data that the Commission collects annually in connection with the *TRS Worksheet.*[13] According to the most recent data, 792 companies reported that they were engaged in the provision of cellular services.[14] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular services carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 792 small cellular service carriers.

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[12] 13 C.F.R. § 121.201.

[13] Federal Communications Commission, CCB Industry Analysis Division, *Telecommunication Industry Revenue: TRS Worksheet Data*, Tbl. 1 (Average Total Telecommunication Revenue Reported by Class of Carrier) (December 1996) (*TRS Worksheet*).

[14] *Id.*

13. *220 MHz Radio Services.* Because the Commission has not yet defined a small business with respect to 220 MHz radio services, we will utilize the SBA's definition applicable to radiotelephone companies — i.e., an entity employing less than 1,500 persons.[15] With respect to the 220 MHz services, the Commission has proposed a two-tiered definition of small business for purposes of auctions: (1) for Economic Area (EA) licensees,[16] a firm with average annual gross revenues of not more than $6 million for the preceding three years, and (2) for regional and nationwide licensees, a firm with average annual gross revenues of not more than $15 million for the preceding three years.[17] Since this definition has not yet been approved by the SBA, we will utilize the SBA's definition applicable to radiotelephone companies. Given the fact that nearly all radiotelephone companies employ fewer than 1,000 employees,[18] with respect to the approximately 3,800 incumbent licensees in this service, we will consider them to be small businesses under the SBA definition.

14. *Common Carrier Paging.* The Commission has proposed a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging services. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, i.e., an entity employing fewer than 1,500 persons.[19] At present, there are approximately 74,000 Common Carrier Paging licensees. We estimate that the majority of common carrier paging providers would qualify as small businesses under the SBA definition.

15. *Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers such as paging companies. The closest applicable definition under the SBA rules is for radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that the Commission collects annually in connection with the *TRS Worksheet*. According to the most recent data, 117 companies reported that they were engaged in the provision of

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[15] 13 C.F.R. § 121.201, SIC 4812.

[16] Economic Area (EA) licenses refer to the 60 channels in the 172 geographic areas as defined by the Bureau of Economic Analysis, Department of Commerce. *See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, GN Docket 93-252, Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making, 10 FCC Rcd 6880 (1995), 60 FR 26861 (May 19, 1995).

[17] *Id.*

[18] *See* U.S. Bureau of the Census, U.S. Department of Commerce, *1992 Census of Transportation, Communications, and Utilities, UC92-S-1,* Subject Series, Establishment and Firm Size, Tbl. 5, Employment Size of Firms; 1992, SIC 4812 (issued May 1995).

[19] 13 C.F.R. § 121.201, SIC 4812.

mobile services.[20] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under the SBA's definition. Consequently, we estimate that fewer than 117 mobile service carriers are small entities.

16. *Broadband Personal Communications Services (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has defined *small entity* in the auctions for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[21] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenue of not more than $15 million for the preceding three calendar years.[22] These regulations defining *small entity* in the context of broadband PCS auctions have been approved by the SBA. No small business within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small businesses won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully; therefore, there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning bidders and the 93 qualifying bidders in the D, E, and F Blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules.

17. *Narrowband PCS.* The Commission does not know how many narrowband PCS licenses will be granted or auctioned, as it has not yet determined the size or number of such licenses. Two auctions of narrowband PCS licenses have been conducted for a total of 41 licenses, out of which 11 were obtained by small businesses owned by members of minority groups and/or women. Small businesses were defined as those with average gross revenues for the prior three fiscal years of $40 million or less.[23] For purposes of this FRFA, the Commission is utilizing the SBA definition applicable to radiotelephone companies, i.e., an entity employing less than 1,500 persons.[24] Not all of the narrowband PCS licenses have yet been awarded. There is therefore no basis to determine the number of licenses that will be awarded to small entities in future auctions. Given the facts that nearly all radiotelephone companies have fewer than 1,000

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[20] *Id.*

[21] *See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 FCC Rcd 7824 (1996).

