Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-475

In the Matter of	)	
	)	
Market Entry and Regulation of	)	IB Docket No. 95-22
Foreign-affiliated Entities	)	RM-8355
	)	RM-8392

REPORT AND ORDER

Adopted: November 28, 1995 Released: November 30, 1995

By the Commission: Commissioners Barrett and Ness issuing separate statements.

TABLE OF CONTENTS

		Paragraphs
I.	INTRODUCTION	1
II.	COMMISSION GOALS	6
III.	PUBLIC INTEREST ANALYSIS UNDER SECTION 214	19
A.	Adoption of an Effective Competitive Opportunities Analysis	22
B.	Factors of the Effective Competitive Opportunities Analysis	40
1.	Facilities-based entry	47
2.	Interconnection	49
3.	Competitive Safeguards	51
4.	Regulatory Framework	54
C.	Additional Public Interest Factors	56
D.	Scope of Section 214 Public Interest Analysis for Applicants Affiliated with Foreign Carriers	73
1.	Affiliation	73
a.	Affiliation Standard for Entry Purposes	74
b.	Scrutiny Over Foreign Carrier Investments of 25 Percent or Less	88
c.	Aggregation of Multiple Carrier Interests	90
d.	Non-equity Business Relationships	93
e.	Prior Notification and Approval Requirement	96
2.	Affiliated Carriers Subject to the Entry Standard	99
a.	Dominant versus Non-dominant Carriers	100
b.	U.S. Investments in Foreign Carriers	103
c.	Small Carrier Exemption	107
d.	Applicability to Previously Authorized Affiliates of Foreign Carriers	109

3. Primary Market versus Destination Market 110

IV. OTHER MARKET ENTRY ISSUES

A. Definition of a Facilities-Based Carrier 124

B. Resale Entry by Affiliates of Foreign Carriers 132

1. Application of the Effective Competitive Opportunities Analysis to Resale Entrants 132

a. Application to Private Line Resale: Conformance of Equivalent Resale Opportunities with Effective Competitive Opportunities 133

b. Switched Resale and Resale of Non-interconnected Private Lines 139

2. Other Resale Issues 149

a. Relevance of Cost-based Accounting Rates 151

b. Provision of Switched Services over Facilities-based Private Lines 153

c. Provision of Switched Services over Resold Private Lines, including to "Points Beyond" 165

C. Other Forms of Market Entry 171

1. Domestic Interexchange and Enhanced Services; Separate Satellite and Other Non-common Carrier Systems 171

2. Other Satellite Issues 173

V. SECTION 310(b)(4) STANDARD FOR INDIRECT FOREIGN OWNERSHIP OF RADIO LICENSES 179

A. Desirability of the Effective Competitive Opportunities Analysis for Section 310 Determinations 184

1. Common Carrier Licenses 184

2. Broadcast Licenses 190

3. Aeronautical Licenses 195

B. Methodology for Implementing Effective Competitive Opportunities Analysis 197

1. Identifying the Appropriate National Market for Comparison 199

2. Identifying the Appropriate Market Segment for Comparison 209

3. Factors of the Effective Competitive Opportunities Analysis 213

4. Consideration of Additional Public Interest Factors 216

VI. JURISDICTION ISSUES 220

A. Jurisdiction Under Section 214 223

B. Jurisdiction Under Section 310(b)(4) 236

C. Impact on International Trade Policy 239

VII. REGULATORY ISSUES 245

A. Definition of Affiliation for the Purpose of Post-entry Regulation 248

B. Application of Dominant Carrier Regulation to Non-equity Business Relationships 252

C. Operating Safeguards 256

1. "No Special Concessions" Requirement 256

2. Tariffing Requirements 260
3. Facilities Authorization and Reporting Requirements 263
4. Recordkeeping Requirement 266
5. Disclosure of Accounting Rates 267
D. Codification of Proportionate Return 272
E. Refile 275
VIII. CONCLUSIONS 276
IX. PROCEDURAL MATTERS; ORDERING CLAUSES 278
APPENDIX A - List of Commenters
APPENDIX B - Final Rules
APPENDIX C - Final Regulatory Flexibility Analysis

I. INTRODUCTION

1. With this *Report and Order*, we adopt standards for regulating the entry of foreign carriers into the United States market for international telecommunications services. This *Report and Order* explicitly sets forth the entry criteria we believe are necessary to promote effective competition in the U.S. market for these services, including global, seamless network services. Effective competition means competition among service providers in a market that benefits consumers by expanding service offerings, promoting development of innovative technology, and lowering prices. We do not believe that effective competition will occur if foreign carriers that continue to hold market power in foreign markets are allowed unlimited access to the U.S. market. We seek to ensure the public interest benefits of effective competition through application of public interest criteria that consider the availability of opportunities for all U.S. carriers to innovate in the provision of international services, including through entry to foreign markets, and that limit the ability of dominant foreign carriers to leverage their market power into the U.S. international services market. We believe that our new standards may also encourage other countries to remove barriers to competitive entry in their international telecommunications services markets.

2. As part of our overall public interest analysis under Section 214 of the Communications Act,[1] we will examine whether effective competitive opportunities exist for U.S. carriers in the destination markets of foreign carriers seeking to enter the U.S. international services market through affiliation with a new or existing U.S. carrier. Similarly, in deciding whether it is in the public interest to permit foreign investment in licensees of common carrier radio facilities in excess of the benchmarks contained in Section 310(b)(4) of the Act,[2] we will examine whether foreign markets offer effective competitive opportunities to U.S. entities. We note that this approach is fully consistent not only with our existing jurisdiction under Section 310, but also with telecommunications bills currently

---

[1] 47 U.S.C. § 214 (1988).

[2] 47 U.S.C. § 310(b)(4)(1988).

pending in Congress which would specifically incorporate an effective competitive opportunities analysis as part of a Section 310(b)(4) determination.[3]

3. Our effective competitive opportunities analysis under Section 214 of the Act will focus first on the legal framework for entry into the international basic services market by U.S. carriers in the destination markets where the applicant has market power. If there are no legal barriers to entry, we also will consider the practical ability for U.S. carriers to compete in those markets. We will apply the effective competitive opportunities analysis to foreign carriers seeking to provide facilities-based or resale service in the United States. Our analysis under Section 310 is similar to that under Section 214, but with some important distinctions. Our public interest analysis under Sections 214 and 310 also will continue to consider additional public interest factors, including the general significance of the proposed entry to the promotion of competition in the U.S. communications 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.

4. For purposes of implementing this entry standard, we adopt a new definition of "affiliation" and modify our definition of "facilities-based" carrier. We now define affiliation as an ownership interest of greater than 25 percent, or a controlling interest at any level, in a U.S. carrier by a foreign carrier. This definition of affiliation will apply both for purposes of determining when to apply the effective competitive opportunities analysis and of determining the regulatory status of all affiliated carriers, including U.S-based carriers that invest in a foreign carrier. We modify our definition of a "facilities-based carrier" to include any carrier that holds an ownership, indefeasible-right-of-user or leasehold interest in a U.S. international facility.

5. In this *Report and Order,* we also modify the safeguards that we apply to foreign-affiliated carriers regulated as dominant under our *International Services* decision.[4] And we extend our modified dominant carrier safeguards to U.S. carriers on particular routes where they are engaged in a co-marketing or other arrangement with a dominant foreign carrier, and such arrangement presents a substantial risk of anticompetitive effects in the U.S. market for international telecommunications services.

---

[3] Our action here is within the discretion granted us under the current statute, but does not go so far as the proposed language in the pending bills. Both the House and Senate have passed bills which would authorize the Commission to incorporate an effective competitive opportunities analysis in Section 310(b)(4) determinations, but both bills also would amend Section 310 more broadly. *See* S 652, § 303; HR 1555, § 302. *See also, infra* Section V.

[4] *Regulation of International Common Carrier Services,* 7 FCC Rcd 7331 (1992) (*International Services*).

II. COMMISSION GOALS

6. In the *Notice*, we set out three goals of our regulation of the U.S. international telecommunications market: (1) to promote effective competition in the global market for communications services; (2) to prevent anticompetitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their communications markets.[5] We stated our belief that establishing an effectively competitive global communications market could result in reduced rates, increased quality, and new innovative services for U.S. consumers, including the availability of global communications services. We emphasized that prevention of anticompetitive conduct in the provision of international services or facilities would be a necessary step in achieving effective competition. We observed that unrestricted entry into the U.S. international telecommunications market by foreign carriers from closed markets presents a risk of anticompetitive effects in U.S. markets, particularly the high-end market for global network services. Therefore, we tentatively concluded that another key to promoting the public interest by creating effective competition is foreign market liberalization.

7. Over fifty parties filed comments and thirty five parties submitted reply comments in this proceeding.[6] Our goals received overwhelming support from the commenters.[7] Even many commenters who oppose the means by which we seek to achieve those goals comment favorably on them. Some commenters have concerns with the third goal of encouraging foreign countries to open their telecommunications markets. Deutsche Telekom, for example, argues that, if safeguards are fully capable of preventing anticompetitive conduct, it is difficult to see why effective competition hinges upon the opening of foreign markets.[8]

8. We adhere to our goals as stated in the *Notice*, with this clarification: our primary purpose in adopting entry criteria under Sections 214 and 310 of the Act is to promote effective competition in the U.S. telecommunications services market, particularly the market for international telecommunications services. As discussed *infra* in Section VI, several commenters read our proposed primary goal of promoting effective competition in the "global" market as extending beyond our jurisdiction. We clarify that our regulatory focus under Section 214 is on the U.S. international telecommunications services market, which consists of all the routes between the United States and foreign countries. This market

---

5 *Market Entry and Regulation of Foreign-affiliated Entities*, Notice of Proposed Rulemaking, 10 FCC Rcd 4844 (1995) (*Notice*).

6 *See Appendix A* for a list of parties submitting Comments and Reply Comments.

7 *See e.g.*, NYNEX Comments at 3; AT&T Comments at 1; MFSI Comments at 1; BTNA Comments at 2; fONOROLA Comments at 4; LDDS Comments at 1; European Union Reply Comments at 3.

8 Deutsche Telekom Comments at 24.

includes the U.S. end of the market for global, seamless network services (collectively referred to herein as the U.S. international services market).

9. In supporting our goals, commenters agree that effective competition in the U.S. international services market promotes the opportunity for U.S. consumers to choose among multiple suppliers based on innovative offerings, service quality and efficiencies, and price competitiveness. Our concern for the achievement of the full range of these benefits is consistent with competition objectives that we have sought to achieve in a number of proceedings, both domestic and international, over many years.[9] We have repeatedly found that, in a competitive environment, market forces can provide the public the statutorily mandated protection against unreasonably high rates and undue discrimination; that is, marketplace forces can replace regulation and make unnecessary burdensome regulatory requirements for both non-dominant carriers and the Commission. Where we can reduce our regulations because of effective competition, carriers are better able to respond to consumer demand for innovative services at the lowest reasonable price.[10]

10. Effective competition directly advances the public interest and the Commission's paramount goal of making available a rapid, efficient, worldwide wire and radio communication service with adequate facilities at reasonable charges.[11] Competitive entry alone, however, is not enough to achieve all the desired public interest benefits in the most effective manner. Such entry must occur within a framework that ensures effective competition. In this proceeding, we address our concern that, absent such a framework, new entry into the U.S. market by foreign carriers could increase concentration or otherwise extend existing monopoly power, threatening the loss of some or all of the desired consumer benefits.

11. Over the past few years, international telecommunications markets have begun to move rapidly away from a model of correspondent national monopolies to a different model that includes multiple national carriers and a variety of international ventures and provisioning arrangements to meet sophisticated user needs for global connectivity. Foreign domestic markets are also undergoing critical transformations with increasing privatization

---

9 *See, e.g., Regulation of International Common Carrier Services,* 7 FCC Rcd 7331 (1992); *Telefonica Larga Distancia de Puerto Rico,* 8 FCC Rcd 106 (1992); *BT/MCI Declaratory Ruling and Order,* 9 FCC Rcd 3960 (1994); *AmericaTel Corporation,* 9 FCC Rcd 3993 (1994). *See also Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, First Report and Order,* 85 FCC 2d 1 (1980); *Second Report and Order,* 91 FCC 2d 59 (1982); *Third Report and Order,* Mimeo No. 012, released October 6, 1983, 48 Fed. Reg. 46,791 October 15, 1983; *Fourth Report and Order,* 95 FCC 2d 554 (1983); *Fifth Report and Order,* 98 FCC 2d 1191 (1984); *Sixth Report and Order,* 99 FCC 2d 1020 (1985), *rev'd MCI vs. FCC,* 765 F. 2d 1186 (D.C. Cir. 1985).

10 *Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, First Report and Order,* 85 FCC 2d at 14.

11 47 U.S.C. § 151.

and liberalization. Thus, the international services market is in a period of transition in the general direction of competition.

12. As in all periods of transition, there is a great deal of diversity and asymmetry. In many countries, even those moving toward competition, significant monopoly control, or control over bottleneck services and facilities, continues to be held by national carriers.[12] Movement toward competition is being handled in different countries on different timetables and in different ways. Also, in many countries regulatory processes are new and competitive safeguards are just being developed. Against this backdrop, we also see increasing international joint ventures, alliances and co-marketing arrangements, many of which involve horizontal mergers or other combinations that include national carriers that continue to hold monopoly power or other dominant market positions.

13. This proceeding focuses on two important sets of preconditions for effective competition in this changing environment. First, effective competition requires regulation that precludes undue discriminatory and exclusionary behavior. Our international regulatory policies have long addressed the ability of carriers to abuse their market power on the foreign end of U.S. international routes to the detriment of U.S. consumers. Because a foreign carrier can abuse its market power with or without a U.S. affiliate, we have sought to prevent foreign carriers from "whipsawing" or extracting concessions from U.S. carriers through, for example, our international settlements policies.[13] We also have previously recognized that a foreign telecommunications entity that has investments in a U.S. carrier could use its foreign monopoly power to benefit its U.S. affiliate, to the disadvantage of other U.S. carriers. We have applied dominant carrier regulation in such circumstances as a safeguard against these abuses. [14] Our regulation of discriminatory and exclusionary behavior in these instances has sought to control the potential misuse of monopoly power while maintaining the benefits of competitive entry.

14. Second, effective competition requires that carriers have the ability to compete through forming new organizations and new means of providing service. In this regard, international alliances or affiliations themselves may be positive innovations in that they may bring important consumer benefits of efficiency and service innovation in international services. However, liberalization initiatives and new global opportunities create incentives for carriers to find more profitable ways to participate in international markets. For existing

---

12 "Bottleneck services or facilities" are those that are necessary for the delivery of international services, including inter-city or local access facilities on the foreign end.

13 *See Implementation and Scope of Uniform Settlements Policy for Parallel International Communications Routes, Report and Order*, CC Docket No. 85-204, 51 Fed. Reg. 4736 (Feb. 7, 1986), *Reconsideration*, 2 FCC Rcd 1118 (1987), *Further Reconsideration*, 3 FCC Rcd 1614 (1988). *See also, Regulation of International Accounting Rates, Phase I, Report and Order*, 6 FCC Rcd 3552 (1992), *on recon.* 7 FCC Rcd 8049 (1992).

14 *See International Services*, 7 FCC Rcd 7331 (1992).

dominant carriers, incentives are intensified to enter into combinations and other arrangements that will preserve current market shares and protect against competitive pressures. Such combinations may hinder effective competition in the U.S. international services market if, due to the dominance of strategic partners in foreign markets, other U.S. international carriers are precluded from competing because they have no possibilities for forming similar organizations or offering similar consumer benefits. We believe it is important to ensure that major organizational innovations take place in an environment where such innovations can lead to new forms and dimensions of competition, rather than to the establishment and entrenchment of monopoly power.

15. We disagree with Deutsche Telekom's assertion that safeguards, absent open competition in foreign markets, can adequately promote an effectively competitive market for the provision of U.S. international services. Competitive safeguards can be used to prevent carriers with market power from leveraging that market power into an adjacent competitive market to the disadvantage of competition and, ultimately, consumers. We are not, however, convinced that our regulatory safeguards, standing alone, are the optimal way to ensure that entry, particularly facilities-based entry, by a foreign carrier on routes where it has bottleneck control will preserve and promote competition in the U.S. international services market. Effective competition in such circumstances depends upon the ability of U.S. carriers to participate in a competitive market on the foreign end. If there is no opportunity for U.S. participation in competitive markets abroad, then the benefits of providing international service on an end-to-end basis will flow solely to a dominant foreign carrier and its U.S. affiliate. The foreign carrier has the competitive advantage, not necessarily because of any superior business acumen, responsiveness to customers, or technological innovation, but because of its protected status in its home market. As a result of this advantage, consumers of international services do not receive the maximum benefits of reduced rates, increased quality, and innovation.

16. In our view, 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. Our goal of promoting effective competition in the context of foreign carrier entry into the U.S. international market is thus best served by considering the extent to which foreign countries have opened their markets to U.S. carriers. Only with effective opportunities to compete on the foreign end can both the benefits of foreign carrier affiliation and the prevention of anticompetitive conduct actually be achieved.

17. Our primary goal is, as proposed, to advance the public interest by promoting effective competition in the U.S. telecommunications services market, particularly the market for international services. We also reaffirm our goals of preventing anticompetitive conduct in the provision of international services or facilities, and encouraging foreign governments to open their communications markets.

18. As discussed in detail below, our goal to promote effective competition is best served by adoption of an effective competitive opportunities test as part of our overall public interest analysis of Section 214 applications filed by foreign carriers or their affiliates seeking to operate as international carriers on affiliated routes. Our goal of promoting effective competition also is served by adopting a similar analysis in our public interest analysis of applications for common carrier radio facilities that fall within the scope of Section 310(b)(4) of the Act.

III. PUBLIC INTEREST ANALYSIS UNDER SECTION 214

19. We adopt in this *Report and Order* an effective competitive opportunities test that will serve as an important element in our public interest analysis of Section 214 applications filed by foreign carriers or their U.S. affiliates (collectively referred to here as "foreign carriers") seeking to provide U.S. international services on routes where the foreign carriers have market power on the foreign end. We invoke our authority under Sections 1 and 214 of the Act[15] to review and apply this test to all planned investment in U.S. carriers by foreign carriers above a 25 percent equity threshold, or a controlling interest at any level. Under this test, we will examine the ability of U.S. carriers to compete effectively as international carriers in destination foreign markets where the foreign carrier has market power.

20. This test is similar to the effective market access test proposed in our *Notice*, but with some important distinctions. We have changed the proposed standard from "effective market access" to "effective competitive opportunities." This term signals our focus on ensuring that a genuine potential exists for competition, without going so far as to guarantee market access for U.S. carriers. In addition, we have narrowed our inquiry to allow for a more predictable yet flexible application of the test. We have identified both the factors for evaluating effective competitive opportunities and other factors relevant to our overall public interest analysis under Section 214. Our objective is to adopt a clear entry standard to replace our *ad hoc*, case-by-case approach to foreign carrier entry into the U.S. international services market.

21. All applicants filing for Section 214 authority to provide international services must certify whether they are affiliated with a foreign carrier in their proposed destination markets. We will apply the effective competitive opportunities test on a route-by-route basis. We will consider the existence of effective competitive opportunities only in reviewing applications filed by a foreign carrier to operate as a U.S. carrier to destination markets where the foreign carrier has market power. Where the affiliated foreign carrier does not have market power in a particular destination market, we will not apply the effective competitive opportunities test in reviewing the public interest merits of the carrier's Section 214

---

[15] *See* 47 U.S.C. §§ 151, 214 (1988).

application on that route.[16] We will allow the carrier to serve that market, unless there are other public interest factors that warrant otherwise.[17]

A. Adoption of an Effective Competitive Opportunities Analysis

22. In the *Notice*, we stated that our current *ad-hoc*, case-by-case approach may not adequately address the questions of market access and potential anticompetitive effects that arise in today's evolving telecommunications markets where carriers seek to operate on both ends of international circuits.[18] Our current approach also has caused some uncertainty in the market because of the lack of a clear standard for evaluating applications by foreign carriers with different degrees of market power. To resolve those issues, we initiated this proceeding and proposed an effective market access test as part of our public interest analysis under Section 214.