[22] *See id.*

[23] *See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, and Amendment of the Commission's Rules to Establish New Narrowband PCS, GEN Docket No. 90-314,* Competitive Bidding Third Memorandum Opinion and Order and Further Notice, 10 FCC Rcd 175, 208 (1994).

[24] 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812.

employees[25] and that no reliable estimate of the number of prospective narrowband PCS licensees can be made, we assume, for purposes of the evaluations and conclusions in this FRFA, that all the remaining narrowband PCS licenses will be awarded to small entities.

18. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small business specific to the Rural Radiotelephone Service, which is defined in Section 22.99 of the Commission's Rules.[26] A significant subset of the Rural Radiotelephone Service is BETRS, or Basic Exchange Telephone Radio Systems (the parameters of which are defined in Sections 22.757 and 22.759 of the Commission's Rules). Accordingly, we will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing fewer than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them have fewer than 1,500 employees.[27]

19. *Air-Ground Radiotelephone.* The Commission has not adopted a definition of small business specific to the Air-Ground Radiotelephone Service, which is defined in Section 22.99 of the Commission's Rules.[28] Accordingly, we will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing fewer than 1,500 persons.[29] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA definition.

20. *Specialized Mobile Radio Licensees (SMR).* Pursuant to Section 90.814(b)(1) of our rules, the Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz Specialized Mobile Radio (SMR) licenses to firms that had revenues of less than $15 million in each of the three previous calendar years. This regulation defining "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[30] We do not know how many firms provide 800 MHz or 900

[25] The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

[26] 47 C.F.R. § 22.9.

[27] 13 C.F.R. § 121.201, SIC 4812.

[28] *Id.*

[29] *Id.*

[30] *See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-583, Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639, 2693-702 (1995), 60 FR 48913 (September 21, 1995); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz*

MHz geographic area SMR service pursuant to extended implementation authorizations or how many of these providers have annual revenues of less than $15 million. We do know that one of these firms has over $15 million in revenues. We assume that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected includes these 60 small entities.

21. *Microwave Video Services.* Microwave services includes common carrier,[31] private operational fixed, and broadcast auxiliary radio services. At present, there are 22,015 common carrier licensees. Inasmuch as the Commission has not yet defined *small business* with respect to microwave services, we will utilize the SBA's definition applicable to radiotelephone companies — i.e., an entity with less than 1,500 employees.[32] Although some of these companies may have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of common carrier microwave service providers that would qualify under the SBA's definition. We therefore estimate that there are fewer than 22,015 small common carrier licensees in the microwave video services.

22. *Offshore Radiotelephone Service.* This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.[33] At present, there are approximately 55 licensees in this service. Some of those licensees are common carriers. We are unable at this time to estimate the number of licensees that would qualify as small under the SBA's definition.

23. *Local Multipoint Distribution Service (LMDS).* The Commission has so far licensed only one licensee in this service, and that licensee is not providing service as a common carrier. There will be a total of 986 LMDS licenses.[34] Licensees will be permitted to decide whether to provide common carrier service, and we have no way of estimating how many will choose to do so. Because there will be no restrictions on the number of licenses a given entity may acquire, we have no way of estimating how many

Frequency Band, PR Docket No. 93-144, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd 1463 (1995), 61 FR 6212 (February 16, 1996).

[31] 47 C.F.R. § 101 *et seq.* (formerly part 21 of the Commission's rules).

[32] 13 C.F.R. § 121.201, SIC 4812.

[33] These licensees are governed by subpart I of part 22 of the Commission's rules, 47 C.F.R. §§ 22.1001–.1037.

[34] *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 25.5–29.5 GHz Frequency Band, to Reallocate the 29.5–30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, FCC 97-82 (Mar. 13, 1997), ¶ 13 (*LMDS Order*).

total licensees there will be. We also cannot estimate the number of common carrier licensees that will qualify as small entities.

24. *Space Stations (Geostationary).* Very few systems are currently operated on a common carrier basis. Because we do not collect information on annual revenue or number of employees of all these licensees, we cannot estimate with precision the number of such licensees that may constitute a small business entity. It is likely that no more than one such entity that is currently operating as a common carrier would constitute a small business entity. There may be a small increase in the number of such entities in the future as a result of recent licensing action in the Ka-band.