23. We proposed that, if a foreign carrier desires to enter the U.S. international facilities-based market either directly or through an affiliation or investment in an authorized U.S. carrier, we would consider whether there was effective market access in the primary market, or markets, of the foreign carrier seeking entry. We defined effective market access as the ability for U.S. carriers, either currently or in the near future, to provide basic, international facilities-based telecommunications services in these markets. In order to make this determination, we proposed to examine six factors we believed to be indicative of effective market access.[19] None of these factors would be dispositive of this determination. We defined "primary markets" as "those key markets where the carrier has a significant ownership interest in a facilities-based telecommunications entity that has a substantial or dominant market share of either the international or local termination telecommunications market of the country, and traffic flows between the United States and that country are significant."[20]

24. We further proposed that, once we reviewed the effective market access element of our public interest analysis, we would assess other public interest factors that might weigh in favor of, or against, allowing entry in the U.S. international market.[21] Finally,

---

16 For a discussion of application of the effective competitive opportunities analysis to resale, see *infra*, ¶ 139-148.

17 *See infra* ¶ 56.

18 *Notice* ¶ 23.

19 *See infra* ¶ 40.

20 *Notice* ¶¶ 40-43.

21 *Notice* ¶ 45; *infra* ¶ 56.

we proposed to solicit the views of the Executive Branch on the proposed foreign carrier's entry into the U.S. market.

Position of the Parties

25. Most commenters in this proceeding support the adoption of some variation of an effective market access test.[22] They believe that a market access test will help us achieve our goal of promoting effective competition. They also believe that by replacing the *ad-hoc* approach with a clear entry standard, we will add certainty and predictability to the Section 214 application process.[23] A significant number of commenters, however, oppose the specific proposal in the *Notice*.[24] They argue that the proposed standard would add uncertainty and delays to the application process.[25] In particular, a number of commenters express concern with our solicitation of the Executive Branch's views as a measure that would significantly delay the application process.[26] Some argue that we should expedite the process by establishing and publishing a timetable by which we will process all new and pending Section 214 international facilities-based applications.[27] Some of the commenters did not specifically support or oppose the adoption of an effective market access test, but rather reserved their comments for specific proposals within the *Notice*.

---

22 These include: AT&T, ACC (expand to include alliances), ARINC, Ameritech, AmericaTel, Arch Communications Group, Professor Jonathan D. Aronson, BTNA, CTIA (limited Comments to 310(b)(4)), Citicorp, Columbia Communications Corporation, Communications Telesystems International, Economic Strategies Institute, French Government, GE American Communications (applicability to satellite services), GTE (only to the extent that it is flexibly applied), Department of Justice, K&S International Communications, Inc., Loral/QUALCOMM, MCI, MFSI, MPAA(favors multilateral approach, until then it supports effective market access), Motorola, NTIA (great deference should be given to the Executive Branch), PanAmSat, SDN Users Association, Telecommunications Resellers Association, Transworld Communications (U.S.A.), Inc.(exemption from any rules for small U.S. international carriers), and TRW (mainly comments on satellite issue).

23 *See e.g.,* BTNA Comments at 5 (a clear standard will lend predictability to business planning by carriers in the United States and abroad).

24 These include: British Government, Cable &Wireless, Inc. (unless significant changes are made), Deutsche Telekom, Domtel, fONOROLA (any effective market access test should be narrowly focused), France Telecom, German Government, Korean Government, LDDS, Mexican Government, TLD, NYNEX, Sprint, Teleglobe, Telex-Chile, S.A., US West.

25 Teleglobe Comments at 4; LDDS Comments at 9; British Government Comments at 1; Domtel Comments at 3, 5; NYNEX Comments at 2; U.S. West Reply at 8; France Telecom Comments at 8.

26 *See e.g.,*Telex-Chile Comments at 2; Domtel Comments at 3.

27 Teleglobe Comments at 11, 34; NYNEX Comments at ii, 3, 8; LDDS Comments at 11; European Union Reply Comments at 5.

26. A few commenters question whether we should adopt any effective market access entry standard for foreign carriers. As noted above, Deutsche Telekom argues that the competitive safeguards we have previously imposed on foreign carriers entering the U.S. market are sufficient measures to ensure effective competition.[28] It further states that these safeguards are a better way to promote competition than imposing barriers to entry. Several commenters also express concern that the adoption of an effective market access test would be viewed as a closing of the U.S. market and, potentially, invite retaliation by foreign governments.[29] For example, Teleglobe argues that foreign governments might react by delaying the removal of their own restrictions in the name of protecting their own national carriers from large U.S. carriers.[30] On the other hand, some commenters supporting the adoption of an entry standard argue that the test would open foreign markets by encouraging foreign governments to liberalize terms of entry into their markets.[31]

Discussion

27. The threshold issue is whether we should depart from our *ad-hoc* approach to processing applications by foreign carriers and adopt a market entry standard as part of our public interest analysis. We conclude that we should. An "effective competitive opportunities" analysis will serve the public interest significantly better than our current approach, while alleviating the main concerns of commenters opposed to adopting the proposed effective market access entry standard.

28. Adoption of the effective competitive opportunities test as one part of our overall public interest analysis under Section 214 will promote effective competition in the U.S. international services market in several ways. First, the effective competitive opportunities analysis will increase competition by explicitly setting forth the critical factors for foreign carrier entry into the U.S. market. The inadequacy of our *ad hoc* approach has become apparent in recent years as we have been presented with an increasing number of

---

28 Deutsche Telekom Comments at 38. *See* France Telecom Comments at 21-22, 24. France Telecom argues that, with respect to any non-controlling investment in a U.S. carrier, the Commission should impose the same requirements as those imposed on MCI in connection with the BT/MCI transaction. *See also* TLD Comments at 38-41, Sprint Comments at vi, 34.

29 British Government Comments at 6; Deutsche Telekom Comments at 32-34, Reply at 20; Korean Government Comments at 1, 3; LDDS Comments at 5-8; SCT/Mexico Government Comments at 11-13; NYNEX Comments at 2, 5-8, 11, n. 24; Teleglobe Comments at 5-6; Telex-Chile Comments at 3, Domtel Comments at 2; U.S. West Reply at 9.

30 Teleglobe Comments at 24.

31 Ameritech Comments at 2; AT&T Reply at 25-28; Citicorp Comments at 2.

requests for approval of combinations between U.S. and foreign carriers.[32] In each of these cases, we considered the potential impact on international services markets and the appropriate means of best serving our competition goals. In each instance, we determined that the existence of competition on the foreign end was critical to a finding that the proposed affiliation would serve the public interest by fostering competition in U.S. international services markets. We anticipate additional proposals for new foreign investment and entry from countries with markets closed to competition or U.S. participation as well as from countries that have existing or emerging competition in international services.[33] The new principles and criteria we establish in this proceeding are intended to help us deal consistently with each of these cases. Instead of a case-by-case procedure that inherently creates uncertainty, we are establishing clear guidance as to the factors we deem necessary for effective competition to develop. The effective competitive opportunities test therefore facilitates and liberalizes entry into our market, creating new possibilities of well-financed competitors contesting for market share.

29. In addition to promoting the potential for more vigorous competition, the criteria of the effective competitive opportunities analysis spell out a better approach to addressing the potential for foreign carriers (or their U.S. affiliates) to unfairly leverage their market power in the U.S. market. As we explained above, we disagree with Deutsche Telekom when it contends that safeguards alone are adequate.[34] Safeguards by themselves are not as effective in achieving meaningful competition in the provision of U.S. international services as a market structure supported by competitive entry and safeguards on both ends of a particular international route. At a time when many countries are adopting regulatory reforms to permit competition in basic telecommunications services, it is possible for us to start moving beyond a reliance on safeguards to the more efficient and pro-competitive approach of encouraging competition. Our public interest mandate allows us to seek a comprehensive approach to increasing the level and quality of competition for U.S. consumers.

30. Adoption of an effective competitive opportunities analysis also will stimulate competitive entry on both ends of international routes. We believe that the ability of foreign carriers to serve, either directly or through an affiliation, an international route from the United States should provide a significant incentive to foreign governments who maintain rigid entry barriers, and foreign carriers who benefit from such barriers, to end such practices. As barriers to entry in foreign markets fall, foreign carriers will have greater incentives to

---

32 For example, we have reviewed and approved, with conditions, the 20 percent equity investment of British Telecom plc ("BT") in MCI, and the 80 percent equity investment of ENTEL-Chile in AmericaTel. *See BT/MCI Order* 9 FCC Rcd 3960 (1994), and *AmericaTel Order* 9 FCC Rcd 3993 (1994). *See also Domtel Communications, Inc.*, FCC 95-377, released September 11, 1995.

33 A proposal for equity investment in Sprint by France Telecom and Deutsche Telekom is currently pending in a separate proceeding. *Sprint Corporation,* File No. ISP-95-002.

34 *See supra* ¶ 15.

work with U.S. carriers in delivering new services at lower prices. Thus, facilitating the added option of competition on both ends of international routes should promote competition in the U.S. market and thereby benefit U.S. consumers.

31. A key benefit of the effective competitive opportunities analysis we adopt here is that it liberalizes entry into the U.S. market. As modified, our approach applies an effective competitive opportunities test only to those situations that give rise to anticompetitive effects, i.e., destination markets where a dominant foreign carrier can leverage market power. Further, the standards created by the effective competitive opportunities analysis are ones which we also believe U.S. legal and regulatory systems must meet. We look for no more from others than we demand of ourselves. We believe that all governments and their consumers would benefit from encouraging entry while safeguarding against abuse of market power. But the choice of whether to permit competition, and thus meet the effective competitive opportunities test, is that of the foreign government.

32. Does our approach provide incentives for foreign carriers and governments to support liberalization? This rests on three factors -- the value of direct entry as an international carrier for new foreign entrants, the value of foreign investment in U.S. carriers for new entrants, and the value to foreign carriers of maintaining competitive parity with non-dominant carriers. There is good reason to believe that the option of entry into the U.S. telecommunications market is a significant advantage, especially for those who are trying to establish their U.S. market position largely through their own marketing organization. Direct entry on a facilities basis offers large foreign carriers maximum flexibility in pricing, service provisioning, and marketing. Entry on a resale basis offers carriers considerable flexibility to establish their brand presence in the U.S. market with minimal financial risk. Therefore, we believe that a foreign carrier would have a significant incentive to encourage its government to liberalize sufficiently to meet the effective competitive opportunities test for facilities-based or resale entry if that were necessary for the carrier to control an end-to-end network service.

33. There also is significant value in being able to establish a substantial investment relationship with a U.S. carrier. BT's investment in MCI and the proposed investment of France Telecom and Deutsche Telekom in Sprint are clear testimony that foreign carriers highly value (in the billions of dollars) even twenty percent shares of major U.S. carriers. Partnerships with U.S. carriers, cemented by large equity holdings, provide foreign carriers with lower cost options for pursuing the U.S. customer base. The partnerships also provide immediate access to the established customer base of the U.S. affiliate. And the partnerships greatly strengthen the capacity to offer the benefits of one-stop shopping for all global needs, including a single customized billing and cost control system for all global services, and specialized service and software designed to meet the special needs of the client. In short, these partnerships offer important strategic capabilities in a critical global market. And the ability to invest substantially in the U.S. affiliate/partner permits the foreign carrier to strengthen its partner's capabilities in the U.S. market while creating a management structure that better safeguards its competitive interests in the joint venture. In sum, the ability of a foreign carrier to acquire a substantial equity position in a

U.S. carrier can be an important advantage in a major world market. This advantage can provide a significant incentive for a foreign government to support liberalization.

34. A third incentive to seek to satisfy the effective competitive opportunities test is the desire of dominant foreign carriers to maintain parity in competitive entry with non-dominant carriers. The effective competitive opportunities test adopted here applies only to carriers with market power. Thus, it greatly simplifies entry into the U.S. market for non-dominant carriers of foreign countries. If dominant carriers are to match these entry opportunities, and the competitive strategies that they make possible, they have an incentive to support policy reforms in foreign countries that would satisfy the effective competitive opportunities analysis.

35. In sum, using our effective competitive opportunities analysis as part of our public interest determination allows us to maintain our open entry policy, but limits the ability of foreign carriers to leverage their market power to the benefit of their U.S. affiliates, and to the detriment of unaffiliated U.S. carriers and ultimately U.S. businesses and consumers. Not only does this promote competition in the U.S. international services market, it also encourages foreign governments to join in our efforts to promote an effectively competitive international telecommunications market. While we are encouraging foreign governments to open their markets to competition and believe that in most cases open markets bring the maximum consumer benefits, we are not taking any actions that force governments to open their markets. The choice to protect a national carrier or promote competition is one that each government must decide.

36. We recognize that our approach necessarily entails limiting the activities of certain competitors in U.S. markets. Specifically, we may prohibit foreign carriers (or their affiliates) that have market power from offering service along routes where they can exercise such power. Such action may reduce nominal competition in the U.S. market in the short term, but should ultimately increase the competitive options available to U.S. telecommunications users. In our judgment, the benefits of allowing these foreign carriers unlimited access into the U.S. international services market are outweighed substantially by the ultimate costs. Those costs are, first, the cost of regulating such entities on a case-by-case basis to prevent anticompetitive misconduct.[35] Second, allowing entry by foreign carriers with significant market power could deter entry by other U.S. carriers or from foreign carriers that face competition (or, at least, a liberalized regulatory and legal regime) in their own markets. By contrast, increased competition in foreign markets will create additional benefits

---

[35] For example, in *BT/MCI Order*, 9 FCC Rcd 3960, 3973 (1994), this Commission imposed conditions on the acquisition by British Telecom plc ("BT"), a foreign entity with market power in the United Kingdom, of 20% of the stock of a U.S. interexchange carrier MCI. The U.S. Department of Justice ("DOJ") imposed additional, similar conditions. *United States v. MCI Communications Corp. and BT Forty-Eight Co. (NewCo)*, Case No. 1:94CV01317 (D.D.C. filed June 15, 1994), Final Judgment *passim*. Enforcing and monitoring these conditions entails, at a minimum, significant record-keeping by this Commission, DOJ, BT, MCI, and the latters' competitors. If any violation of these conditions is alleged, there will be additional litigation and enforcement expenses.

for the United States by facilitating the creation of jobs for U.S. citizens and investment opportunities for U.S. capital.

37. In response to those who argue that our proposed test will add delays to the process, we have refined our criteria for determining whether effective competitive opportunities exist. These refined criteria should assist us in making our determination in a timely and predictable manner by giving clear guidance on what we deem critical for approving an application. These modified factors can be applied flexibly, but also provide applicants guidance on what factors are relevant to consideration of their applications. We disagree with those commenters urging us to publish a timetable by which we must issue a final determination on international Section 214 applications. Establishing a timetable for disposing of international Section 214 applications would limit our ability to examine all the issues that affect the public interest. We will, however, work in the most expeditious manner to resolve complex and difficult issues.

38. We also believe that soliciting the views of the Executive Branch will not delay the process. The Executive Branch plays a significant role in assisting us with our review of important matters affecting the general public interest. We expect the Executive Branch review of foreign carrier applications to enter the U.S. market as international carriers to be done simultaneously with our review.[36] In addition, NTIA, commenting on behalf of the Executive Branch, states that, if the Executive Branch decides to respond to a particular Section 214 application, it would endeavor to do so within thirty days after the end of the pleading cycle.[37] Therefore, we believe that according deference to the Executive Branch's input on trade, foreign policy, national security and domestic law enforcement issues will not create any additional delays in the process. We believe our public interest analysis will benefit from such input by the Executive Branch.

39. We emphasize that the effective competitive opportunities test *and* additional public interest factors[38] collectively constitute our Section 214 public interest analysis for international service applications. The emphasis under this analysis will be on the ability of U.S. carriers to compete effectively in the provision of international facilities-based or resale services in particular foreign countries. If those opportunities do not exist, then the public interest is best served by denying a foreign carrier the ability to enter the U.S. market on a resale and/or facilities basis on such routes where the carrier has market power, absent the existence of other compelling public interest factors.

---

36 We will notify the relevant Executive Branch agencies upon receipt of Section 214 applications filed by foreign carriers or their affiliates as well as of notifications of foreign carrier investments in existing U.S. carriers. *See infra* ¶ 62.

37 NTIA Reply Comments at 6. NTIA filed comments in this proceeding on behalf of the Departments of Commerce, Defense, Justice, State, Treasury, and the Office of United States Trade Representative.

38 *See infra*, Section III.C.

B. Factors of the Effective Competitive Opportunities Analysis

40. We now address those factors that we will examine in making our determination whether effective competitive opportunities are available in the destination markets where the foreign carrier is dominant. In the *Notice*, we proposed the following criteria for determining effective market access: (1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those that the foreign carrier seeks to offer in the United States; (2) whether competitive safeguards exist in the foreign country to protect against anticompetitive and discriminatory practices, including cost-allocation rules to prevent cross-subsidization; (3) the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services; (4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities; (5) the protection of carrier and customer proprietary information; and (6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards.[39] We declined to make any of the factors dispositive, and we did not assign a specific weight to any one factor. An additional question raised in our *Notice* was whether effective market access must presently exist on a particular route or whether it is sufficient that it exist in the near future.

Position of the Parties

41. Some commenters are concerned that these factors are ambiguous, or that a specific weight is not accorded each factor.[40] AT&T argues that the factors proposed should be considered a "minimum" set of criteria for determining effective market access. It encourages us to expand these factors to include regulatory equal access, 800 number portability, and administration of the primary market's numbering plan by an independent regulator.[41] fONOROLA argues that a market entry test should be applied only to entities with statutory monopolies in foreign countries.[42] AT&T argues that the factors of the effective market access test must be present at the time of entry.[43] It discourages us from

---

39 *Notice* ¶ 40.

40 *See, e.g.,* Deutsche Telekom Comments at 31 and n. 21; Domtel Comments at 4; France Telecom Comments at 16 (concern with inflexibility of test); BTNA Comments at 3 (while in support of the proposal, BTNA sought clarification of the first element of the analysis).

41 AT&T Comments at 29, 30-32.

42 fONOROLA Comments at 17.

43 AT&T Comments at 37-38; *see also* Letter, dated July 13, 1995, from Jacqueline D. Miller, Regulatory Director AT&T, to William F. Caton, Acting Secretary, Federal Communications Commission. *See also* Motorola Comments at 8.

considering factors that might lead to effective competition in the future because reliance on prospective events may unfairly handicap U.S. carriers in the interim.

Discussion

42. The factors of the effective competitive opportunities analysis will apply to our review of foreign carrier applications to provide international facilities-based or resale services. The first *de jure* factor, however, will vary depending on whether the applicant seeks authority to provide facilities-based service, switched resale, or private line resale. We discuss in this Section each factor as it applies to applications for facilities-based service. We address the factors of the effective competitive opportunities test for resale services in Section IV.B, *infra.*

43. To clarify the standard in the *Notice*, we have modified our criteria and made some of the original proposed factors illustrative of broader principles of effective competitive opportunities. We are placing a greater emphasis on the first factor of the test: the legal ability to provide international facilities-based service. This will provide a higher level of predictability to foreign carriers seeking entry. By providing a list of the other factors necessary for effective competition, we are providing foreign carriers with additional clarity when considering whether to invest in, or establish directly, a U.S. international facilities-based presence. Yet we respond to those parties that urge us to be flexible in applying our test by not making any particular criterion dispositive. Our test will not be, as fONOROLA urges, narrowed to focus solely on statutory monopolies; there are other factors that may produce anticompetitive concerns that we will not ignore.

44. The test we adopt examines first the legal, or *de jure*, ability of U.S. carriers to enter the foreign market and provide international facilities-based service. It then focuses on the actual conditions of entry, including the terms and conditions of interconnection, competitive safeguards, and the regulatory framework. We will focus on the overall effect of these four elements on the opportunities for viable operation as a facilities-based carrier in the foreign market. If, however, any of the factors of the effective competitive opportunities test are completely absent, we will deny authority to provide facilities-based service on that route, unless other public interest factors warrant a different result. We also will consider as relevant any evidence of existing competition in international facilities-based services. These factors should provide foreign carriers and governments clear guidance on what conditions we believe are necessary to ensure effective competitive opportunities.

45. We agree with the British Government that, if a market entry standard is too high, it might be viewed by other governments as a closing of the U.S. market.[44] For this reason, we rejected AT&T's original request for comparable market access. Our new approach does not deny access to the U.S. market. Rather, it requires a foreign carrier to demonstrate that effective competitive opportunities exist before it can serve a destination

---

[44] British Government Comments at 6.

market where it has market power. This approach reflects our conclusion that we can best promote effective competition by focusing the application of our entry standard only on foreign carrier applications that present the greatest potential for anticompetitive conduct, and the least potential for effective competition, in the U.S. international market. We stress again that competition, not government regulation, is the most effective and, therefore the preferred, solution to eliminate the potential abuse of foreign market power.[45] Until countries eliminate the potential for abuse of monopoly power by opening their telecommunications markets to competition, we must preserve the right to act to protect U.S. consumers, businesses, and carriers from anticompetitive effects of foreign carrier entry.

46. We conclude that a favorable effective competitive opportunities finding can be made if such opportunities currently exist or if it is reasonably certain that they will be available in the near future. Much as we would prefer countries to have effective competitive opportunities today, we recognize that progress in this area takes time. Requiring all the factors of the effective competitive opportunities test to be present at the time of entry would be counterproductive. We are, however, concerned that intervening events could prevent or delay countries from following through on commitments to introduce competition if the implementation date is too far off. Under our approach, the foreign carrier must demonstrate that necessary measures will be adopted and implemented in the near future in order for us to reach a favorable determination about the destination country. Moreover, where commitments to effective competition have been made but not fully implemented, we will condition a carrier's Section 214 authority to serve a particular country upon these commitments being implemented in the near future.

1. Facilities-based entry

47. As noted, we will first determine whether U.S. carriers are permitted, as a matter of law, to offer international facilities-based services in the destination foreign country. This means that a U.S. carrier must have the legal right to obtain a controlling interest in a facilities-based carrier[46] and be able to originate and terminate International Message Telephone Service (IMTS) traffic. This does not mean, however, that a U.S. carrier must actually be providing a facilities-based IMTS service in the foreign market before we determine effective competitive opportunities exist; only that it not be legally prohibited from doing so. Even if the foreign-affiliated carrier seeks to provide a facilities-based service in the United States other than IMTS, such as private line service, we would still look to see if there are *any* legal restrictions on U.S. carriers' ability to enter the foreign country to provide facilities-based IMTS.[47] We believe that, unless and until U.S. carriers have the legal ability

---

45 *BT/MCI* 9 FCC Rcd at 3969-3970, note 88. *See also International Services* 7 FCC Rcd at 7333-34.

46 Our definition of a facilities-based carrier is addressed in Section IV.A., *infra.*

47 *See infra* ¶ 121 for a discussion of how this analysis focusses on the ability of a carrier to enter a foreign market and provide IMTS.

to acquire a controlling interest in a carrier that is able to provide facilities-based IMTS in the foreign market, the incumbent carrier will continue to have the ability to leverage economic power into the U.S. international services market. Absent the ability to obtain such an interest in a competitive enterprise, U.S. carriers cannot obtain a degree of bargaining power sufficient to constrain anticompetitive behavior by the incumbent, or respond effectively to competitive inroads made by the incumbent as a result of its unique ability to operate on an end-to-end basis. We do not believe that the legal ability to acquire a non-controlling interest is sufficient to achieve robust competition in the provision of U.S. international services on that route and the provision of global, seamless network services to U.S. customers.

48. If U.S. carriers are prohibited *de jure* from competing in the provision of facilities-based IMTS, then we would find there are not effective competitive opportunities on that route. For example, if there is a law, regulation, or policy prohibiting facilities-based competition in the provision of IMTS in a foreign country, effective competitive opportunities do not exist on that particular route. In this case, there would be no need to consider any other factors of the test for service on that route. The applicant would not be allowed to provide any type of international facilities-based service in any manner from the United States to that country, unless other public interest factors warranted a different result. If the foreign carrier's destination market has no explicit legal restrictions on entry, we will then examine the other factors of the effective competitive opportunities test to determine whether there are *de facto* effective competitive opportunities or whether measures are in place to allow such competition to develop in the near future.

2. Interconnection

49. The second factor we will examine as part of the effective competitive opportunities test is 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. In addition, there must be adequate means to monitor and enforce these conditions, *e.g.*, published charges. For example, should a foreign carrier operate as a dominant provider of local access services, its terms and conditions for interconnection should be publicly available on a nondiscriminatory basis and at reasonable prices.[48] This would prevent that foreign carrier from favoring its affiliated U.S. carrier over competing unaffiliated U.S. carriers in terms of both economic and technical interconnection with its facilities. The ability to grant preferential interconnection to one carrier over another is anticompetitive and the ability to do so likely would result in a finding that effective competitive opportunities do not exist on that route. Unless other public interest factors warrant otherwise, we would likely deny a foreign carrier authorization for international

---

[48] *See ACC Global Corp. and Alanna, Inc.*, 9 FCC Rcd 6240, 6254 (1994) (ACC/Alanna). In that order, we concluded that the nondiscriminatory offering of published standard interconnect arrangements at standard prices is an adequate alternative to our regulatory approach of requiring tariffed service offerings and rates. A similar type of analysis would be applied under our effective competitive opportunities test.

facilities to that country until measures were adopted to prevent such discriminatory conduct.

50. AT&T argues that this interconnection criterion should include equal access in the foreign market, as well as some form of number portability.[49] Certainly these would be illustrative of adequate terms and conditions for interconnection in the foreign market. We will not go, however, as far as AT&T suggests by requiring that equal access or number portability be present in order for us to find effective competitive opportunities in the foreign market. Even AT&T acknowledges that there is some reasonable transition time to nationwide equal access in a foreign market.[50] AT&T also argues that the Commission should examine as part of its public interest analysis the extent to which U.S. carriers can provide facilities-based, domestic long distance service.[51] We will not go so far as to adopt AT&T's proposal. Rather, we will consider the extent to which U.S. carriers have access to intercity services as relevant to the issue of whether interconnection is available on nondiscriminatory charges, terms and conditions. The examples of interconnection issues mentioned above are not exhaustive of the elements we would examine for purposes of an adequate interconnection regime.[52]

3. Competitive Safeguards

51. The third factor that we will examine is whether competitive safeguards exist in the foreign country to protect against anticompetitive practices. The safeguards we will consider important 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.

52. While the actual facilities-based presence of a U.S. carrier in a foreign country is not required under our test, a government policy that allows a competitor to enter its international facilities-based market, yet fails to contain the necessary safeguards that would allow competition to develop, is of minimal value in protecting new entrants against potential abuses of market power. It has been our experience that interconnection and other competitive safeguards are critical for the development of an effectively competitive market in countries where one carrier is dominant.

---

49 AT&T Comments at 29 (equal access), 32 (number portability).

50 AT&T Comments at 32, n. 34.

51 AT&T Comments at 36-37.

52 For example, where facilities are available only on a leased basis, we will consider the underlying lease arrangement in the same manner as we consider the availability of interconnection arrangements. That is, terms and conditions of such arrangements must be fair and nondiscriminatory.

53. An emerging competitive market particularly requires these safeguards in order to prevent market power abuse. Should we allow a dominant carrier from such a country into the U.S. market, the carrier would have little incentive to support and, in fact, would have the incentive to oppose a foreign government's implementation of competitive safeguards because it already would have gained the benefit of access to the U.S. international facilities-based market. Moreover, where the foreign government owns the foreign carrier, it may have even less incentive to implement competitive safeguards.

4. Regulatory Framework

54. The fourth factor of the effective competitive opportunities test is whether there is an effective regulatory framework in the destination country to develop, implement and enforce legal requirements, interconnection arrangements and other competitive safeguards. Our focus will be 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. In order for effective competition to develop in a foreign country, there must be no unfair advantage bestowed on that country's carrier through government regulatory policies. Absent sufficient separation between the operator and the regulator to ensure that the regulator is independent, empowered, and does not have a conflict of interest in regulating the operator, there is little reason to believe that such favoritism will not occur. Transparent procedures are important as well to allow competitors to know precisely what obligations are required of the incumbent dominant carrier and what rights they have to seek enforcement of such obligations. Fair and transparent procedures that allow public input into the decision-making process help ensure that the resulting rules are effective and nondiscriminatory.

55. Deutsche Telekom expresses concern that an inquiry into the regulatory process of other countries is likely to offend these countries.[53] Our inquiry into the degree of separation between the regulator and the operator and of the regulatory procedures is not meant as a measure of a foreign regulatory agency's integrity or competency. Rather, it reflects our experience that a regulator separate from an operator and fair and transparent procedures are essential to ensuring effective competitive opportunities.

C. Additional Public Interest Factors

56. In our *Notice*, we proposed to assess five additional factors in the public interest along with the effective market access test that might weigh in favor of, or against, allowing entry in the U.S. international market. These factors were: (1) the state of liberalization in the foreign carrier's domestic market and the availability of other market access opportunities to U.S. carriers; (2) the status of the foreign carrier as a government or non-government entity; (3) the general significance of the proposed entry to promotion of

---

[53] Deutsche Telekom Comments at 33-34.

competition in global markets; (4) the presence of cost-based accounting rates; and (5) any national security implications.[54]

Position of the Parties

57. Citicorp argues that any test adopted be applied in a flexible manner and that the Commission not attach disproportionate weight to the market access element of the test.[55] It advocates that the Commission also consider the extent to which foreign countries satisfy the needs of international telecommunications users. It argues this would promote the widespread availability of the telecommunications services that users need to support their international business operations.

58. In its Petition for Rulemaking, AT&T proposed that, as a prerequisite to entry, we require foreign carriers to reduce accounting rates for all U.S. carriers to the lesser of either cost-based levels or the lowest accounting rate that they offer to any other telecommunications entity from another country.[56] In our *Notice*, we declined to propose this approach based on our tentative conclusion that accounting rates will decrease as a natural consequence of the introduction of competition. As an alternative, we proposed to consider the presence of cost-based accounting rates as part of our total public interest analysis to determine whether facilities-based market entry should be allowed.[57]

59. Several commenters urge us to adopt cost-based accounting rates as a precondition to U.S. market entry, rather than considering the presence of such rates as among several public interest factors in our Section 214 assessment. They argue that competition alone will not solve the problem of above-cost accounting rates.[58] They contend that, without such a precondition, bilateral negotiations to reduce accounting rates will be futile because the foreign carrier will have every incentive to maintain above-cost accounting rates in order to keep the cost of U.S. facilities-based services higher and, thereby, "price squeeze" unaffiliated U.S. carriers, which will reduce competition and harm U.S. consumers.[59]

---

54 *Notice* ¶¶ 42, 45.

55 Citicorp Comments at 2; Citicorp Reply at 2-3.

56 *Notice* at ¶ 42.

57 *Id.*

58 AT&T Reply at 32-35; ESI Comments at 4; SDN Comments at 1. For example, AT&T argues that, even though competition exists in Chile, above-cost accounting rates are the norm and interconnection charges are ten times higher for inbound traffic than for outbound calls. AT&T Reply at 33-34. AT&T also cites the United Kingdom as an example of the unwillingness of foreign carriers to lower accounting rates once they have access to the U.S. market. *Id.* at 34.

59 AT&T Comments at 35; AT&T Reply at 32; SDN Comments at 1.

60. Commenters who oppose requiring cost-based accounting rates as a condition of foreign carrier entry into the U.S. market[60] argue that such a requirement "puts the cart before the horse," and that market openness will provide competitive pressures which will drive down accounting rates.[61] Other commenters argue that our ongoing concern with the settlements deficit is myopic and misplaced in light of our authorization of services, such as country direct services, which exacerbate the settlements deficit.[62] TLD adds that cost-based accounting rates should not be tied to entry issues because the problem posed by above-cost accounting rates is not limited to foreign carriers seeking entry into the U.S. market, and thus such an approach would only address part of the problem.[63] Telex-Chile argues that current regulations are adequate to protect U.S. carriers and to promote international competition,[64] and France Telecom asserts that such a condition would be ineffective and overly intrusive.[65] Finally, BTNA and the British Government urge us to look at U.S. collection rates, arguing that traffic levels are a relevant and important factor in the establishment of accounting rates. Unless accounting rate reductions are passed through to the consumer, they argue, it is unrealistic to expect foreign carriers to agree to further reductions.[66] The British Government further opposes this proposal on the grounds that it raises concerns about what is "cost-based" and because it believes that this issue is tangential to the *Notice*.[67]

Discussion

61. In light of our review of the comments, we have modified the public interest factors that, in addition to our effective competitive opportunities test, will weigh in favor of, or against, authorizing a foreign carrier to serve destination countries where it has market power. We will consider these factors in our review of applications, whether facilities-based or resale, filed by foreign carriers. We now believe that some of the factors originally proposed are considered more appropriately in the context of the effective competitive opportunities criteria. For example, the status of the foreign carrier as a government or non-

---

60 British Government Comments at 5-7; BTNA Comments at 5-7; Cable & Wireless Comments at 12, 13, Reply at 15-16; DOJ Reply at 18; France Telecom Reply at 12; GTE Comments at. 4, 5; K&S Comments at 8; MCI Comments at 8; MFSI Comments at 2; Telex-Chile Comments at 1, 2, 8; TLD Comments at 75.

61 fONOROLA Comments at 18, n. 25.

62 MFSI Comments at 2; K&S Comments at 8.

63 TLD Comments at 75.

64 Telex-Chile Comments at 1, 2.

65 France Telecom Reply at 12-13.

66 British Government Comments at 5-7; BTNA Comments at 5-7.

67 British Government Comments at 5.

government entity is now considered in the context of the fourth effective competitive opportunity factor that relates to the degree of separation between the regulator and the operator of international facilities-based services. The state of liberalization in the foreign carrier's domestic market for local access and intercity services is relevant to the existence of reasonable and nondiscriminatory charges, terms and conditions for interconnection for the provision of services other than resold switched services. We have decided not to include as one of our additional public interest factors the availability of other market access opportunities to U.S. carriers.

62. The additional factors we will consider relevant to foreign carrier applications include the general significance of the proposed entry to the promotion of competition in the U.S. communications market, and any national security, law enforcement, foreign policy, and trade concerns raised by the Executive Branch. Changing circumstances may require that we consider other factors as relevant to our Section 214 analysis in the future. The presence of cost-based accounting rates also will remain, as proposed, an additional public interest factor. These additional factors, with the exception of the presence of cost-based accounting rates, have always been germane to our public interest analysis under Section 214. There may be occasions under the standard adopted here when the public interest requires that such factors override our effective competitive opportunities determination, to either allow or deny entry. For example, the Executive Branch may raise national security concerns with particular Section 214 applications. The Executive Branch also may present countervailing foreign policy or trade concerns that may warrant either a favorable or unfavorable entry determination. The Executive Branch's input would continue to be important in our consideration of the overall public interest.

63. Where additional public interest factors warrant authorizing a foreign carrier to provide service to a country where it has market power, we may find it necessary to impose conditions on its authorization to supplement our dominant carrier regulations. For example, where the foreign carrier has granted a limited number of operating agreements to U.S. carriers on this route, additional safeguards may be appropriate to ensure that competition on this route is not adversely affected by the lack of effective competitive opportunities for U.S. carriers to operate on the foreign end.

64. We decline to adopt as an additional public interest factor the extent to which foreign countries satisfy the needs of international telecommunications users as advocated by Citicorp.[68] The needs of international telecommunications users ultimately are best served by allowing facilities-based competition to flourish on both ends on an international route. Moreover, such an analysis could require us to devote significant resources to examining the business arrangements of individual users, a task that generally is not appropriate for a regulatory body.

---

[68] *See supra* ¶ 57.

65. In this *Report and Order,* we again decline to require cost-based accounting rates as a precondition to foreign carrier entry into the U.S. market. We will consider, however, the relationship of accounting rates to relevant cost benchmarks as a factor under our general public interest analysis. We believe this approach will create an incentive for foreign carriers to reduce their accounting rates towards cost which, in turn, will lower prices and increase the range of services available to U.S. consumers.

66. We agree with AT&T and other commenters that accounting rates are currently far above costs and thus harmful to U.S. consumers of international telecommunications services. We thus disagree with commenters who suggest that our concern about accounting rates is "myopic" or unrelated to this proceeding. A foreign carrier's ability to evade competitive safeguards in the settlement process increases if it is affiliated with a U.S. carrier, and the incentive to evade such safeguards increases as accounting rates exceed costs. Thus, the level of accounting rates is relevant to the risks associated with foreign carrier entry.

67. We agree, however, with those commenters arguing that requiring cost-based accounting rates as a precondition of entry could preclude otherwise qualified candidates from competing in the U.S. international services market. It would become, in effect, a barrier to market entry. Such a result would be contrary to our objective of encouraging competitive entry and, thereby, reducing industry concentration on both ends of U.S. international routes. Additional competition should produce service alternatives and price competition in the U.S. market which should in turn stimulate U.S. outbound demand. This, in turn, will make foreign carriers more amenable to further reducing their accounting rates, in that they will experience less of a loss in settlement revenues. This reduces the per minute settlements burden on U.S. consumers.[69]

68. Further, we are not persuaded by AT&T's argument that, absent a requirement of cost-based accounting rates, a U.S. carrier will be able to price its U.S. services without regard to the full cost of settlements with its foreign affiliate and, thereby, will be able to "price squeeze" unaffiliated U.S. carriers.[70] In fact, AT&T's concern involves a "semi-squeeze"[71] rather than a "price squeeze." A "semi-squeeze" can occur if a vertically integrated firm is able to obtain the services or products it needs from affiliates at artificially high price levels that include excessive profits. The affiliate supplies the necessary products and services to both the vertically integrated firm and the unaffiliated competitors at this price which includes excessive profit. For the vertically integrated firm the sale is only an internal bookkeeping transaction; in effect, it pays the real cost for the inputs. The unaffiliated

---

69 *See also* supra ¶ 60.

70 For a detailed description of price squeezes, *see* Joe S. Bain *Industrial Organization*, 2nd edition, John Wiley & Sons, Inc. New York (1968) pages 357-365 ("Bain").

71 *See* Bain.

competitor, however, pays not only for the underlying cost of the resources, but also for the vertically integrated competitor's excessive profits as well.

69. To effect such a "squeeze", however, additional conditions are required for the integrated firm to inflict economic harm on the non-integrated firm. The integrated firm must have control of the services or products that are the source of the squeeze and must be able to set the price of those inputs. If there are alternative suppliers or substitutes for the inputs, any attempt by the integrated firm to raise the price of the inputs will fail because the non-integrated firm will merely shift its purchases to the lower priced alternative. We are not convinced that dominant foreign carriers can set the "input" accounting rate level unilaterally. These rates are established by negotiation between a U.S. and foreign carrier. Competitive pressures from end users and carriers, as well as our International Settlements Policy, have strengthened the position of U.S. carriers during accounting rate negotiations, and we expect this trend will continue.

70. Even assuming *arguendo* that a dominant foreign carrier can unilaterally set an accounting rate, a squeeze will not succeed if the high price of a particular input can be offset by lower prices for other inputs, or economies of scale and scope, or other efficiencies. Where such offsets are possible, the integrated firm will have little or no ability to inflict substantial harm on competitors via a squeeze. AT&T has not shown that such offsets are not available to U.S. carriers. Finally, the affiliated U.S. carrier must maintain low prices and high accounting rates over a sufficiently long time period so as to inflict substantial economic harm to competitors. When all these conditions are taken into consideration, we do not believe AT&T has presented a persuasive argument that above-cost accounting rates on particular routes where a carrier has an affiliate on the foreign end realistically jeopardize the ability of unaffiliated carriers to compete on those routes or in the U.S. international services market as a whole. Additionally, we believe the possibility of such harm is outweighed by the benefits of additional price and service competition that will result from further U.S. market entry.