25. *Space Stations (Non-geostationary).* These systems by and large do not operate as common carriers. Because we do not collect information on annual revenue or number of employees, we cannot estimate with precision whether any carrier that may choose to operate on a common carrier basis constitutes a small business entity. The trend is for such systems to operate on a non–common carrier basis. These systems, of which there will be a limited number, by and large are not yet operational and are still being licensed and constructed.

26. *Earth Stations.* The vast majority of earth stations licensed by the Commission are not operated on a common carrier basis. Earth stations that communicate with non-geostationary and Ka-band satellite systems may operate on a common carrier basis but these systems are not yet operational and are still being licensed and constructed. We are unable to estimate at this time the number of earth stations communicating with such systems that may operate on a common carrier basis and, of those, the number that will be licensed to small business entities.

c. Aeronautical Enroute and Aeronautical Fixed Licenses

27. The Commission has not adopted a definition of small business specific to the aeronautical enroute and aeronautical fixed services. Accordingly, we will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing fewer than 1,500 persons.[35] There are 45 licensees providing aeronautical enroute and aeronautical fixed services, including Aeronautical Radio Inc. (ARINC) and its affiliates. All of the licensees are small businesses except ARINC, which has approximately 2,000 employees. We therefore conclude that there are 44 small businesses providing aeronautical enroute and aeronautical fixed services.

d. Submarine Cable Landing Licenses

28. The new rules and policies adopted in this *Order* will affect all holders of and future applicants for cable landing licenses, whether or not they operate their cables as common carriers. It is difficult to estimate how many applications for cable landing licenses will be filed in coming years, but that number will likely increase if we adopt our proposal to lower the barriers to granting licenses for cables to WTO Member countries. Since 1992, there have been approximately 40 applications for cable landing

[35] *Id.*

licenses. The total number of licensees is difficult to determine, because many licenses are jointly held by several licensees. Our rules will also permit more current licensees to accept additional investment from entities from WTO Member countries.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

29. The rules and policies adopted in this *Report and Order and Order on Reconsideration* will affect large and small entities. We will require that U.S. carriers whose foreign affiliates have market power maintain or provide certain records regarding their foreign affiliates. Our rules will in most cases reduce the burdens that are currently imposed on such carriers, and we anticipate that the remaining requirements will not impose a significant economic burden, particularly on small entities. A variety of skills may be required to comply with the proposed requirements, but all of the skills that may be required are of the type needed to conduct a carrier's normal course of business. No additional outside professional skills should be required, with the possible exception of preparing an initial Section 214 or cable landing license application and of preparing a submission for our consideration under Section 310(b)(4), most of which will be simplified by the rules and policies we adopt here.

30. An applicant for a Section 214 authorization or a cable landing license will no longer be required to show either that an affiliated foreign carrier lacks market power or that the destination country provides effective competitive opportunities (ECO) to U.S. carriers so long as it shows that the destination country is a Member of the World Trade Organization. Similarly, entities holding or seeking to hold common carrier wireless licenses or aeronautical enroute or aeronautical fixed licenses that have more than 25 percent indirect foreign investment will not need to demonstrate that the home markets of the foreign investor or investors from WTO Members offer effective competitive opportunities for U.S. investors in the analogous service sector. *See supra* Section III.

31. Authorized international common carriers will no longer be required to notify the Commission before accepting investments by foreign carriers (or their affiliates) between 10 percent and 25 percent. We have retained a requirement that authorized carriers notify the Commission before accepting investment greater than 25 percent. We have added a requirement that authorized carriers notify the Commission before they (or their affiliates) acquire a direct or indirect controlling interest in a foreign carrier; previously, those interests were subject only to a post hoc notification requirement. We continue to require authorized carriers to notify the Commission within 30 days after acquiring a direct or indirect interest greater than 25 percent in a foreign carrier if the acquisition of that interest has not otherwise been reported. *See supra* Section VI.B.

32. We have narrowed the application of our "No Special Concessions" rule, which prohibits carriers from entering into exclusive arrangements with foreign carriers. That rule will now apply only to carriers' dealings with foreign carriers that have sufficient market power in their home markets to adversely affect competition in the U.S. market. *See supra* Section V.B.1. Carriers wishing to enter into alternative settlement arrangements with foreign carriers operating in WTO Member countries will presumptively be allowed to do so. That presumption may be overcome where an opponent demonstrates that there are not multiple facilities-based carriers operating in the foreign carrier's market. *See supra* Section V.E.

33. To ensure fair competition among authorized carriers and to be consistent with our policy governing the confidentiality of competing carrier information, all U.S. carriers will be prohibited from receiving proprietary or confidential information about competing U.S. carriers obtained by any foreign carrier in the course of its regular business dealings with the competing U.S. carrier, unless the U.S. carrier provides specific written permission. *See supra* Section V.B.2.a. We will also require U.S. carriers desiring to make use of foreign-derived customer proprietary network information (CPNI) pertaining to a specific U.S. customer to first obtain approval from that customer and notify that customer that the customer may require the carrier to disclose the CPNI to unaffiliated third parties. *See supra* Section V.B.2.b.

34. An authorized carrier affiliated with a foreign carrier will be subject to additional requirements. Its authorization to serve the affiliated market will be conditioned on the foreign affiliate's offering to all U.S.-licensed carriers a settlement rate at or below the benchmark adopted for that country in the Commission's recent *Benchmarks Order*.[36] Foreign-affiliated carriers classified as dominant are subject to additional reporting, recordkeeping, and compliance requirements. In this *Order*, we substantially reduce the initial showing that a foreign-affiliated carrier must make in order to be presumptively classified as non-dominant by adopting a presumption that a foreign carrier with less than 50 percent market share in certain relevant terminating markets does not have sufficient market power to affect competition adversely in the U.S. market. We remove existing dominant carrier requirements that we find to be unnecessarily burdensome and adopt a narrowly tailored dominant carrier framework designed to address specific concerns of anticompetitive behavior. We replace the requirement that dominant carriers file tariffs on fourteen days' advance notice with a one-day advance notice requirement, and we will accord these tariff filings a presumption of lawfulness. We will no longer require foreign-affiliated carriers to obtain Commission approval before adding or discontinuing circuits on the dominant route. We require dominant carriers to provide service on the affiliated route through a corporation that is separate from its foreign affiliate, maintain separate books of account, and not jointly own switching or transmission facilities with its foreign affiliate. Carriers regulated as dominant will be required to file quarterly traffic and revenue reports, provisioning and maintenance reports, and circuit status reports on the dominant affiliated route. We decline to adopt the proposal in the *Notice* to ban exclusive arrangements involving joint marketing, customer steering, and the use of foreign market telephone customer information. *See supra* Section V.C.2.

35. Finally, we impose a reporting requirement on switched resellers that are affiliated with a foreign carrier that has sufficient market power on the foreign end of a route to affect competition adversely in the U.S. market. We will require these resellers to file quarterly traffic and revenue reports for their switched resale traffic on the affiliated route. *See supra* Section V.C.1.b.

Federal Rules that May Duplicate, Overlap, or Conflict with the Rules Adopted Here

36. None.

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[36] *International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280 (rel. Aug. 18, 1997) (*Benchmarks Order*).

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

37. We have taken significant steps to minimize the procedural burdens imposed on all affected entities. The application of the rules we adopt in this *Order* does not vary depending on the size of the entities involved. Some regulations may be more burdensome on large carriers than on small carriers because large carriers may be more likely to be dominant or to operate on a facilities basis than are small carriers. That is, small carriers may be more likely to operate as resellers of switched international services, which are less likely to be subject to our most stringent regulation.