71. We also disagree with AT&T's argument that competition may not ensure significant progress towards cost-based accounting rates. We believe that additional service providers will increase supply options, and lower foreign calling prices. These actions should stimulate demand, and increased usage of fixed plant should reduce the carriers' average unit costs. In addition, greater demand may increase net revenues thereby reducing foreign carriers' need to rely on settlement payments to finance investment and enabling reductions in the level of accounting rates. Thus, increased global competition will encourage foreign carriers to move accounting rates towards cost-based levels. We therefore believe it would be counterproductive to require cost-based accounting rates as a precondition to foreign carrier market entry.

72. Nevertheless, the above-cost component of accounting rates does burden U.S. consumers and the U.S. economy. We have no evidence to suggest that effective competition will develop so quickly and uniformly in U.S. international telecommunications services that

an additional means for fostering cost-based accounting rates is unnecessary. Thus, we do not agree that the issue of accounting rates is irrelevant or tangential to the *Notice*, as argued by the British Government.[72] We therefore will consider the presence of cost-based accounting rates as part of our overall public interest analysis to determine whether to permit entry by a dominant foreign carrier on its affiliated route. We will also consider as a favorable factor the disclosure by a foreign carrier or its government of the accounting rates the carrier maintains with carriers in other foreign countries.[73] We believe this approach will encourage carriers in foreign countries to reduce accounting rates to cost, yet will not impede competition in the U.S. international services market by creating a significant barrier to entry.

D. Scope of Section 214 Public Interest Analysis for Applicants Affiliated with Foreign Carriers

1. Affiliation

73. This *Report and Order* adopts a minimum benchmark level of over 25 percent ownership of capital stock, or a controlling interest at any level, for classifying a U.S. carrier as an "affiliate" of a foreign carrier for the purpose of applying the effective competitive opportunities test. Our assessment of "capital stock" ownership will be made under the standards developed in Commission case law for determining such ownership.[74] We adopt this "over 25 percent" standard because of the potential for a foreign carrier with a less-than-controlling interest in a U.S. carrier to leverage its monopoly control over bottleneck facilities in the foreign market to favor its U.S. affiliate or to otherwise obtain an unfair competitive advantage in the U.S. international services market.[75] Although the test generally will apply only to U.S. carriers with greater than 25 percent foreign ownership, we reserve the right to scrutinize transactions below that very level that nonetheless present a significant potential impact on competition. We decline to consider a carrier engaged in a co-marketing agreement or other non-equity business relationship to be "affiliated" for the purpose of our effective competitive opportunities analysis, but instead address anticompetitive concerns

---

72 We also do not believe that it would be necessary to determine precisely that an accounting rate is "cost-based" in order to consider it as a public interest factor, as the British government has suggested. We would consider an accounting rate level favorably if it is among the lower accounting rates which U.S. carriers have with foreign carriers and is close to the current estimated cost to terminate an international call. *See, e.g.*, AT&T Comments at 34-35.

73 *See infra*, ¶ 267, 271.

74 *See, e.g.*, *Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995) (Ownership interest in a corporation for the purpose of applying the statutory benchmarks is determined by a partial owner's total capital equity contribution); *see also Wilner & Schreiner*, 103 FCC 2d 511 (Ownership interest in limited partnerships -- as opposed to voting interests -- are considered independently for Section 310 purposes).

75 Affiliation issues relating to our post-entry regulatory scheme are addressed *infra* ¶¶ 248-251.

raised by such relationships by regulatory restrictions and safeguards.[76] Finally, we adopt a prior notification and approval process for certain foreign carrier investments.

a. Affiliation Standard for Entry Purposes

74. We proposed in the *Notice* to adopt a new affiliation standard for application of our proposed rules. We tentatively concluded that we should adopt an affiliation standard at a specified ownership level which is less than that required to achieve control. We requested comment on what that level should be.[77]

Positions of the Parties

75. Several carriers argue that only foreign carriers that hold controlling interests should be considered "affiliated." Deutsche Telekom, France Telecom, and fONOROLA argue that including non-controlling interests is unnecessary because such interests do not give rise to anticompetitive incentives. Deutsche Telekom thus argues that our proposed threshold would be inconsistent with our findings in *International Services* and the goals of this proceeding.[78] Cable & Wireless and Sprint assert that an affiliation threshold that considers less-than-controlling interests would serve no purpose because acquisition of a non-controlling interest by a foreign carrier would provide no incentive for foreign governments to liberalize.[79] AmericaTel therefore argues that such a standard would inhibit investment and amount to "overkill."[80]

76. Conversely, several commenters advocate a threshold at a less-than-controlling level. The Department of Justice (Justice) states that a substantial non-controlling equity investment by a foreign carrier in a U.S. international service provider can adversely affect competition. Justice notes three forms such anticompetitive conduct might take. First, the foreign carrier may favor its U.S. affiliate contrary to the Commission's policies. Second, the investment may create incentives for the foreign carrier to engage in behavior that would increase the profits of its U.S. affiliate at the expense of U.S. consumers. Third, the foreign carrier may influence the U.S. affiliate to cooperate in conduct benefiting the foreign parent at the expense of competing U.S. carriers.[81] LDDS and AmericaTel oppose the proposed non-

---

76 *See infra*, ¶ 252.

77 *Notice at* ¶¶ 52-64.

78 Deutsche Telekom Comments at 54 (citing *International Common Carrier Services*, 7 FCC Rcd 7331 (1992)).

79 Cable & Wireless Reply at 9; Sprint Comments at 26.

80 AmericaTel Comments at 13.

81 DOJ Reply at 15.

controlling interest affiliation threshold, but support a 25 percent affiliation threshold if such a test is adopted. They maintain it would be sufficient to accomplish the goals of this proceeding while providing administrative simplicity and sufficient flexibility for U.S. carriers to acquire foreign capital.[82] AT&T, BTNA, GTE and MCI argue that a ten percent interest can provide incentives to discriminate and that ample precedent exists in analogous areas for such a threshold.[83]

77. Several parties offer additional proposals. NYNEX and Teleglobe advocate a reciprocal affiliation standard, which would have our affiliation standard reflect another country's approach. TLD proposes that our market entry test should only apply to foreign carriers with significant traffic streams and investments.

Discussion

78. The record in this proceeding and our experience over the last several years lead us to conclude that a 25 percent affiliation standard, rather than a control standard, is the appropriate threshold for today's market conditions. We agree with Deutsche Telekom that adoption of a non-controlling interest standard reflects a departure from our earlier findings three years ago in *International Services*.[84] As noted above, the market for international telecommunications services is undergoing drastic and rapid change and is becoming increasingly important to the U.S. economy.[85] We now therefore find that the competitive risks are too great to exempt all non-controlling interests from our effective competitive opportunities analysis.[86]

79. We disagree with Deutsche Telekom's argument in favor of a control standard. It argues that a foreign carrier with a less-than-controlling interest does not have the power to coerce a U.S. carrier into acquiescing to its scheme of anticompetitive conduct and that such interests therefore provide no ability and very little incentive to act anticompetitively. As Justice notes, however, a substantial investment in a U.S. carrier by a foreign carrier with market power could increase the extent to which it engages in behavior harmful to U.S.

---

82 LDDS Comments at 9-10; AmericaTel Comments at 13.

83 AT&T Comments at 25; BTNA Comments at 8-10; GTE Comments at 8; MCI Comments at 11. *See also* TLD Comments at 47-48.

84 7 FCC Rcd 7331 (1992) (A foreign non-controlling interest in a U.S. carrier could give a foreign carrier an incentive to favor its U.S. affiliate but would not generate sufficient concern to justify imposition of dominant carrier regulation where the interest held does not rise to the level of control.); Deutsche Telekom Comments at 51.

85 *See supra,* ¶ 12.

86 *See supra,* ¶ 33.

customers.[87] We find that a non-controlling interest can provide a foreign carrier with the incentive to engage in anticompetitive behavior that favors its U.S. affiliate. The foreign carrier can benefit directly by engaging in behavior that increases the profits of its U.S. affiliate when profits are passed through to the foreign carrier. A large investment in a U.S. publicly traded company, though insufficient to give the foreign carrier control, can give the foreign carrier substantial enough influence over the U.S. carrier to entice it into acquiescing to anticompetitive conduct and allocating to the foreign carrier a portion of the profits derived from such activity. We find that existing safeguards are not sufficient to control this activity because we have no jurisdiction to regulate the foreign bottleneck where such conduct would occur. We therefore find that it is necessary to scrutinize foreign carrier investments of a less-than-controlling interest.

80. We find ample precedent for our view that a less-than-controlling interest can provide a carrier with the incentive and ability to engage in anticompetitive conduct. As noted in the *Notice*, the Bell Operating Companies have been given a generic waiver from the line of business restrictions to allow them to acquire up to ten percent of foreign telephone companies subject to certain non-discrimination safeguards without specific court approval.[88] Under our ownership attribution rules in the broadcasting, cable, and Personal Communication Services (PCS) multiple ownership contexts, we have considered interests as low as five percent as providing a shareholder with the potential for influencing a licensee.[89] Deutsche Telekom objects to our reliance in the *Notice* on definitions of affiliation in other contexts because investors are considered "affiliated" at widely varying levels. It states that such definitions of "affiliation" are not relevant here because the term is defined arbitrarily according to the purpose at hand.[90] While the term "affiliation" can have different meanings in different contexts, the standards cited above and in the *Notice* are designed to identify instances where an equity investment can confer sufficient influence to raise significant

---

87 DOJ Reply at 12; Department of Justice, Antitrust Division: *Proposed Final Judgement and Competitive Impact Statement, United States v. MCI Communications Corp.* and *BT Forty Eight Company*, 59 Fed. Reg. 33009, 33017. We find that a minority investment can be a way of bringing incentives of two entities into closer alignment. Although such incentives can be constructive in some contexts, such incentives can present problems where one entity possesses market power and control over bottleneck facilities. Such power, combined with restrictive regulations, makes risks too substantial.

88 *Notice* at ¶ 59; *See United States v. Western Electric Co.*, No. 82-0192 (D.D.C. Feb. 4 1993).

89 *See Report and Order*, MM Docket No. 83-46, 97 FCC 2d 997 (1984). *See also Notice of Proposed Rulemaking, Review of the Commission's Regulations Governing Attribution of Broadcast Interests*, 10 FCC Rcd 3606; 47 C.F.R. §§ 76.501, Note 2, 76.503(f), 76.504(h).; *Broadband PCS Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4959; 7 C.F.R. § 24.101; *see also Memorandum Opinion and Order* in Gen. Docket No. 90-314 and ET docket No. 92-100, 9 FCC Rcd 1309, 1312-13 (1994); *recon, granted in part, Second Memorandum Opinion and Order*, 9 FCC Rcd 4519, 4521-22 (1994) (petition for reconsideration pending).

90 Deutsche Telekom Comments at 57.

anticompetitive and other public interest concerns. These standards support our finding that a non-controlling investment confers sufficient influence on the investor to raise significant competitive concerns. We also find that the controlling interest standards cited by Deutsche Telekom are not specifically designed to identify incentives to engage in anticompetitive activity -- the purpose behind the affiliation rules we adopt here.[91]

81. Application of the effective competitive opportunities test to less-than controlling investments by a foreign carrier is not intended to restrict investment in U.S. carriers.[92] We recognize that foreign carriers can provide a significant source of needed capital for the development of the U.S. telecommunications infrastructure. Because the test will only be applied to prevent foreign-affiliated carriers from operating to closed destination markets, it is not an absolute bar to foreign carrier investment. The effective competitive opportunities test also only applies to foreign telecommunications carriers, and is not intended to restrict investment by foreign entities generally. Moreover, application of a fixed percentage standard, as opposed to a control standard, will provide foreign carrier investors with greater predictability in determining the investments to which the test will be applied and will also reduce administrative delays associated with application of the test.

82. Finally, Sprint and Cable & Wireless argue that scrutiny of less-than controlling interests does not provide foreign governments with incentives to liberalize. We do not agree. We recognize that we have no direct influence over the scope of liberalization in foreign markets. Recent experience indicates, however, that at least three dominant foreign carriers have shown a very strong desire to acquire substantial, yet non-controlling investments in U.S. carriers in order to better compete in new, potentially lucrative global markets by offering end-to-end services to large corporate customers.[93] These foreign carriers obviously consider these non-controlling investments to be very important to their strategic marketing plans, and this presumably would give them a strong incentive to encourage their governments to liberalize their markets so that they may compete effectively in global markets.

83. The next question, then, is what is the proper threshold of minority interest. We find that a greater than 25 percent affiliation standard would better advance the goals of this proceeding than would a ten percent standard. An investment greater than 25 percent is large enough to give a foreign carrier substantial influence over the conduct of a U.S. carrier and substantial rewards from anticompetitive conduct. Thus, at this level, existing safeguards may not always be sufficient.

---

91 *Id. (citing* the Equal Access to Justice Act, 47 C.F.R. § 1.1504, the Uniform System of Accounts 47 C.F.R. § 32.9000, and the MFJ, *United States v. AT&T,* 552 F. Supp 131, 160-165 (1982)).

92 *See* AmericaTel Comments at 13; *see also* Cable & Wireless Reply at 10.

93 *See BT/MCI,* 9 FCC Rcd, 3960; See *Sprint Communications Co, Petition for Declaratory Ruling,* File No. ISP-95-002, filed October 14, 1994.

84. Applying the test to investments above 25 percent also is consistent with the level at which foreign ownership in parents of a radio licensee is scrutinized under Section 310(b)(4) of the Act. Adoption of this affiliation standard will avoid establishing two different ownership levels for scrutiny of foreign markets as we approve foreign investments in U.S. telecommunications carriers. Finally, applying the test at this level will allow for greater clarity and predictability because many foreign carrier investments would be subject to our scrutiny under both Sections 214 and 310(b)(4).

85. We do not find that the potential anticompetitive conduct addressed by a ten percent affiliation standard would justify the detrimental impact such scrutiny would have on investment in U.S. carriers and the administrative burden associated with its application. A ten percent affiliation standard would significantly increase the number of potential investments subject to our effective competitive opportunities test. The resulting potential for administrative delays and procedural obstructionism by opponents to any foreign investment would defeat our intended purpose of facilitating foreign investments that do not erode competition. On balance, we find that applying the effective competitive opportunities test to foreign equity investments of greater than 25 percent will best balance the positive effects of market opening incentives and competitive safeguards against any negative effect due to restriction on foreign investment or administrative burden the test may cause. Adoption of the 25 percent threshold will best advance our goal of promoting competition in the U.S. market for international telecommunications services.

86. We reject the suggestions of Nynex and Teleglobe for a reciprocal affiliation standard.[94] Such an approach is not tailored to address the potential for anticompetitive use of market power, which is an important reason for government review in this context. We also reject TLD's proposal to apply any market entry standard adopted here only where the foreign carrier seeking entry: (1) terminates significant amounts of traffic in correspondence with the U.S. carrier in which it seeks to invest; (2) proposes a significant dollar investment in the U.S. carrier; or (3) proposes a significant percentage of investment.[95] We recognize that the percentage of investment by a foreign carrier, standing alone, may not identify all cases where Commission scrutiny is warranted. For this reason, we will scrutinize planned investments of 25 percent or less where they present a significant potential impact on competition in the U.S. international services market.[96] While this approach will create some regulatory uncertainty, we at this time find it preferable to selecting specific dollar and traffic thresholds necessary to implement TLD's proposed standard. The absolute size of an investment by a foreign carrier does not necessarily correlate with the influence that carrier may have with the U.S. carrier in which it invests. The significance of that investment to the U.S. carrier also depends on the nature of the capital structure of the U.S. carrier, which will vary from case to case. We also

---

94 Nynex Comments at 7-8; Teleglobe Comments at 33-34.

95 TLD Reply at 44-48.

96 *See infra* ¶¶ 89, 97-98.

find traffic volume to be an unreliable measure of a foreign carrier's influence with a U.S. carrier. Traffic flows on any given route vary over time. Indeed, we are concerned that the amount of traffic carried by a U.S. carrier in correspondence with its foreign carrier affiliate will increase relative to the shares of unaffiliated U.S. carriers as a result of anticompetitive conduct on the part of the affiliated U.S. and foreign carriers.

87. Finally, we also will find a foreign carrier to be affiliated with a U.S. carrier where it controls, is controlled by, or is under common control with a second foreign carrier already found to be affiliated with that U.S. carrier as outlined above.[97] We believe that anticompetitive dangers exist in such indirect investments which are equivalent to those present in a direct investment context. We therefore find that such interests require application of the effective competitive opportunities test. We find, however, that it is inappropriate to scrutinize such indirect interests using the over 25 percent standard because any influence created as a result of such an investment in this context is sufficiently attenuated, and because the U.S. carrier is under an obligation not to accept any "special concessions" from any foreign carrier, including carriers associated with its foreign affiliate.[98]

b. Scrutiny Over Foreign Investments of 25 Percent or Less

88. In the *Notice*, we proposed to preserve an avenue for Commission scrutiny of investments that do not fall within our definition of affiliation, yet that present certain unique factors demonstrating that our scrutiny is necessary to preserve the public interest.[99] LDDS objects to this proposal because it will reduce certainty in the application of the rule and increase delay.

89. We find as a general matter that foreign carrier investments of 25 percent or less will not require application of the effective competitive opportunities test. We nevertheless conclude that we should subject a foreign carrier investment to the effective competitive opportunities test where it presents a significant potential impact on competition in the U.S. market for international telecommunications services -- even if this investment does not rise to a level greater than 25 percent. Subjecting such investments to our review will create some regulatory uncertainty. But in a market such as international telecommunications where some players possess significant market power, the potential exists for substantial investments below the 25 percent level to have a dramatic impact on competition in certain limited circumstances. In addition, such scrutiny may be necessary to prevent carriers from using corporate structuring tactics to evade scrutiny under these rules.[100]

---

97 *See International Services,* 7 FCC Rcd 7331, 7333, for a discussion of Commission precedent setting forth the circumstances that constitute "control" under Section 214(a).

98 *See infra,* ¶ 256-259; 47 C.F.R 63.14.

99 *Notice* at ¶ 64.

100 *See infra* ¶¶ 97-98 for a discussion of our prior notification and approval requirements.

c. Aggregation of Multiple Carrier Interests

90. The *Notice* also requested comment on the issue of how we should apply the proposed rules to an investment by more than one foreign carrier or by a consortium of foreign carriers.[101] We conclude that, where two or more foreign carriers invest in a U.S. carrier, we will consider the U.S. carrier to be foreign-affiliated where the foreign carriers are likely to act in concert and the combined foreign carrier interests either exceed 25 percent or constitute a controlling interest.[102]

91. Several U.S. carriers support the concept of aggregating the interests of foreign carrier investors in order to avoid substantial cumulative foreign investments escaping Commission review.[103] Some foreign carriers oppose aggregation because they contend that it would not advance the objectives of this proceeding and that its application to carriers with differing degrees of market openness makes it problematic.[104] Deutsche Telekom asserts that aggregation would not further the goals of this proceeding because the greater the number of participants, the less likely a scheme of anticompetitive conduct will be successful. Deutsche Telekom also argues that the smaller investments that would become subject to the proposed standard if interests were aggregated would be unlikely to persuade foreign governments to open their markets.[105] Justice, however, believes that foreign carrier interests should be aggregated where the foreign carriers that own equity in a U.S. carrier are allied in providing international telecommunications services or otherwise have sufficiently common interests to make it likely that they would act in concert to influence the U.S. carrier.[106]

92. We find Justice's view persuasive. Although it may be more difficult for multiple carriers to collude to act anticompetitively than it would for a single carrier to act alone, we find that the public interest requires that we closely scrutinize those transactions that indicate a likelihood of such collusion. For example, alliances such as Atlas, the proposed joint venture between Deutsche Telekom and France Telecom, proclaim that their benefits to customers include close coordination of services and pricing among carriers. We therefore will aggregate multiple foreign carrier interests and apply the effective competitive

---

101 *Notice* at ¶ 61.

102 Similarly, where we find that two or more foreign carriers are likely to act in concert, but their combined investment in a U.S. carrier falls below the affiliation threshold, we will subject the investment to our effective competitive opportunities test where it presents a significant potential impact on competition. *See infra,* ¶¶ 93-95.

103 AT&T Comments at 27; BTNA Comments at 9; MCI Comments at 12.

104 Deutsche Telekom Comments at 61; France Telecom Comments at 10-12.

105 Deutsche Telekom Comments at 61-62.

106 DOJ Reply at 16.

opportunities test to all affiliated routes of U.S. carriers where aggregated dominant foreign carrier interests exceed 25 percent, or rise to the level of control, and those carriers are parties to a contractual relation (*e.g.* a joint venture or marketing alliance) affecting the provision or marketing of basic international telecommunications services in the United States..

d. Non-equity Business Relationships

93. In the *Notice,* we proposed not to apply the effective competitive opportunities test to U.S. carriers that are parties to *non-exclusive* co-marketing and other non-equity business alliances. We proposed instead to review the need to impose reporting requirements on carriers engaged in co-marketing arrangements for the provision of basic global network services. We expressed a heightened concern in the *Notice*, however, with *exclusive* co-marketing agreements and suggested that such arrangements should be prohibited, at least in the absence of effective facilities-based competition on the foreign end.[107]

94. Many commenters note their concern over the anticompetitive dangers of co-marketing agreements and other business alliances.[108] Some argue that anticompetitive influences are the same whether an alliance is formed by an equity investment or a non-equity agreement and that such alliances should be subject to the effective competitive opportunities test.[109] Justice agrees with our general proposition to exclude from our definition of affiliation non-equity business relationships and reserve the right to review any transaction involving foreign carrier participation.[110] Justice does note, however, that a relationship closely related to the core monopoly activities of a foreign carrier may give rise to anticompetitive problems even without an equity investment.[111] Citicorp does not support proposals that would subject co-marketing agreements and joint ventures to the proposed

---

107 *Notice* at ¶¶ 62-63.

108 *See, e.g.*, MFSI Comments at 3; TLD Comments at 52; Nynex Comments at 12-13; ACC Comments at 8-12; Deutsche Telekom Reply at 31-35.

109 Deutsche Telekom Comments at 59, Reply at 31; France Telecom Comments at 12; BTNA Comments at 12-15. *See also* MFSI Comments at 3-4 (requesting that prior approval of alliances be withheld absent a finding that the allied foreign carrier freely grants operating agreements to U.S. carriers on a reasonable basis).

110 Justice Reply at 16.

111 *Id.*

entry test.[112] LDDS advocates applying dominant carrier regulation to AT&T for all routes where it is allied with a foreign carrier with market power.[113]

95. We conclude that non-equity arrangements do not constitute "affiliation" for purposes of applying our effective competitive opportunities standard. We decline to apply this analysis to any such non-equity arrangements, whether exclusive or non-exclusive, because we do not find foreign carrier participation in such alliances to constitute entry into the U.S. international services market as a common carrier.[114] Moreover, application of the effective competitive opportunities test in such an instance would not serve the goals of this proceeding and could have negative consequences. Such an application could deny U.S. consumers the competitive benefits of the services of such alliances[115] and would do little to open foreign markets. While these alliances warrant increased regulatory scrutiny,[116] we find that 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. We also find that it would be extremely difficult to apply a market entry test to non-equity arrangements with a sufficient degree of certainty. In short, we conclude that the anticompetitive concerns raised by such arrangements are better addressed by our "no special concessions" requirement and our dominant carrier regulatory regime.[117]

---

112 Citicorp Comments at 6-7.

113 LDDS Comments at 12. *See also* MFSI Comments at 3-4 (Commission should impose on allied U.S. carriers the nondiscrimination safeguards adopted in the *BT/MCI Order, supra* note 35, and require such U.S. carriers to ensure their foreign partners make all negotiated accounting rates simultaneously available to all U.S. carriers).

114 Indeed, if a U.S. and foreign carrier form a joint venture for the purpose of providing U.S. international basic services, that joint venture would require Section 214 authorization and be subject to our market entry rules.

115 *See* Citibank Comments at 3.

116 We concluded in *International Services* that non-equity arrangements between a U.S. and foreign carrier do not present a substantial possibility of anticompetitive effects such that these relationships need to be addressed in the context of deciding whether to regulate a carrier as dominant or non-dominant. 7 FCC Rcd at 7333. Based on the record in this proceeding, we modify this aspect of the rules adopted in *International Services*.

117 *See infra* ¶¶ 252-259.

e. Prior Notification and Approval Requirement

96. We proposed in the *Notice* that authorized carriers notify the Commission within 30 days of becoming "affiliated" with a foreign carrier. The notification would be used to determine whether a change in regulatory status is warranted and whether further review of the facts is necessary in order to determine whether the affiliation serves the public interest, convenience, and necessity. A number of parties expressed their concern that the proposed notification requirement would put the Commission in the position of deciding whether an investment complies with our proposed rules after the transaction has been already completed.[118] These carriers argue that the Commission will be reluctant to take action to reverse a transaction which has already been completed.

97. We agree with this argument. We will therefore require a U.S. international carrier to notify the Commission 60 days prior to acquisition by a foreign carrier of a ten percent or greater interest in that U.S. carrier. We will place the notification on public notice for 14 days. Unless the Commission 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, then the investment is presumed to be in the public interest. If notified that the acquisition raises a substantial and material question under these market entry rules, then the carrier shall not consummate the planned investment until it has filed an application under Part 63 of the rules, and the Commission has approved the application by formal written order.[119] The Commission will act quickly to resolve all issues raised in such applications.

98. We impose this requirement for the purpose of both determining the regulatory status of the U.S. carrier, as well as determining the applicability of the effective competitive opportunities analysis. We require notification of a ten percent or greater interest to determine whether there are unique factors that require application of the test. Although standing alone we do not find a ten percent interest to be a cause for concern, where a ten percent foreign carrier investor acts in concert with foreign carrier investors of larger shares, for example, there may be cause for concern. In order to implement this reporting requirement effectively, we modify our Part 63 rules to require the reporting of both direct *and* indirect shareholdings of ten percent or more. We also modify our rules to require that all U.S. international carriers report, within 30 days of the effective date of the rules, any direct or indirect ten percent investments by foreign carriers that exist at that time.

---

118 AT&T Comments at 28; BTNA Comments at 11-12; MCI Reply at 17.

119 Appendix B contains our market entry rules and associated rule changes.

2. Affiliated Carriers Subject to the Entry Standard

99. As proposed in the *Notice*, we will apply our effective competitive opportunities entry standard only to those entities defined as foreign *carriers* under our Rules.[120] Entities that are not foreign carriers under this definition have no control over bottleneck facilities and, as a result, cannot engage in anticompetitive conduct against unaffiliated U.S. carriers. No party objected to this approach or suggested that such entities have the ability or the incentive to engage in anticompetitive conduct in the provision of international services.

a. Dominant versus Non-dominant Carriers

100. In the *Notice,* we proposed to apply our entry standard to foreign carriers operating in "primary markets" that sought to enter the U.S. market to provide international facilities-based service.[121] Domtel emphasizes that an important source of competition for a *de facto* foreign monopoly is often a non-dominant foreign carrier.[122] Therefore, Domtel argues that a broad application of our entry standard to non-dominant foreign carriers ultimately could hinder competition in the foreign country and here. The Department of Justice is similarly sanguine about entry by foreign entities that have no economic market power in a foreign market.[123]

101. We find these arguments persuasive. A non-dominant carrier's participation in the U.S. market would likely enhance its competitive position *vis-a-vis* the dominant foreign carrier and reduce the ability of the dominant foreign carrier to exercise market power in the provision of international service between that country and the United States.[124] We also agree with Justice's view that foreign entities with no economic market power in a foreign market are not a source of regulatory concern.[125]

---

120 For the purposes of the rules adopted here, a "foreign carrier" is defined as we have defined it in Section 63.01(r)(1)(ii) of our rules: ". . . [A]ny 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, *see* Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art.1." We construe this definition of a foreign carrier as we did in *International Services.* Thus, it includes foreign carriers that provide intercity or local access services or facilities in a foreign country. *International Services,* 7 FCC Rcd 7331, at 7334 n.47.

121 *See infra* ¶ 110 for an explanation of the term "primary market" as used in the *Notice.*

122 Domtel Reply at 5.

123 DOJ Reply at 24.

124 Domtel Reply at 2-9. *See also* fONOROLA Comments at 5.

125 DOJ Reply at 24.

102. Accordingly, we narrow the focus of our test to those carriers that have market power that potentially can be leveraged on international routes to the detriment of unaffiliated U.S. carriers. We will apply the effective competitive opportunities analysis only to international Section 214 applications from foreign carriers that have market power, or are affiliated with such a carrier, in the destination markets they seek to serve.[126] Foreign carriers that do not have market power, *i.e.*, control over bottleneck services or facilities, lack the ability to discriminate against unaffiliated U.S. carriers. As a result, there is no regulatory need to engage in an analysis of whether or not effective competitive opportunities exist on those routes. The fact that a non-dominant foreign carrier is applying to serve the U.S. market on an end-to-end basis suggests that, at a minimum, there are opportunities to compete in this foreign market, and we should not be imposing regulatory burdens that may hinder the development of competition in that market. Our goals of this proceeding would be furthered by enhancing this non-dominant foreign carrier's ability to compete against the dominant carrier in the provision of international services.

b. U.S. Investments in Foreign Carriers

103. We also proposed in the *Notice* to exclude from the scope of the market entry test U.S. carriers that acquire an ownership interest in foreign carriers because such scrutiny would not further the goals underlying this proceeding.[127]

104. Domtel opposes this proposal because it maintains U.S. owners of foreign carriers possess the ability and incentive to discriminate against carriers that do not possess such an interest. This is particularly true, Domtel argues, where the foreign carrier is dominant in its market and a controlling interest is acquired by a U.S. carrier.[128] TLD similarly argues that by not examining U.S. carriers' foreign investments, we have not provided in the *Notice* a rationale for alleged disparate treatment of AT&T vis-a-vis other carriers.[129] Such disparate treatment, TLD argues, might be viewed by some foreign governments as protectionist, and possibly by U.S. courts as violating the Equal Protection Clause.[130]

105. We do not find Domtel's arguments against our proposal to exclude investments by U.S. carriers in foreign carriers persuasive. While a substantial investment by

---

126 *See infra* ¶ 116. Section 63.01(r)(8) of the Commission's rules, as amended in this *Report and Order*, sets forth factors that relate to the scope or degree of a foreign carrier's market power. 47 CFR § 63.01(r)(7). *See infra* Appendix B.

127 *Notice* at ¶ 50.

128 Domtel Reply at 16.

129 TLD Comments at 60.

130 *Id.*

a U.S. carrier in a dominant foreign carrier may raise competition concerns with respect to traffic between the foreign country and the United States, there are established Commission rules and policies, as well as antitrust laws, that address such concerns.[131] We have confidence in our ability to address any such competitive concerns with our traditional safeguards, including our dominant carrier safeguards.[132] In contrast, we do not have as effective means to guard against anticompetitive conduct made possible by a foreign carrier's control over the foreign bottleneck when the foreign carrier invests in a U.S. carrier. We do not have jurisdiction over the foreign carrier that has bottleneck control and that may leverage that control to gain an unfair advantage in the U.S. market. Thus, we are not confident of the effectiveness of any measures we would take to prevent anticompetitive conduct by the foreign carrier in its use of foreign bottleneck facilities.[133] Further, we do not want unnecessarily to impede the flow of U.S. telecommunications carriers' investment and entry into foreign markets. The presence of U.S. carriers not only benefits those carriers' U.S. customers, but also may foster liberalization efforts. Finally, such a restriction on U.S. investment in foreign carriers would be tantamount to an export control and would be directly contrary to long-standing U.S. policy in favor of U.S. investment abroad.

106. We reject TLD's assertion that we have not provided a reasoned rationale for applying a different regulatory approach to U.S. carrier investment in foreign carriers. TLD argues that applying the effective competitive opportunities test to foreign carriers and not to U.S. carriers is an "arbitrary or irrational" distinction because large carriers such as AT&T carry more traffic to foreign affiliates than smaller foreign carriers and thus present greater potential for competitive harm. TLD argues that such a distinction therefore violates the Equal Protection Clause.[134] The effective competitive opportunities analysis distinguishes between U.S. carriers and foreign carriers for three separate reasons. First, we do not find that the same anticompetitive concerns exist where a U.S. carrier invests in a foreign carrier as exist where a foreign carrier invests in a U.S. carrier. As discussed above, in circumstances where a U.S. carrier has a substantial investment in a dominant foreign carrier and uses its influence over the foreign carrier to obtain an anticompetitive advantage on the affiliated route, we have jurisdiction over the U.S. carrier, through its licenses and authorizations in the United States, to redress its behavior. By contrast, where a dominant foreign carrier has a substantial investment in, and influence over, a U.S. carrier, we do not have similar jurisdiction over the foreign carrier, through its foreign licenses and authorizations, to redress any anticompetitive use of its bottleneck facilities. Thus, we do not find that a large carrier, such as AT&T, creates a greater potential for anticompetitive harm

---

131 *See Atlantic Tele-Network, Inc.*, 8 FCC Rcd 4776 (1993), *pet. for review denied sub nom., Atlantic Tele-Network, Inc. v. FCC*, No. 93-1616 (D.C. Cir. July 25, 1995); Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25.

132 *See generally, infra* Section VII.

133 *See supra* ¶ 79.

134 TLD Comments at 60 (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432).

than a smaller foreign carrier because we have confidence in our ability to guard against and redress any anticompetitive conduct in which AT&T may engage. Second, as stated above, applying the analysis to a U.S. carrier seeking to invest abroad would be contrary to U.S. policy. Third, application of the analysis to a U.S. carrier investor would not serve the market opening goals of this proceeding. TLD argues, in effect, that we should prohibit U.S. carriers from investing in foreign carriers unless the foreign markets are open to competition. Because U.S. carriers are a significant source of capital in liberalizing markets, we find that such a measure would do far more to inhibit the development of effective competition than it would to enhance it. For these reasons, we do not find that it is "arbitrary or irrational" to adopt a measure such as the effective competitive opportunities test that distinguishes between U.S. and foreign carriers. We therefore find that the effective competitive opportunities test does not violate the Equal Protection Clause.

c. Small Carrier Exemption

107. Some commenters propose that we exempt small U.S. carriers from any market entry rules adopted in this proceeding and not apply the effective competitive opportunities test to a foreign carrier investment in a U.S. carrier with gross annual revenue of less than $125 million.[135] They argue that our market entry rules would greatly restrict the flow of capital available to small carriers. AT&T argues that we should reject this proposal because it is the potential leveraging of foreign market power that creates the threat to U.S. competition and U.S consumers and businesses, regardless of the market share of the U.S. carrier.[136]

108. We do not find that a policy exempting foreign carrier investment in small carriers from our market entry rules would serve the goals of this proceeding. We reject this proposal, first, because application of the effective competitive opportunities test on a route-by route basis will not restrict the availability of capital to the extent feared by many of the commenting parties and, second, because such an exemption would allow a foreign carrier to enter the U.S. market as a small carrier and grow quickly to dominate the route to its affiliated market.

d. Applicability to Previously Authorized Affiliates of Foreign Carriers

109. We agree with TLD's argument that the test we adopt should not apply to existing Section 214 authorizations to provide international service held by foreign-affiliated

---

135 CTS Comments at 5; Transworld Comments at 2.

136 AT&T Reply at 35-36.

carriers.[137] We have imposed safeguards on existing foreign-affiliated carrier authorizations to protect against anticompetitive conduct. It also would be inequitable to subject these carriers' current authorizations to further entry review. We do not, however, agree that these foreign-affiliated carriers should be exempt from the rules adopted here for any future or pending international Section 214 applications that they are required to file with the Commission. Such an exemption would not further the goal of promoting effective competition because it would require us to ignore applications where there is a substantial risk of anticompetitive conduct. Therefore, all such carriers will have their future or pending applications subject to the standards adopted here.[138] For example, if a foreign carrier sought authority to serve an unaffiliated route, then we would not apply the effective competitive opportunities test. If applying to initiate service to an affiliated route, or to add circuits to an already-authorized affiliated route, we would apply the test as outlined in this *Report and Order*. In addition, where a previously authorized carrier has an affiliation under our modified affiliation standard, it will be required to report such relationships under the rules adopted here, and would be subject to reclassification as a dominant carrier if warranted. Finally, any applicant with a foreign carrier affiliation should amend its pending application(s) to conform to these rules within 30 days of their effective date.

3. Primary Market versus Destination Market

110. Once we determine that an applicant for international authority is affiliated with a dominant foreign carrier, we must decide which markets will be subject to the effective competitive opportunities test. In the *Notice*, we proposed to examine effective market access in the primary markets of the foreign carrier seeking entry. We defined primary markets as those key telecommunications markets where the carrier has a significant ownership interest in a facilities-based telecommunications entity that has a substantial or dominant market share of either the international or local termination telecommunications market of the country, and the traffic flows between the United States and that country are significant.[139] We proposed that the foreign carrier would not be allowed to provide service to *any* market if *any* of its primary markets failed the effective market access test, unless other public interest factors warranted differently. In analyzing whether effective market access exists, we proposed in the *Notice* to limit our examination to the basic, international

---

137 *See e.g.*, TLD Comments at 60, Reply at 48; IDB Mobile Comments at 2, 8-10; AmericaTel Comments at 5.

138 *Cf. TLD Order*, where we stated: "Given the limits imposed on our authorization to (T)LD, we will have the opportunity to attach additional conditions, where warranted, should (T)LD seek to expand its U.S. international service offerings or capabilities. We also reserve the right to impose additional conditions on (T)LD's authorized operations if, after due notice and comment, such conditions are warranted." *TLD Order*, 8 FCC Rcd 106 at 116.

139 *Notice* ¶ 43.

facilities-based telecommunications market and the local termination market of the foreign carrier.[140]

Position of the Parties

111. Our proposal to examine the primary markets of the foreign carrier seeking entry elicited numerous responses from the commenters. Their main concern with the primary market approach is that it is either too vague or overly broad.[141] Cable & Wireless claims that a broad primary market inquiry might lead to protracted and contentious proceedings. It argues that a home market approach provides the most effective method of opening foreign markets as it would motivate the home government to liberalize because its own nationals would benefit.[142] In contrast, it notes that, where the foreign carrier has interests in many countries outside its home market, the governments in these primary, but non-home, markets lack sufficient motivation to encourage competition because doing so would not directly benefit their nationals.

112. TLD argues that any entry standard should only apply to applications that propose to serve a country where the applicant is affiliated with the terminating carrier.[143] TLD argues that there are no anticompetitive or discrimination concerns raised when a carrier serves a route where it has no affiliation with a terminating carrier.

113. Domtel urges the Commission to change its definition of a "primary market" to the key markets where a carrier has a significant ownership interest in a facilities-based telecommunications entity that has a dominant (45 percent or more) combined market share of the local exchange and domestic and international basic services of the foreign market, and traffic flows between the United States and that country are significant.[144]

114. France Telecom recommends that the Commission consider the openness of the entire telecommunications market and not only the basic, international facilities-based services segment.[145] France Telecom urges the Commission to be flexible and recognize the progress

---

140 *Notice* ¶¶ 43, 44.

141 British Government Comments at 6 (too vague), DOJ Reply at 25 (overly broad), TLD Comments at 65, Cable & Wireless Comments at 5.