38. The revisions to our policies toward evaluating Section 214 and cable landing license applications will significantly reduce burdens on many current and potential international common carriers. A foreign-affiliated carrier seeking to serve an affiliated route will no longer be required to show either that its affiliate lacks market power or that the destination country provides effective competitive opportunities (ECO) to U.S. carriers so long it shows that the destination country is a Member of the World Trade Organization. We believe this to be a minimal burden for most small entities and a significantly lesser burden than the detailed showings required to demonstrate either that the affiliate lacks market power or that the destination country provides ECO. The ECO test, in particular, has proven to be unusually burdensome both on applicants and on the Commission.

39. Similarly, the revisions to our policy toward evaluating Section 310(b)(4) requests by common carrier radio licensees and aeronautical licensees to accept indirect foreign investment greater than 25 percent will significantly reduce the burdens on licensees (and prospective licensees) seeking to accept investment from entities in WTO Member countries. Those applicants will no longer be required to show that the home market of the investor offers effective competitive opportunities for U.S. investors in the analogous service sector. This will make those applications much simpler and less time-consuming and, more importantly, will make it much easier for licensees to accept foreign investment and for prospective licensees to plan their business affairs. Common carrier radio licensees will continue to be required to seek Commission approval before accepting indirect foreign investment above a level for which they have previously received Commission approval.

40. We have taken steps to facilitate entry into the U.S. market for international telecommunications services by small carriers. Small carriers often enter the market, at least initially, by reselling the switched services of other authorized international carriers. In this *Order*, we change our procedural rules to afford streamlined processing to any applicant whose foreign affiliate is from a WTO Member country if the applicant requests authority to serve that country solely by reselling the switched services of unaffiliated U.S. international carriers. We also will streamline process the Section 214 application of any foreign-affiliated applicant whose affiliate is from a WTO Member and that demonstrates clearly and convincingly that the foreign affiliate has less than a 50 percent market share in certain relevant terminating markets in the destination foreign country. In addition, we will streamline process the Section 214 application of any applicant whose affiliate is from a WTO Member and is not otherwise eligible for streamlined processing if the applicant certifies that it will comply with our dominant carrier regulations. Streamlined applications, unless they are removed from the streamlined process, are granted 35 days from the date they are placed on public notice. *See supra* Section VI.A.

41. In revising our regulations that apply to authorized international common carriers, we have developed a targeted approach designed to monitor and detect anticompetitive behavior in the U.S. market without imposing regulations that are more burdensome than necessary. In doing so, we have attempted to minimize burdens on entities that are unlikely to pose a threat to competition. We also have removed restrictions on whole categories of activities that we have concluded do not pose a threat to competition in the developing competitive marketplace. Our approach relies in large part on reporting requirements, rather than restrictions on capacity changes or service options, to prevent affiliated carriers from causing competitive harms in the U.S. international services market.

42. We have significantly reduced the scope of our rule that prohibits carriers from entering into certain exclusive arrangements with foreign carriers. Our "No Special Concessions" rule will now prohibit accepting certain specified arrangements only from foreign carriers that have sufficient market power in their home markets to adversely affect competition in the U.S. market. We adopt a presumption that foreign carriers with less than 50 percent market share in the relevant terminating markets do not have such sufficient market power. We anticipate that delineating those arrangements that are subject to the prohibition and adopting this presumption will significantly clarify the circumstances in which authorized carriers will be permitted to accept special concessions from foreign carriers. This more targeted rule also will allow authorized carriers substantially more flexibility in arranging their business affairs.

43. Carriers wishing to enter into alternative settlement arrangements with foreign carriers operating in WTO Member countries will presumptively be allowed to do so. This presumption may be overcome by a demonstration that there are not multiple facilities-based carriers operating in the foreign carrier's market. We expect to allow alternative settlements more as a rule than as an exception, and the issue of whether there are multiple facilities-based carriers operating in the foreign market will be less burdensome than the issue of whether the foreign market offers effective competitive opportunities, which is the standard being replaced.

44. We have declined, in this *Order*, to adopt certain proposals in the *Notice* that would have restricted the business strategies of carriers classified as dominant. Instead, we will impose reporting requirements that will enable us to detect and deter anticompetitive behavior. We have declined to adopt proposals in the *Notice* to ban exclusive arrangements involving joint marketing, customer steering, and the use of foreign market telephone customer information. We have found that such proscriptive safeguards would be unduly burdensome and could unnecessarily impede business activities. We choose to rely instead on the general prohibition on accepting special concessions combined with additional reporting and disclosure requirements, instead of proscriptive safeguards, for carriers with foreign affiliations. We have also relieved carriers of the requirement to notify the Commission of investments by foreign carriers of 10 percent or more; they now must report an investment by a foreign carrier only when that investment exceeds 25 percent. We conclude that none of the safeguards we impose specifically on carriers classified as dominant will impose significant economic burdens.

45. We have also declined to impose on switched resellers a condition that their foreign affiliates maintain settlement rates at or below the benchmark settlement rates we adopted in the *Benchmarks Order*. We find that such a condition would be unnecessarily burdensome inasmuch as

resellers have less ability to engage in anticompetitive conduct than facilities-based carriers and we have a greater ability to detect anticompetitive conduct by switched resellers. Imposing a benchmark condition on switched resellers would impose significant economic impact on resellers, many of whom are small entities, that could prevent some new entrants from entering the U.S. market and affect the ability of existing carriers to provide service. To address concerns about traffic distortions related to resale, however, we have decided to impose a requirement on switched resellers that are affiliated with a carrier that has sufficient market power to affect competition adversely in the U.S. market. We will require those resellers to file quarterly traffic and revenue reports for their traffic on the affiliated route in order to enable the Commission to determine whether switched resellers are engaging in anticompetitive conduct.

46. In the *Notice*, we sought comment on whether to adopt, as an additional dominant carrier safeguard, some level of structural separation between a U.S. carrier and its affiliated foreign carrier. We adopt here a requirement that a foreign-affiliated U.S. international carrier regulated as dominant provide service in the U.S. market through a corporation that is separate from the foreign affiliate, maintain separate books of account, and not jointly own switching and transmission facilities with its foreign carrier affiliate. We find that, without such separation, discrimination, cost-misallocation, and the possibility of a predatory price squeeze by such a foreign-affiliated carrier would have the potential to cause substantial harm to consumers, competition, and production efficiency in the U.S. international services market. These requirements will not impose a significant burden on such carriers because most foreign-affiliated carriers operating in the United States do so in a manner that is consistent with the requirements we adopt here. We have considered imposing more stringent structural separation requirements but have found them to be unnecessary and to potentially impose a significant burden on foreign-affiliated carriers that operate in the U.S. market.

47. We are unable to adopt NextWave's proposal to state that indirect foreign investment in C-block and F-block PCS licensees by any entity whose home market is a WTO Member country serves the public interest and will not be subject to prior Commission approval. We have found that prior approval is necessary in all instances of indirect foreign investment in excess of 25 percent because of the need to review such investments for national security, law enforcement, foreign policy, and trade concerns as well as for the exceptional case that poses a very high risk to competition. We do, however, adopt NextWave's alternative proposal to establish an expedited process and timetable for addressing those applications: These applications will generally be added to the International Bureau's streamlined process and usually granted within 35 days from the date the International Bureau places the application on public notice. We expect that application of our open entry standard and streamlined process will both minimize procedural burdens on small entities and present substantial new opportunities for obtaining foreign capital. *See supra* Section III.D.

48. We are unable to adopt TDS's proposal to disregard investments in common carrier radio licensees by non-carriers held as publicly traded securities. We accept the concerns of Executive Branch agencies that a prior approval process is necessary for all investments and that even small investments in publicly traded securities could, if aggregated, nevertheless create a degree of control or influence over a licensee that would be contrary to U.S. national security or law enforcement interests. *See supra* Section III.D.

49. We have also decided not to adopt a policy that a common carrier radio licensee need not seek Commission approval before accepting increases in indirect foreign ownership once they have obtained Commission authority to exceed 25 percent indirect foreign ownership. We have determined that every such increase requires Commission review in order to consider the effect of the ownership on national security and law enforcement interests. *See supra* Section III.D.