142 Cable & Wireless Comments at 3, 6. *See also* TLD Comments at 65.

143 TLD Comments at 63.

144 Domtel Reply at 10.

145 France Telecom Comments at 15-17; *See infra* at ¶ 122.

some countries are making toward liberalization of their overall communications market.[146] Similarly, Teleglobe urges the Commission to adopt a standard based on the existence of "mutually advantageous market opportunities" for U.S. companies in the applicant's primary market.[147]

115. Justice urges the Commission to examine the overall competitiveness of the foreign market, including the extent to which competition from non-U.S. facilities-based carriers in that market reduces the market power of the dominant telecommunications carrier.[148] Justice also encourages us to consider in our market access analysis whether or not there is a general prohibition on competitive entry in any area of services and facilities in the country that could affect international telecommunications.[149]

Discussion

116. We conclude we should apply an effective competitive opportunities test to all applications by foreign-affiliated carriers to operate as U.S. international carriers to foreign points where the affiliated foreign carrier has market power. This may include the home market of the foreign carrier, but it also includes all other destination markets where it has the ability to leverage market power. We define market power as the ability of the carrier to act anticompetitively against unaffiliated U.S. carriers through the control of bottleneck services or facilities on the foreign end.[150] "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. We believe that there is no need for us to apply an effective competitive opportunities analysis when a foreign carrier seeks to serve countries where it does not own or control bottleneck facilities that give it a dominant market position. We believe this approach balances the commenters' concerns, without limiting our ability to encourage closed markets to open.

117. The approach we adopt differs from the *Notice*'s primary market proposal in that it would not apply an effective competitive opportunities analysis to applications from foreign carriers to serve countries where they have no affiliates and are unable to exploit market power as they could if they served a destination market where they maintained a dominant market position. Under our original proposal, we could deny a foreign-affiliated

---

146 *See also* GTE Comments at 2-3. GTE supports a flexible determination of effective market access.

147 Teleglobe Comments at 11, Reply at 17. This approach would hinge on overall market conditions and would allow entry into the U.S. market so long as the foreign telecom market as a whole is considered sufficiently open to create a climate of mutually advantageous market opportunities for U.S. carriers.

148 DOJ Reply at 26.

149 *Id.*

150 *Cf. International Services*, 7 FCC Rcd 7331 at 7334.

carrier *any* international facilities-based Section 214 authority if only one of the primary markets in which it has an affiliation is not open to effective competitive opportunities. That approach would put the Commission in the position of potentially denying a foreign carrier U.S. international facilities on routes where there was little threat to competition. It would unnecessarily deprive the U.S. market of additional competition, and it would place unwarranted burdens on the Commission's resources.[151] It would also have required us to determine which markets were "primary" and which were not, an analysis that would have been imprecise and controversial.

118. We believe our new approach's focus on market power in destination markets will better enable us to achieve our goals in this proceeding. Under this approach, we could grant a foreign carrier seeking to enter the U.S. market for the first time Section 214 authority to serve all U.S. international routes on a facilities (or resale) basis, with the exception of a route where the foreign carrier has market power on the foreign end and is unable to demonstrate that effective competitive opportunities are available in the foreign country. Where the foreign carrier seeks to invest in or acquire an existing U.S. carrier, we could condition approval of the investment or acquisition on the U.S. carrier divesting its operating interests, including direct circuits to the foreign country.

119. We also do not agree with Cable & Wireless' suggestion that we should adopt a "home market" approach. Contrary to Cable & Wireless' arguments, a pure home market approach is too narrow. Some foreign carriers operate as the dominant carrier in numerous markets around the world. If we only examined their home market, we would be ignoring significant competitive issues in other affiliated markets.[152]

120. Under our route-by-route approach, we will prohibit a U.S. carrier with a foreign carrier affiliation from using its authorized U.S. international facilities or services on unaffiliated routes to provide direct or indirect service to any country where it is affiliated with a foreign carrier, unless and until it secures additional specific authority for such service from the Commission. A carrier may not, for instance, provide service on a facilities-basis, over resold private lines, or via switched resale to a third country and then route such traffic back to an affiliated country where it possesses market power. Allowing foreign carriers to indirectly serve markets which they are barred from serving directly would defeat the purposes behind the effective competitive opportunities analysis and not contribute to the goals of this proceeding.

---

151 *See* Teleglobe Comments at 4. It notes that, as proposed, the standard would be unlikely to yield administrative efficiencies or reduce burdens on the Commission's resources.

152 *See supra* Section III.D.2.a (concluding that we will apply the effective competitive opportunities test only to foreign carriers that are dominant or affiliated with a dominant carrier in the destination market they seek to serve).

121. Our focus in applying the effective competitive opportunities analysis to applications for facilities-based entry is on the ability of a U.S. carrier to enter a foreign country and provide facilities-based IMTS. We recognize the concerns of those commenters that support a flexible market segment-by-segment approach to acknowledge the progress some countries are making in liberalizing their markets, and we welcome liberalization in all market segments. But the reality remains that IMTS accounts for the vast majority of the revenues in facilities-based international services and is a service of paramount importance to U.S. consumers. In addition, a broad inquiry into market segments of a country's telecommunications market would be time-consuming and burdensome on Commission resources, and bear little relation to our objective to prevent anticompetitive conduct in the provision of U.S. international services. We accordingly conclude that the legal ability to provide IMTS in a foreign market must remain the focus of our effective competitive opportunities analysis for facilities-based applications from foreign carriers. Therefore, we decline to adopt France Telecom's and Teleglobe's suggestion that we analyze every market segment before determining whether or not effective competitive opportunities exist for U.S. carriers in that market.

122. We also reject France Telecom's request that we not accord primacy to the basic, international facilities-based segment of the foreign carrier's home market but rather that we consider a foreign market as a whole.[153] This is the segment that poses the greatest competitive concerns for the provision of facilities-based service. The goals of this proceeding would not be served, absent other public interest considerations, by allowing a foreign carrier with control over bottleneck services or facilities to provide international facilities-based service from the United States to those markets that are open only for other types of service, such as cellular or paging services.[154] Such an approach would not sufficiently address the potential for a foreign carrier to use its control over bottleneck services and facilities to discriminate against unaffiliated U.S. facilities-based carriers, or to compete in the United States not on its merits, but rather on the basis of its protected position in a foreign market.[155]

123. As stated *supra* at ¶ 45, we will, as Justice suggests, consider as relevant to our effective competitive opportunities test evidence of any competition in the international facilities-based services market of the destination country, including competition from non-U.S. facilities-based carriers. We would view a general prohibition on competitive entry by

---

153 France Telecom Comments at 15.

154 We reiterate, however, that the state of liberalization for local access and intercity services is relevant to the interconnection factor of the effective competitive opportunities test. *See supra* ¶ 61.

155 We also decline to make specific findings under our effective competitive opportunities analysis for particular countries in this proceeding as fONOROLA requests with respect to Canada. We also consider as beyond the scope of this proceeding MFSI's request that we limit Canadian ownership of wireline facilities in the United States to the same minority interest level permitted U.S.-owned firms in Canada. *See* fONOROLA Comments at 19, MFSI Comments at 13-14.

U.S. carriers, however, as unacceptable under the Section 214 analysis that we adopt here. Absent the legal ability to obtain a controlling interest in a facilities-based carrier in a foreign market, U.S. carriers cannot obtain a degree of bargaining power sufficient to constrain anticompetitive behavior by the incumbent carrier in that market, or respond effectively to competitive inroads made by the incumbent as a result of its unique ability to operate on an end-to-end basis.

IV. OTHER MARKET ENTRY ISSUES

A. Definition of a Facilities-Based Carrier

124. Our regulation of U.S. international services traditionally distinguishes between facilities-based service and resale for two reasons. First, facilities-based carriers have greater freedom than resellers to set prices because the authority they exercise over provisioning and configuration of facilities provides a high degree of control over costs not available to resellers. Second, facilities-based carriers' ability to configure facilities and route traffic according to their specific needs provides them with significantly greater ability than resellers to engage in anticompetitive conduct, especially where they control bottleneck facilities.[156] As a result, we have historically scrutinized facilities-based carriers more closely than resellers in both the entry and post-entry contexts. The distinction is also relevant in the context of our private line resale policy, where we have required resellers of private lines for the provision of switched services to demonstrate that equivalent resale opportunities exist in the destination country before offering this service.[157]

125. In its petition for rulemaking, IDB asked that we adopt a new definition of a facilities-based carrier because it found that recent Commission actions had created confusion regarding this definition.[158] IDB urged that we consider as facilities-based a carrier that obtains the maximum interest permitted by law in a cable or satellite circuit. A carrier thus would be considered facilities-based in the United States if it purchases an ownership or indefeasible right of user (IRU)[159] interest in a U.S. half-circuit in an international cable or satellite (whether common carrier or non-common carrier) or if it leases satellite capacity

---

156 *See supra* ¶ 116.

157 *See Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1992) *(International Resale Order)*; *Order on Reconsideration*, 7 FCC Rcd 7927 (1992), *petition for reconsideration/clarification pending. See also infra,* ¶ 133.

158 *See Notice* ¶ 68.

159 An IRU interest is one in which the holder acquires the exclusive and irrevocable right to use the facility, but not the right to control the facility. *See, e.g., Reevaluation of the Depreciated-Original-Cost Standard in Setting Prices for Conveyances of Capital Interests in Overseas Communications Facilities Between or Among U.S. Carriers*, 2 FCC Rcd 1465 (1987).

directly from Comsat.[160] IDB argued that, to the extent the Commission seeks to exercise jurisdiction over carriers providing the foreign half-circuit, the Commission should treat as facilities-based a U.S. carrier that directly leases a foreign half-circuit if that is the maximum interest allowed by foreign law.[161]

126. Our *Notice* tentatively concluded that we should not consider the nature of a carrier's interest in a foreign half-circuit. We proposed to codify our current definition of a U.S. facilities-based carrier as one that purchases an ownership or IRU interest in a U.S. half-circuit in an international satellite or submarine cable (whether common carrier or non-common carrier) or if it leases a U.S. half-circuit from Comsat or from a non-common carrier international satellite or submarine cable provider. We tentatively found that IDB's proposed maximum interest test could undermine the purpose of our *International Resale Order*[162] and also could encourage foreign countries to stop short of creating full facilities-based competition.[163]

Positions of the Parties

127. Several parties commented on this issue. Some U.S. carriers agree that we should codify our current definition and reject the maximum interest test for the reasons set forth in the *Notice*.[164] Teleglobe opposes our proposed codification because it would treat some leases as facilities-based in the U.S. market, but would not treat equivalent leases as valid evidence of facilities-based competition in foreign markets.[165] CTS and Transworld warn that small carriers often are unable to conclude operating agreements with foreign administrations when they are classified as resellers. Thus, classifying all circuits leased from a common carrier as "resold" could hinder their efforts to enter foreign markets.[166]

128. IDB similarly maintains that it is arbitrary to classify a carrier as facilities-based when it leases capacity from COMSAT or from a non-common carrier submarine cable or satellite provider, while classifying a carrier as a reseller when it leases capacity from a

---

160 IDB's proposed definition would not consider a carrier that leased circuits in a cable or satellite circuit to be facilities-based where ownership or IRU interests are available.

161 *Notice* ¶¶ 67-71.

162 7 FCC Rcd 559.

163 *See Notice* at ¶ 71.

164 AT&T Comments at 51; MCI Comments at 18; MCI Reply at 17-18; AmericaTel Reply at 13.

165 Teleglobe Comments at 31.

166 CTS Comments at 6; Transworld Comments at 6-7.

common carrier submarine cable or satellite provider.[167] IDB reiterates its proposal to adopt a definition of a facilities-based carrier as one that acquires the maximum interest allowed by law. IDB also argues that the lease of foreign circuits should be considered facilities-based. IDB contends that our proposed definition will preclude U.S. carriers from offering foreign customers private line services that are interconnected at a U.S. carrier's central office. It also observes that exacerbation of the settlements imbalance is not as great a cause for concern as it once was. IDB also concludes that its maximum interest test does not send the wrong message to foreign countries regarding liberalization of facilities-based services because our proposed standard itself should make clear the Commission's intent. In any case, argues IDB, terminology should not dictate a regulatory framework.

Discussion

129. We find our proposed definition of a facilities-based carrier as modified below, to be more workable than IDB's maximum interest test. Our definition can be applied in a uniform manner, whereas a maximum interest test would treat the same configurations differently based on differing regulatory structures. IDB's proposed definition also could have the undesirable effect of treating as resellers certain carriers that are currently considered facilities-based. Specifically, carriers that lease capacity in U.S. non-common carrier submarine cables or in separate satellite systems are considered facilities-based despite the fact that they do not obtain the "maximum interest" allowed by law. Further, IDB's definition could appear to legitimize limiting competition in foreign markets to resellers of foreign half-circuits provided by a monopoly carrier. Finally, IDB is concerned that our proposed definition may cause a U.S. facilities-based carrier to lose its facilities-based characterization because it interconnects its U.S. half-circuit with a leased foreign half-circuit.[168] We clarify here that our definition of a facilities-based carrier focuses solely on the U.S. half-circuit. Our definition does not consider the nature of a U.S. carrier's interest, if any, in the corresponding foreign half-circuit.

130. We recognize, however, as pointed out by IDB, CTS, and Transworld, that our past distinctions between facilities-based definitions applicable in private and common carrier systems may have outlived their usefulness. CTS and Transworld urge us to strive, wherever possible, to ensure that our rules do not inadvertently impede new carriers from providing service between U.S. and foreign markets. We therefore adopt the proposal to treat as facilities-based a carrier that leases a half-circuit on a common carrier cable. We see no reason to classify carriers differently based on the regulatory classification of the underlying facility that they use to carry their traffic. We emphasize, however, that the leases we refer to here are of bare capacity only and do not refer to the lease of a private line. A

---

167 IDB Comments at 20.

168 Some commenters read the *Notice* to propose classifying as a reseller a U.S. carrier that owns the U.S. half of an international circuit and leases the matching foreign half-circuit. *See* IDB Comments at 23. We do not regulate carriers in such a manner, and we did not intend this by our *Notice*.

carrier that acquires a lease of bare capacity must operate that U.S. half-circuit under its own operating agreement with the carrier that provides the corresponding capacity on the foreign end. We accordingly amend our rules to define a U.S. international facilities-based carrier as one that holds an ownership, indefeasible-right-of-user, or leasehold interest 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.

131. Teleglobe asserts that our definition of facilities-based carrier is inconsistent with our proposed market access test because this policy only considers facilities-based *ownership* as valid evidence of effective competitive opportunities in a foreign country, while our proposed definition would consider some leases as facilities-based in the United States.[169] We agree with Teleglobe on this point and, accordingly clarify the application of our effective competitive opportunities analysis for facilities-based entry by foreign carriers. Under our effective competitive opportunities test for facilities-based entry, as stated above, we could find that a country offers effective competitive opportunities where it allows competitive carriers to provide facilities-based service over circuits obtained through a lease of bare capacity.[170] We would not find that a country offers effective competitive opportunities for facilities-based entry where it limits competitive carriers to reselling private lines. This approach is entirely consistent with the definition of facilities-based carrier as adopted here.

B. Resale Entry by Affiliates of Foreign Carriers

1. Application of the Effective Competitive Opportunities Analysis to Resale Entrants

132. The *Notice* proposed to continue our current policy on foreign carrier entry by resale of private lines interconnected to the public switched network.[171] We requested comment, however, on whether we should conform the equivalency requirement established in the *International Resale Order*[172] to the entry standard we adopt in this proceeding. We sought comment on whether a consistent approach to determining equivalency and effective market access would make the equivalency standard clearer and more administratively feasible. We also sought comment on the issue of whether we should maintain our open entry policy for resale of switched services and for resale of non-interconnected private lines. For the reasons stated below, we conform our equivalency requirement to the effective competitive opportunities analysis and also apply this analysis to foreign carriers seeking to provide service via switched resale and resale of non-interconnected private lines.

---

169 Teleglobe Comments at 31.

170 *See supra* ¶ 47.

171 *Notice* ¶ 77.

172 7 FCC Rcd 559.

a. Conformance of Equivalent Resale Opportunities with Effective Competitive Opportunities

133. In the *International Resale Order*, we found that a policy encouraging the resale of international private lines would further the public interest in cost-based international telecommunications services and the more efficient use of international facilities. We recognized, however, that allowing "one-way" resale, where resold private lines are used only for inbound switched traffic into the United States, could enable foreign carriers unilaterally to divert U.S. inbound switched traffic to private lines. We found that permitting unilateral evasion of the settlements process would exacerbate the U.S. net settlements deficit and ultimately increase the burden on U.S. ratepayers through, for example, higher rates. We therefore required that applicants seeking to provide switched service over resold private lines demonstrate that the destination foreign country affords resale opportunities equivalent to those available under U.S. law.[173] In our *Notice*, we requested comment on whether we should conform the equivalency test to our proposed effective market access analysis in order to make our standards clearer and more administratively feasible.[174]

134. AT&T and MCI urge replacement of the equivalency approach with whatever market entry test is adopted in this proceeding. AT&T observes that we currently consider in our equivalency determinations not only whether foreign countries offer equivalent resale opportunities as a matter of law, but whether U.S. companies in fact may offer such services on a competitively equal basis with the foreign carrier. To make this determination, AT&T argues, we should consider the same factors we consider under our market entry analysis because equivalency cannot exist unless the test is satisfied. In essence, AT&T argues that we should not allow carriers to offer switched service via resale of private lines from countries that do not allow facilities-based competition.[175] Cable & Wireless and Citicorp oppose replacement of the "equivalency" determination because they find that the equivalency policy has been successful at accomplishing the Commission's goals, while providing certainty and sufficient flexibility to accommodate different market structures and regulatory regimes. Both urge that we not abandon equivalency in favor of a construct more relevant in the facilities-based context.[176]

135. We declined in the *International Resale Order* to adopt specific criteria for determining whether equivalency exists in a given foreign country. We did state, however, that in order for equivalency to exist, the subject foreign country must, at a minimum, permit open entry for, and nondiscriminatory treatment of, U.S. carriers. It also must authorize U.S.-

---

173 *International Resale Order*, 7 FCC Rcd at 562; *see also ACC/Alanna*, 9 FCC Rcd 6240; *fONOROLA and EMI*, 7 FCC Rcd 7312 (1992), *recon.*, 9 FCC Rcd 4066 (1994).

174 *Notice* ¶ 77.

175 AT&T Comments at 49-50.

176 Cable & Wireless Reply at 11-13; Citicorp Reply at 7.

based carriers to interconnect international private lines to the public switched network at both ends. We emphasized that licensing, prices, terms, and conditions afforded to U.S.-based resellers should be equivalent to those made available to foreign-based resellers providing service in their country.[177] Our effective competitive opportunities test as revised is now substantially similar to the framework we have applied in implementing the *International Resale Order*. We modified our effective competitive opportunities analysis based in part on the position of Cable & Wireless and Citicorp that the approach we have followed in applying the equivalency standard has provided certainty and is sufficiently flexible to accommodate a variety of market structures and regulatory regimes. We believe the success of our equivalency standard is largely due to the fact that the emphasis has been on a broad set of guiding principles, rather than on a specific set of requirements that must be met by every foreign country.[178] The four principles we find relevant in evaluating whether effective competitive opportunities exist are essentially the same as those that have guided us in determining the existence of equivalent resale opportunities in a particular country.[179]

136. Because the four effective competitive opportunities principles and the equivalency test are so similar, we believe it will reduce uncertainty and confusion if we restate our equivalency criteria in the same manner as our effective competitive opportunities criteria. We will amend our rules in Section 63.01 to do so. Our rules will thus require that applicants seeking to provide switched service over resold private lines demonstrate that the foreign country at the other end of the private line provides U.S. carriers with: (1) the legal right to resell international private lines, interconnected at both ends, for the provision of switched services; (2) nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carrier facilities for termination and origination of international services, with adequate means of enforcement; (3) competitive safeguards to protect against anticompetitive and discriminatory practices affecting private line resale; and (4) fair and transparent regulatory procedures, including separation between the regulator and operator of international facilities-based services.

137. This restatement of our equivalency standard does not represent a substantive change. In making our equivalency and effective competitive opportunities inquiries, we will focus on the overall effect of the various elements of the foreign regulatory regime on the opportunities for viable operation.[180] A finding of "equivalent resale opportunities" is a finding of "effective competitive opportunities" to resell international private lines for the provision of switched services. To avoid confusion, however, we will continue to use the term equivalency to denote the required finding for authorizing private line resale on a

---

177 *Id.*

178 Cable & Wireless Reply at 11; Citicorp Comments at 3-4.

179 *See supra* ¶¶ 43-55.

180 *See ACC/Alanna,* 9 FCC Rcd 6240, 6254. *See also supra* ¶ 54.

particular route. We do not here adopt AT&T's proposal that we refuse to allow carriers to provide interconnected private line service, for the provision of switched services, to and from a country that does not offer facilities-based competition. Although the existence of facilities-based competition in a given market has been an important factor in our equivalency determination to date, it has by no means been dispositive.

138. Finally, we note that there are two practical distinctions between the two standards. Our effective competitive opportunities test applies only on routes where the foreign carrier applicant controls bottleneck facilities, whereas our equivalency test applies on all routes. In addition, our effective competitive opportunities test requires that these four principles be satisfied in the near future, while our equivalency standard requires that the four principles be satisfied at the time we make an equivalency finding. We retain these two distinctions for purposes of our equivalency analyses because we believe they serve the underlying purpose of the equivalency requirement -- to prevent undue increase in the U.S. settlements deficit.

b. Switched Resale and Resale of Non-interconnected Private Lines

139. The *Notice* proposed to adopt a rebuttable presumption that there is no competitive harm in permitting unlimited foreign carrier entry for switched resale and resale of non-interconnected private lines, even to affiliated countries. In the switched services context, we relied on our conclusion in *International Services* that foreign carrier resale of U.S. international switched services presents no substantial possibility of anticompetitive effects in the U.S. international services market.[181] In the non-interconnected private lines context, we relied on the competitive benefits of such resale and the existence of safeguards to prevent abuse. After taking into account the concerns of several commenting parties, we revise our proposal and find that switched resale and resale of non-interconnected private lines by a foreign carrier do indeed present competitive issues worthy of our scrutiny and that applying the effective competitive opportunities test is the appropriate remedy.

140. Americatel, Cable & Wireless, Sprint and TLD argue that we should maintain our open entry policy for switched resale. Americatel makes the same argument for the resale of non-interconnected private lines. These carriers argue we should not apply the proposed market entry analysis to foreign carriers seeking to offer such service.[182] Cable & Wireless argues in particular that the effective market access standard, as articulated in the *Notice*, is most relevant in the facilities-based context and that there is no prospect that an

---

181 *Notice* at ¶ 74 (citing *International Services*, 7 FCC Rcd at 7335, ¶ 31).

182 Americatel Comments at 6-7; Cable & Wireless Reply at 11-13; Sprint Comments at 39-40; TLD Reply at 50.

effective market access policy for resale would convince a foreign government to open its closed market.[183]

141. AT&T, GTE and MCI argue to the contrary that we should modify our existing policy for switched resale and apply the effective market access test.[184] MCI argues that a foreign carrier should be required to demonstrate affirmatively that its resale of U.S. international switched services would be consistent with the public interest.[185] AT&T opposes foreign carrier entry for resale generally because it argues that the ability to provide service via resale gives a foreign carrier from a closed market an unfair advantage in the marketing of global services. TLD disputes AT&T's argument. It states that the ability to provide service via resale would not allow a foreign carrier to compete effectively with a U.S. facilities-based carrier because it lacks the control over facilities that is necessary to pose a competitive threat in the market for global network services.[186]

142. We find that an open entry policy for switched resale and resale of non-interconnected private lines is no longer desirable in the present international market environment. An open entry policy for resale would allow a foreign carrier that cannot satisfy the effective competitive opportunities analysis to serve the U.S. market via switched resale and resale of non-interconnected private lines, even though it may be barred from serving a given market on a facilities basis. Allowing such a carrier to provide international service via switched or non-interconnected private line resale could give it a significant competitive advantage in marketing global network services to multinational customers that seek a single provider of such services. U.S. carriers that are denied the ability to provide these services in the market of the foreign carrier, whether on a facilities or resale basis, would be unable to provide the same kinds of seamless global network services to their international clients. A foreign carrier from a highly restricted market could provide global services by serving its own market via resale and the rest of the world on a facilities-basis. We find that there is a significant danger that such a marketing advantage will allow a foreign carrier to compete on the basis of access to its closed home market rather than on the basis of price or quality of service.

143. We stated in *International Services* that the competitive concerns associated with switched resale are less significant than those associated with facilities-based entry.[187] In that decision, we found anticompetitive conduct unlikely, and dominant carrier regulation unnecessary, because in order for a foreign carrier to favor its U.S. resale affiliate it would

---

183 Cable & Wireless Comments at 11-13.

184 AT&T Comments at 22-25; GTE Comments at 6; MCI Comments at 19.

185 MCI Comments at 19.

186 TLD Reply at 50-51.

187 7 FCC Rcd at 7335.

necessarily have to favor the underlying U.S. facilities-based carrier as well.[188] We continue to consider it unlikely that a foreign carrier reseller would engage in discriminatory conduct under such circumstances. We therefore reject GTE's proposal that we regulate switched service resellers as dominant. We are concerned, however, that a foreign carrier's ability to provide switched service via resale to a closed market where it possesses market power will provide that carrier with an unfair advantage in marketing global network services. Such unmeritorious advantages create a risk of anticompetitive effects in the emerging market for global network solutions.

144. The record in this proceeding persuades us that resale is a viable form of entry for a foreign carrier. Although an international reseller does not control pricing or operation of the underlying transmission facilities, no party disputes that the existence of multiple U.S. facilities-based carriers provides pricing flexibility for resellers and the technical capability to serve the U.S. end of the market for global, seamless network services.[189] A foreign facilities-based carrier that resells international services in the United States can offer ubiquitous 1+ service as well as dedicated private lines to customers on both ends of a particular U.S. international route, while a U.S. carrier could not make that same representation to U.S. customers seeking end-to-end telecommunications services and "one-stop" shopping. Ultimately, this disserves U.S. consumers because, in the absence of full competition on the merits by all competitors, consumers do not receive reduced rates, increased quality, and innovation.[190] We therefore will apply the effective competitive opportunities test to those foreign-affiliated carriers that seek to provide international service to markets in which they possess market power via switched resale and resale of non-interconnected private lines.

145. Our effective competitive opportunities analysis in this context focusses on whether effective competitive opportunities exist in the destination market of a carrier with market power to provide the particular resale service which the foreign carrier seeks to provide in the United States -- either switched or non-interconnected private line. We consider the particular resale service the carrier seeks to provide in order to guard against marketing advantages that stem from the asymmetrical ability to provide switched or private line service on a resale basis. Although this approach differs from that which we adopt in the facilities-based context, where we focus on the ability to provide IMTS, we find that it is important to encourage market opening on an incremental basis in the resale context. The ability to provide service via resale does not offer as great a potential for anticompetitive conduct as does facilities-based entry.[191] Nor does the ability to market service on an end-to-end basis via resold U.S. circuits provide as great a potential for anticompetitive effects in the

---

188 *Id.*

189 *See* AT&T Ex Parte Presentation in IB Docket No. 95-22 and File No. ITC-95-248, October 5, 1995 at 6-9.

190 *Cf. Notice* ¶ 29.

191 *See Notice* at ¶¶ 75-76.

U.S. international services market as does facilities-based entry, which maximizes a carrier's cost and operational advantages. An incremental approach to authorizing foreign carrier resale, either for switched or non-interconnected private lines, recognizes that not all countries will be able to liberalize their international market at the same pace, and provides benefits to U.S. consumers who will be served by new resale carriers from liberalized countries. We therefore find that considering the ability to resell non-interconnected private lines separately from resale of switched services will provide consumer benefits, significant flexibility for carriers and incentives for them to further encourage liberalization of their markets.

146. In applying our effective competitive opportunities analysis, we first consider the legal ability to provide the relevant resale service in the destination country where the applicant possesses market power. Next, we consider practical barriers to entry, including the existence of reasonable and nondiscriminatory charges, terms and conditions for the provision of such resale service, competitive safeguards to protect against anticompetitive and discriminatory practices affecting resale, fair and transparent regulatory procedures, and separation between the regulator and operator of international facilities-based services. We will amend our rules in Section 63.01 to require that applicants affiliated with a foreign carrier with market power in the destination country provide information on the above factors when seeking authority to provide service via switched resale or resale of non-interconnected private lines.

147. We disagree with Cable & Wireless that applying the effective competitive opportunities test to switched resale will not provide a significant incentive for foreign governments to open their markets.[192] Because our effective competitive opportunities test may preclude a foreign carrier from providing service to closed markets in which it possesses market power, the ability to serve those markets via resale could be very significant for a carrier seeking to provide global seamless services. Indeed, an open entry policy for switched resale could actually cause the effective competitive opportunities analysis in the facilities-based service context to be less effective at opening foreign markets. By allowing a carrier to serve via switched resale a closed market in which it is dominant, entry on a facilities-basis becomes less important, particularly as an initial means of penetrating the U.S. international services market. If such a carrier is barred from serving its closed dominant market altogether, however, the incentive becomes much greater to pressure its government to make the necessary changes to its regulatory regime in order that the carrier may gain access to that route from the United States. Even TLD, which does not support a market entry test, argues that applying the test does not provide a foreign government with sufficient incentives to liberalize its facilities-based services market where there is an open entry policy for resale.[193]

148. As a final matter, it is important for purposes of enforcing our policies on private line resale and interconnection to emphasize what we mean by the term "non-

---

192 Cable & Wireless Reply at 12-13.

193 TLD Comments at 30; *see also* TLD Reply at 50.

interconnected." Our *International Resale Order* confirmed the right of an end user to interconnect its international private line to the public switched network.[194] We did not make any distinction in that order between end user private lines interconnected at the end user's premises or at a carrier's central office. Pending the outcome of our *Further Notice* on this issue,[195] we here confirm that a U.S. end user that subscribes to the international private line offering of a U.S. resale or facilities-based carrier may interconnect its private line to the U.S. public switched network at its own premises or at a carrier's central office. If an end user at any time desires to use a U.S. international private line to provide service to a third party on a common carrier basis, it requires specific prior Section 214 authority to do so.

2. Other Resale Issues

149. In the *Notice,* we requested comment on AT&T's proposal that we adopt cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries.[196] In order to eliminate any confusion over the scope of the prior certification requirement adopted in the *International Resale Order*, we also proposed to codify the requirement that any carrier that seeks to connect a U.S. half-circuit with a leased, foreign private line half-circuit for the provision of a switched, basic service must obtain specific Section 214 authorization to do so.[197]

150. For the reasons stated below, we decline to require cost-based accounting rates as a condition of foreign carrier entry for private line resale. In addition, we find it in the public interest to allow a carrier to connect a U.S. facilities-based private line half-circuit to a foreign leased, private line half-circuit in order to provide a switched, basic service without a demonstration of equivalency. We find that such a configuration should only be allowed, however, where the circuit is interconnected to the public switched network at one end only and the U.S. carrier does not correspond with a carrier that owns the foreign half-circuit. Finally, we will allow hubbing of switched services over resold private lines through equivalent countries to "points beyond," subject to certain conditions.

a. Relevance of Cost-based Accounting Rates

151. AT&T argues that we should adopt cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries. It argues that absent such a precondition the foreign carrier has no incentive to

---

194 7 FCC Rcd at 560.

195 *See Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, CC Docket No. 90-337, 7 FCC Rcd 7927, 7928 (1992) *(Further Notice)*.

196 *Notice* ¶ 78. The *Notice* did not propose any specific action on this topic.

197 *Notice* ¶ 79.

reduce its accounting rate because its U.S. affiliate can avoid the above-cost accounting rate by diverting its outbound traffic over international private lines.[198] Opposing commenters argue that as such resale develops, accounting rates will become less relevant, and competition will put its own pressure on above-cost accounting rates.[199]

152. We decline to require cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries. Such a requirement could deter foreign administrations from allowing resale carriers to serve the United States, and thus would delay or limit an important source of competition to incumbent carriers on routes to the United States. The development of private line resale is a form of arbitrage that will create additional competition, leading to lower accounting rates. We will consider, however, the presence of cost-based accounting rates as a general public interest factor in our review of Section 214 applications to provide international switched service over private lines.[200] Where a carrier can demonstrate that a cost-based accounting rate is available to U.S. carriers on a particular U.S. international route, there would appear to be no public interest reason to prohibit use of private line circuits for the provision of switched services on that route.

b. Provision of Switched Services over Facilities-based Private Lines

153. The *Notice* proposed that any U.S. carrier that seeks to connect its authorized facilities-based half-circuit to a leased, foreign private line half-circuit to provide a switched basic service must obtain specific Section 214 authority to do so. In light of the issues raised by the commenting parties, we find it is not necessary to impose a Section 214 requirement in all such cases. We instead conclude the concerns raised in the *Notice* are better addressed by modifying our proposal to allow U.S. carriers to provide switched services over their authorized facilities-based private lines where those private lines are interconnected to the public switched network at one end only, and where the U.S. carrier does not correspond with a carrier that owns the foreign half-circuit. We conclude that it is not in the public interest to require U.S. carriers in these circumstances to obtain prior Section 214 authorization and demonstrate that equivalent resale opportunities exist in the foreign market. We will require in all other cases that a U.S. carrier obtain Section 214 authorization and demonstrate equivalency prior to providing switched services over its authorized facilities-based private lines.

---

198 AT&T Comments at 35.

199 British Government Comments at 5-6; fONOROLA Comments at 18, n.25; K&S Comments at 8; MFSI Comments at 8.

200 We will also consider as a favorable factor in our review of these Section 214 applications the disclosure of the accounting rates a dominant foreign carrier maintains with carriers in other foreign countries. *See supra*, ¶ 72.

154. IDB argues in response to the *Notice* proposal that we have not properly justified modifying what it sees as a successful policy that permits facilities-based carriers to interconnect their private lines on the U.S. end without making an equivalency demonstration. According to IDB, the *International Resale Order* was meant only to apply to resale of the U.S. end of an international private line, and not to "single-end foreign resale," where the U.S. half-circuit is provided by a U.S. facilities-based carrier rather than by a U.S. reseller. IDB argues that our proposal would preclude U.S. carriers from entering newly open foreign markets and competing for the private line traffic of foreign customers. IDB also argues that any impact on the settlements imbalance due to interconnected private lines is slight. Further, IDB argues that we lack the jurisdiction and authority to impose an additional certification requirement on authorized facilities-based private line carriers.

155. K&S, a small international carrier, also supports the loosening of our rules regarding private line resale. K&S requests that we allow U.S. carriers to provide foreign private line service interconnected to the U.S. public switched network where the foreign market has begun to liberalize, where the private line carrier is unaffiliated with the monopoly or dominant foreign carrier, and where the private line half-circuits are not interconnected to the foreign public switched network. K&S argues that such new entrants provide needed competitive stimulus in foreign markets and that any increase in the settlements deficit caused by this activity is outweighed by the positive competitive impact of new entrants in foreign markets and the downward pressure such services put on collection rates and accounting rates.[201] IDB similarly argues that we should exempt "single-end foreign resale" from our private line resale policy to enable U.S. carriers to enter newly opening foreign markets and allow multinational customers access to "the kinds of IPL (international private line) interconnection configurations which they employ today."[202]

156. It has become evident that a certain amount of uncertainty surrounds our policy regarding the carriage of switched traffic over international private lines. We take here the opportunity to state this policy clearly. In 1991, the *International Resale Order* permitted private line resellers to carry switched traffic over private lines outside the settlements process where equivalent resale opportunities exist in the destination foreign country. Carriers are required to demonstrate in their applications for Section 214 authority to resell international private lines that such opportunities exist.[203] In our subsequent order finding that the United Kingdom offers such equivalent opportunities, we stated specifically that resellers must show equivalency whether the resold private line is interconnected at one or both ends.[204] We did not, however, explicitly adopt a requirement that facilities-based carriers in all circumstances

---

201 K&S Comments at 8; *see also* IDB Comments at 33.

202 IDB Comments at 39.

203 *International Resale Order,* 7 FCC Rcd at 561.

204 *ACC Global Corp. and Alanna, Inc.,* 9 FCC Rcd 6240, 6271 (1994).

obtain additional Section 214 authority to carry switched traffic over their existing facilities-based private lines. By its terms, the *International Resale Order* adopted such a requirement only in circumstances where a facilities-based carrier sought to resell a U.S. private line half-circuit.[205]

157. Because of the confusion surrounding this issue, we proposed to codify the requirement that any carrier that seeks to connect a U.S. half-circuit with a leased, foreign private line half-circuit to provide a switched, basic service must obtain specific Section 214 authority to do so.[206] This codification was proposed in order to apply our equivalency requirement to switched traffic carried over facilities-based private lines so as to bring their treatment in line with that which we adopted for resold private lines. In light of the comments filed in this proceeding, however, we adopt a modified version of this proposal. Those carriers commenting on this issue argue that we should allow a U.S. carrier to interconnect its private lines to the public switched network on the U.S. end, as long as the foreign end is not interconnected to the public switched network. K&S and IDB argue that the beneficial impact of allowing competitive entrants into foreign markets outweighs any concerns resulting from the diversion of traffic from the switched network.[207] We find these arguments persuasive. Although diversion of traffic from the switched network can increase the settlements deficit in the short term,[208] we find that increased competition in foreign markets will have the greater beneficial effect of putting downward price pressure on foreign monopoly facilities-based carriers, stimulating foreign outbound traffic and decreasing the incentive for the foreign carrier to maintain above-cost accounting rates. Further, we find that increased competition in foreign markets generates additional public interest benefits as discussed above.[209] Together, these long term competitive benefits outweigh any short term harm caused by an increase in the net settlements imbalance. We therefore will allow a U.S. facilities-based carrier to provide switched services over its private lines without a demonstration of equivalency, subject to two exceptions as discussed below.[210]

158. We emphasize that we do not find it in the public interest to modify our policy as it was applied in the *International Resale Order*, *i.e.*, to private lines resold on the U.S. end. Our modification applies only to a configuration not directly addressed in that order, the interconnection of facilities-based U.S. private line half-circuits to foreign leased circuits. To

---

205 *International Resale Order,* 7 FCC Rcd at 562.

206 *Notice* at ¶ 79.

207 K&S Comments at 8; IDB Comments at 31.

208 For a discussion of the negative impact of the carriage of switched traffic on an inbound basis only, see *supra,* ¶ 133.

209 *See supra* ¶ 15.

210 *See infra* ¶¶ 159-160.

the extent this new application allows diversion of switched traffic off the settlements regime on an inbound basis, it diverts return traffic from all IMTS carriers (based on their share of proportionate return traffic) to private line carriers. Restricting application of this policy to facilities-based carriers redistributes revenues among U.S. facilities-based carriers, all of which are free to engage in this practice and compete against each other. Opening the policy to resellers would, however, allow resellers to gain at the direct expense of the facilities-based carriers without creating any avenue for facilities-based carriers to recoup lost settlement revenues.

159. There are two circumstances in which we do not believe that the positive competitive effects of our policy described above can justify permitting carriers to use facilities-based private lines to carry switched traffic. The first is where the U.S. carrier corresponds with a carrier that directly or indirectly owns the foreign half-circuit in a market that we have not found to offer equivalent resale opportunities. Allowing switched traffic to be carried over private lines in such an instance would not create any competition to the foreign facilities-based carrier. Where there is equivalency, however, U.S. carriers have the ability to divert outbound switched traffic on to private lines, and any harm from the diversion of U.S. inbound switched traffic is effectively negated. We therefore find it necessary to prohibit a facilities-based carrier from providing switched services over private lines in correspondence with a carrier that directly or indirectly owns those facilities where the foreign market does not offer equivalency.

160. Second, we continue to believe that the potential for diverting large amounts of traffic off the settlements process is too great where the private line circuit is interconnected to the public switched network on both ends. We therefore will allow switched traffic to be carried over facilities-based private lines that are interconnected to the public switched network only on one end. Limiting the provision of these services to instances where the customer must connect to the international circuit via dedicated access on one end would result in this service being provided only to customers with sufficient international traffic volumes to justify the expense of a dedicated local connection. This restriction would thus place an effective limit on the amount of traffic that would be diverted off the switched network.