50. We conclude that these steps we have taken to minimize significant economic impact on small entities will advance the small business goals of Section 257 of the Act, as added by the Telecommunications Act of 1996.

Report to Congress

51. The Commission will send a copy of this *Report and Order and Order on Reconsideration,* including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A summary of this *Report and Order and Order on Reconsideration,* and a copy of this FRFA, will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

STATEMENT OF FCC CHAIRMAN WILLIAM E. KENNARD
November 25, 1997

Re: Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142

Re: Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, IB Docket No. 96-111

Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations, CC Docket No. 93-23

COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the INTELSAT K Satellite, File NO. ISP-92-007

These items illustrate what I have stressed since my first day as Chairman as the principles that should guide the work of this agency, the three Cs: competition, community and common sense. They promote competition by opening up our telecommunications and satellite markets to foreign participation, ensuring that U.S. consumers will be confronted with an expanding array of choices and lower prices. They promote community by establishing a framework that should make it easier and cheaper for people around the world to communicate and exchange ideas. The items takes a common sense approach to opening our markets. They replace a process that has, to this point, been extremely burdensome administratively -- the process of authorizing foreign participation in our markets -- with a streamlined process that nonetheless gives us the ability to protect against the potential for anti-competitive harm where necessary.

Over the past two years, the United States has led a revolution in the telecommunications sector. On the domestic front, the Telecommunications Act of 1996 delivered a clear and compelling blueprint for competition in telecommunications services. Internationally, the Commission acted decisively to reform the antiquated system for delivering international services. At the same time, the United

States challenged the nations of the world to build a global communications network that brings the world together through communications and creates global opportunities. In February of this year, the United States reached a historic agreement with 68 other countries to open markets for basic telecommunications services around the world.

Today, the Commission considers rules governing foreign entry into the U.S. telecommunications and satellite markets in response to the landmark agreement on telecommunications negotiated under the auspices of the World Trade Organization (WTO). In that agreement, countries representing 90 percent of the $600 billion global market for basic telecommunications services have pledged to open their markets to international competition. Equally as important, almost all the participants bound themselves to observe a set of pro-competitive regulatory principles that closely follow the Congressional vision of free competition, fair rules, and effective enforcement enacted in the Telecommunications Act. In light of the market opening and regulatory commitments contained in the WTO Basic Telecom Agreement, we expect to see a widespread shift away from the monopoly provision of telecommunications and satellite services and toward competition, open markets and transparent regulation.

The rules we consider today will open the U.S. telecommunications and satellite markets to foreign investment and entry by foreign carriers. Such entry will introduce new sources of competition in the telecom and satellite markets in the United States and attract much needed investment capital. Increased competition will benefit American consumers by producing lower prices, greater service choice and innovation. Our market-opening actions will also assist the U.S. telecommunications and satellite industries in their efforts to expand beyond our borders. As the world's leaders in telecommunications, our providers and manufacturers are well-equipped to take advantage of the foreign market opportunities that will follow on the heels of the actions we take today. For example, the U.S. satellite industry holds 34 percent of the world satellite market. Finally, the rules we approve today make sense by establishing clear and understandable standards for entry, with streamlined procedures for most applicants and safeguards to prevent foreign carriers with market power from distorting competition in the U.S. market.

Our actions today once again put the United States in a leadership role of prompt and efficient implementation of U.S. commitments in the WTO Basic Telecom Agreement. We will be watching closely implementation by other countries. We expect that U.S. carriers will begin to enter and compete in previously closed foreign markets. We will know that the revolution we started is successful if, in a few years, most of the world's traffic is carried between countries where competition has replaced monopolies, prices decline for international phone calls, and those lower prices translate into a significant increase in the size of the world's international services market. I also expect to see a dramatic increase in the number of people who have access to a telephone around the world. Our own experience shows that competition takes some time to flourish. The WTO Basic Telecom Agreement is the beginning of the revolutionary journey to competition in many countries. With the adoption of the rules we are considering today, the U. S. will continue to spearhead that revolution.