161. In sum, we will allow U.S. carriers to provide switched services over facilities-based private lines that are interconnected to the public switched network on one end only. Where the U.S. carrier connects its facilities-based private line half-circuit with a foreign half-circuit in correspondence with a foreign carrier that owns the underlying half-circuit, we will require that it obtain additional Section 214 authority and demonstrate that equivalency exists. Likewise, where a U.S. carrier seeks to interconnect its facilities-based private line to the public switched network on both ends, we will also require that it obtain additional Section 214 authority and demonstrate equivalency. A U.S. facilities-based private line may be used to carry switched traffic where it is interconnected on one end only -- either the U.S. end or the foreign end -- without prior separate Section 214 authorization and a demonstration of

equivalency.[211] We reaffirm that this approach applies only to facilities-based private line carriers, and should in no way be read to allow one-way inbound resale absent equivalency.[212] We amend Part 63 of our rules[213] to implement this policy for facilities-based carriers. We also make a conforming change to Section 63.01(k)(5) of the rules to reflect our decision, on reconsideration of the *International Resale Order,* that we did not intend to require applicants seeking to resell international private lines for the provision of private line service to demonstrate equivalency.[214]

162. We do not find persuasive IDB's legal objections that, absent a specific condition in a carrier's Section 214 authorization, we lack authority to limit a carrier's use of its authorized facilities by imposing a prior certification requirement under Section 214. IDB argues that the *Execunet* case does not allow us to require a carrier to obtain additional Section 214 authority to provide services over a facility for which it has already received a Section 214 authorization.[215] IDB states that only an express prohibition imposed upon issuance of the certificate may be used to prevent the provisioning of a particular service over an authorized facility. As we discussed in ¶ 233 *infra*, however, it is well established that the Commission is authorized to modify a carrier's existing Section 214 certificate through notice and comment rulemaking adopting rules of general applicability.

163. IDB also argues that subsection (a) of Section 214 cannot be construed to require that U.S. carriers obtain separate and additional authority for existing authorized capacity depending upon what services are provided and how such services are provided by the foreign carrier to customers on the foreign end. We agree with IDB that Section 214(a) does not require that such additional authorization be granted. Rather, we find that the public convenience and necessity require that we adopt an additional condition under Section 214(c)[216] that such authorization be obtained prior to providing switched service over an interconnected private line. We find it in the public interest to require that authorized U.S. facilities-based international private line carriers obtain Section 214 authority to provide switched services in correspondence with a foreign facilities-based carrier or its affiliate, or to

---

211 We note that this limited exception applies notwithstanding conditions which are in many facilities-based carriers' Section 214 authorizations limiting such offerings absent a finding of equivalency.

212 *See International Resale Order*, 7 FCC Rcd at 560. We do not mean to suggest that carriers may avoid our equivalency policy by merely settling traffic carried over resold private lines under a non-discriminatory accounting rate.

213 47 C.F.R. § 63.01-63.702 (1994).

214 *See Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, CC Docket No. 90-337, 7 FCC Rcd at 7928.

215 IDB Comments at 45 (citing *MCI Telecommunications Corp. v. F.C.C.*, 561 F.2d 365 (D.C. Cir 1977) (*Execunet*)).

216 47 U.S.C § 214(c) (1988).

provide such services over a private line interconnected to the public switched network at both ends. We find this requirement necessary to promote competition and to ensure that private line carriers comply with our policies designed to prevent the diversion of foreign switched traffic on to private lines on a U.S. inbound basis only.[217]

164. Finally, IDB contends that, in adopting a prior certification requirement, we are impermissibly regulating foreign carriers operating in foreign markets.[218] IDB's argument misses the mark. Our requirement that a private line carrier receive specific Section 214 authority to provide switched service via a private line interconnected on both ends or one which is connected to a foreign facilities-based half-circuit concerns only the interconnection of U.S. facilities with specified types of foreign facilities, a practice clearly within our regulatory fold, and does not in any way regulate foreign carriers operating in foreign markets.

c. Provision of Switched Services over Resold Private Lines, including to "Points Beyond"

165. The *Notice* requested comment on whether we should permit a carrier with initial Section 214 authority to resell private lines to a particular country for the provision of switched service to add countries without additional approval once we have found such countries afford equivalent resale opportunities.[219] We have since made a specific proposal on this issue in IB Docket No. 95-118.[220] We stated there that we would incorporate by reference in that docket the relevant comments filed in this proceeding. We therefore do not resolve this issue here.

166. Swidler & Berlin, on behalf of several new international carriers, asks that we modify our policy to permit carriers to provide switched service over resold international private line to "points beyond" a country for which we have made an equivalency finding.[221] It argues that permitting carriers to route traffic between the United States and third countries over resold private lines that are connected to authorized equivalent countries will encourage development of international services competition and place increased pressure on foreign

---

217 *See International Resale Order*, 7 FCC Rcd at 561; *See also ACC/Alanna*, 9 FCC Rcd at 6242.

218 IDB Comments at 42-44.

219 *Notice* at ¶ 79.

220 *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, FCC 95-286, released July 17, 1995, at ¶¶ 20-22.

221 *See generally* S&B Comments.

governments to reduce above-cost accounting rates and open their markets to competition.[222] Swidler & Berlin believes that current Commission policy that restricts the "hubbing" of U.S. originating or terminating traffic through equivalent countries to or from "points beyond" impairs the ability of U.S.-owned carriers to establish competitive service offerings in niche markets abroad and to utilize least cost-routing to configure their networks efficiently. It contends that removal of the points beyond restriction will not have a significant impact on the settlements deficit because the attendant settlements bypass will be small in scope and likely to occur initially more outbound from the United States; and that services such as "country direct" and "call-back" already substantially distort the settlements flow. ACC and MFS concur with Swidler & Berlin's proposal.[223]

167. BTNA endorses the "points beyond" proposal to the extent it applies to U.S.-outbound traffic carried over resold private lines to an equivalent country, where it is then forwarded to its ultimate destination over the public switched network. BTNA reasons that, because its proposal would require the private line reseller to take the IMTS of a foreign facilities-based carrier at published rates in order to hub its traffic through the equivalent country, there could be no realistic possibility or incentive for the terminating country to discriminate in favor of such traffic, because the traffic would be included in the broad IMTS traffic stream. BTNA believes that hubbing or, in its words, "transiting" of U.S. outbound traffic by private line resellers through equivalent countries to third countries would permit U.S. resellers to compete more effectively with facilities-based carriers and place downward pressure on accounting rates. It notes that current Commission policy limits the extent to which private line resellers may capture economies of scale, because U.S. outbound traffic destined for countries not deemed equivalent must be carried separately from traffic permitted to be carried over resold private lines. However, because of a potential adverse impact on U.S. settlement payments, BTNA requests that we condition any routing of U.S.-inbound traffic from non-equivalent third countries on the U.S. private line reseller filing quarterly traffic reports detailing the number of minutes transited from each point of origination. Based on this data, reasons BTNA, the Commission can decide at a future date whether traffic flows warrant any change in policy.

168. Under Swidler & Berlin's proposal, countries which we find to satisfy our equivalency standard for private line resale could operate as "hubs" for the routing of U.S. international traffic. We are concerned, however, that this approach would sanction the routing of U.S.-inbound traffic to the hub country via a private line originating in a non-equivalent third country. Such a configuration would effectively eliminate our policy to

---

222 Swidler & Berlin argues that the routing of U.S.-outbound traffic through equivalent countries will pressure foreign administrations to reduce accounting rates to avoid a diversion of traffic and loss of settlements revenue from directly routed traffic. S&B Comments at 15. It also believes that permitting equivalent countries to become "hubs" for third country-destined traffic will create additional incentives for countries to liberalize their policies.

223 It should be noted that Swidler & Berlin represent both ACC and MFS.

prohibit one-way resale of private lines into the United States.[224] We agree with Swidler & Berlin, ACC and MFS that the routing of traffic in this manner has many pro-competitive benefits, including enhancing the ability of U.S.-based carriers to compete at home and abroad. We find insufficient evidence in the record, however, for such a sweeping reversal of our policies. The comments do not persuade us that the competitive benefits from such a proposal outweigh the potential for significant amounts of U.S.-inbound traffic to be diverted from the settlements process, with no opportunity for U.S. facilities-based carriers to offset lost settlement revenues by routing traffic over resold private lines in the reverse direction.

169. We do, by contrast, find record support for a more cautious approach to the resale of international private lines to "points beyond." We will therefore permit U.S. carriers -- both private line resellers and facilities-based carriers -- to route U.S.-outbound switched traffic over U.S. international private lines that terminate in equivalent countries, and then forward the traffic to a third, non-equivalent country by taking at published rates and reselling the IMTS of a carrier in the equivalent country. Similarly, we will permit U.S.-inbound switched traffic that is carried to an equivalent country as part of the IMTS traffic flow from a non-equivalent third country to be terminated in the United States over resold private lines from the equivalent hub country. We will refer to this practice as "switched hubbing." Certain existing facilities-based and private line resale Section 214 authorizations do not permit this particular routing configuration. Notwithstanding the conditions in these authorizations, our action permits switched hubbing as we have described it. As BTNA suggests, this approach should limit the potential for discrimination among carriers hubbing U.S. traffic through an equivalent country. It should also permit traffic to flow over resold U.S. international private lines in both directions -- both into and out of the United States. Because this approach requires that traffic flows be settled between the facilities-based carriers in the non-equivalent and hub countries, it will limit the amount of U.S.-inbound traffic permitted to be terminated over U.S. international private lines and the potential resulting loss of settlement revenues to U.S. facilities-based carriers from such resale activity.

170. U.S. international carriers that route U.S.-outbound traffic via switched hubbing through an equivalent country shall tariff their service on a "through" basis from the United States to the ultimate foreign destination, just as they tariff any other IMTS offering. We also note that all non-dominant private line resellers are required to file for the first three years after an equivalency finding, on a semi-annual basis, the information required by Section 43.61 of the rules. The current filing manual for Section 43.61 data requires that carriers engaged in private line resale, referred to in the manual as "facilities resale," report their traffic and revenue flows, both inbound and outbound, on a country specific basis.[225] To provide an accurate view of the impact on U.S. traffic and revenue flows from switched hubbing, private line resellers that use such routing alternatives are required to report their outbound and inbound traffic and revenue flows according to the ultimate point of

---

224 *See supra* ¶ 133.

225 *See generally Manual for Filing Section 43.61 Data*, FCC Report 43.61, June 1995.

termination or origination. As a final note, as provided in ¶ 120 *supra*, a foreign carrier may not provide service via switched hubbing to an affiliated market where it is not specifically authorized to do so.

C. Other Forms of Market Entry

1. Domestic Interexchange and Enhanced Services; Separate Satellite and Other Non-common Carrier Systems

171. In the *Notice*, we proposed to apply the proposed rules adopted in this proceeding only to common carriers seeking to provide international facilities-based services pursuant to Section 214.[226] We tentatively concluded that current rules and policies governing domestic interexchange services, enhanced services, separate satellite systems, and other non-common carrier facilities do not warrant change.

172. Parties commenting on this issue agree with our tentative conclusion.[227] Orion notes that the absence of limitations on foreign investment in U.S. separate systems helped it secure needed equity for its non-common carrier system.[228] We do not find any support in the record for imposing an effective competitive opportunities analysis on domestic interexchange or enhanced services, separate satellites or other non-common carrier facilities. We decline to do so for the reasons stated in the *Notice*.[229]

2. Other Satellite Issues

173. Cruisephone argues that a categorical exclusion of international Marine Mobile Satellite Systems (MMSS) and Land Mobile Satellite Systems (LMSS) from the Commission's proposed standards will allow U.S. firms to attract foreign capital and increase the number of potential competitors without creating a risk of anticompetitive conduct by foreign carriers or inhibiting competition. Cruisephone asserts that there is no indication that the adoption of a more restrictive standard for international MMSS or LMSS foreign carrier applications will encourage foreign governments to open their communications markets.[230]

---

226 *Notice* ¶ 80.

227 Ameritech Comments at 3; Citicorp Comments at 4, Reply at 7; Columbia Comments at 4; Cruisephone Comments at 3-4; MCI Comments at 21; Orion Comments at 3; TRW Comments at 3-5; Although AT&T did not comment on this issue, it urged us in its petition for rulemaking to apply a comparable market access standard to all forms of entry in the U.S. telecommunications market.

228 Orion Comments at 3.

229 *Notice* ¶¶ 81-83.

230 Cruisephone Comments at 3-4.

We conclude that there is not a sufficient record at this time to exclude MMSS and LMSS from our market entry standard.

174. PanAmSat and Columbia contend that our proposed effective market access analysis should be expanded beyond the *Notice* to apply to any application proposing use of a non-U.S. licensed satellite. In considering such applications, PAS and Columbia would have us consider the extent to which U.S. satellites have effective market access overseas enabling them to compete with the non-U.S. satellite. They argue that we should not allow foreign satellites to be used to provide service to the United States where the country licensing the satellite does not allow carriers to use U.S. satellites to provide service in its market. They contend that, if satellite providers from countries that preclude or discriminate against U.S. satellite providers are permitted to compete without limitation, the resulting asymmetric market access will be detrimental to both U.S. service providers and consumers.

175. Similarly, Loral/Qualcomm urges us to expand the effective market access analysis beyond the *Notice* to consider whether the degree of openness extends broadly over multiple service segments. Loral/Qualcomm proposes that we consider mobile satellite service (MSS) and other communications services in determining effective market access, including discriminatory and anticompetitive behavior in foreign markets against U.S. Low Earth Orbit (LEO) systems.[231]

176. The request of PanAmSat and Columbia raises several issues: (1) whether there is a need at this time for a formal entry standard to evaluate requests for use of non-U.S. licensed satellites in the United States; (2) if so, what the elements of that standard should be; and (3) whether the record before us supports development of any such standard. We agree with PanAmSat and Columbia that the ability of U.S. licensed systems to serve foreign markets is a legitimate consideration in reviewing applications to use foreign satellite systems in the U.S. market. We also agree that there is a need at this time for a formal standard. However, while PAS and Columbia articulate the general thrust of a formal entry standard that would apply to satellites, the record in this proceeding is insufficient to develop the elements of such a standard. We believe that such a standard more appropriately should be developed within the context of IB Docket No. 95-41, in which we are reviewing our international and domestic satellite policies.[232]

177. For similar reasons we decline to extend our market analysis to multiple service segments as requested by Loral/Qualcomm. The focus of our effective competitive opportunities analysis should remain the provision of international service by U.S. carriers in

---

231 Loral/Qualcomm Comments at 4-5.

232 Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, *Notice of Proposed Rulemaking,* IB Docket No. 95-41, 10 FCC Rcd 7789 (1995).

a foreign market.[233] In this respect, restrictions on a U.S. carrier's ability to obtain access to MSS or other satellite systems licensed to operate on the foreign end of a U.S. international route would be relevant to our effective competitive opportunities analysis. Also, notwithstanding whether or not a satellite system is U.S.-licensed, or whether it is being utilized for MSS or fixed services, a Section 214 application by a foreign carrier to provide service to or from the United States using satellite system capacity will be subject to our effective competitive opportunities analysis.

178. TRW urges us to treat foreign carriers that own an Inmarsat-P system with Comsat as affiliates of Comsat for purposes of applying the rules adopted in this proceeding -- apparently in order to make a Comsat application to provide Inmarsat-P service subject to the proposed effective market access analysis. Motorola also urges us to use our authority under Section 308(c) of the Act to consider market access in conjunction with the provision of Inmarsat-P services in the United States.[234] As we read the comments of TRW and Motorola, they seek similar relief for MSS services as requested by PanAmSat and Columbia for the satellite services provided by their systems. United States policy supports the Inmarsat-P system subject to the existence of principles to assure fair competition in MSS services agreed to by the U.S. government at the Tenth Inmarsat Assembly of Parties.[235] These principles include access to national markets on a nondiscriminatory basis for all mobile satellite communications networks subject to spectrum availability. We can utilize our authority under Section 214 and Title III, as appropriate, to assure satisfaction of these principles in considering applications for U.S. participation in and provision of Inmarsat-P services. Comsat currently has one such application pending, and the Executive Branch has filed comments on that application pursuant to its authority under the Communications Satellite Act of 1962, as amended.[236] In view of this pending application and the particular circumstances surrounding U.S. policy on Inmarsat-P, we conclude that Comsat applications involving Inmarsat-P entry into the U.S. market should be considered outside this rulemaking proceeding.

V. SECTION 310(b)(4) STANDARD FOR INDIRECT FOREIGN OWNERSHIP OF RADIO LICENSES

179. Section 310(b)(4) of the Communications Act establishes a 25 percent benchmark applicable to foreign investment in and ownership of the parent company of a common carrier, broadcast, aeronautical fixed, or aeronautical en route licensee, but gives the Commission discretion to allow higher levels of foreign ownership as long as the Commission

---

233 *See supra* ¶ 121.

234 TRW Comments at 2; Motorola Comments at 13.

235 *See* Report of the Tenth (Extraordinary) Session of the Inmarsat Assembly of Parties, December 5-9, 1994.

236 Application of Comsat Corporation (FCC No. 106-SAT-MISC-95) filed May 1, 1995.

determines that such ownership would not be inconsistent with the public interest.[237] In our *Notice*, we asked whether the market access test proposed for the public interest determination under Section 214 also should be incorporated as an important (but non-dispositive) factor in the public interest analysis under Section 310(b)(4).[238] We also requested specific comment on whether the market access standard, if adopted as part of the Section 310(b)(4) public interest analysis, should apply in the context of broadcast licenses, which traditionally have been treated differently from common carrier licenses due to the broadcasters' control over the content of their transmissions.[239]

180. A majority of the commenters in this proceeding support the adoption of some variation of a market access test for *common carrier* licenses.[240] They argue that including such a test in our public interest analysis will promote global competition in communications markets. Those who commented on applying a market access test to *broadcast* licenses are fairly evenly split among favorable and unfavorable responses.[241] Those in favor cite the benefits to competition and the lack of offsetting national interest, while those opposed argue that the effective market access test is irrelevant to the statute's underlying purpose and might adversely affect minority broadcast ownership. ARINC opposes applying the market entry test to aeronautical licenses since the Commission has never even had a request for foreign investment above the benchmark level for this license category.[242] Many parties, whether in favor of or opposed to the market access test, propose that Section 310 foreign ownership

---

237 Section 310(b)(4) provides in pertinent part:

> No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by . . . any corporation directly or indirectly controlled by any other corporation . . . of which more than one fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. § 310(b)(4).

238 *Notice* at ¶ 92.

239 *Notice* at ¶ 103.

240 AT&T, AirTouch, AmericaTel, Arch Communications Group, C&W, Inc., Columbia Communications Corporation, CTIA, Department of Justice, E.F. Johnson, Loral/QUALCOMM, MCI, Motorola, and PanAmSat.

241 Four parties endorse the new test (MPAA, Cook Inlet, Heftel, and NBC) and five oppose it (Professor Jonathan D. Aronson, Fox Television Stations, Inc., Minority Media Telecommunications Council, NTIA, and Univisa).

242 ARINC Comments.

restrictions be further liberalized or even abolished, because they are no longer needed to serve their intended function of safeguarding national security.

181. The parties also differ on the mechanics of applying the effective market access test, if adopted. Their views diverge on such matters as what foreign market(s) should be compared to the U.S. market, what segment, or segments, of the market, or markets, should be compared, and what governmental body should make the comparison.

182. Our review of the record leads us to conclude that the effective competitive opportunities test set forth in Section III, *supra*, would be appropriate to include as an important element in our public interest determination under Section 310(b)(4) for foreign investments in U.S. common carrier licensees. We will not however, apply an effective competitive opportunities test for broadcast or aeronautical licenses at this time. This outcome is consistent with our practice of treating broadcast licenses differently in determining whether to allow foreign ownership above the statutory benchmark level. Since the Commission lacks any historical guidance with respect to foreign ownership of aeronautical licenses, we also decline to apply the proposed test in that context.

183. Although Section 310(b)(4) gives the Commission the discretion to allow foreign ownership above the 25 percent benchmark level, that discretion has been exercised sparingly.[243] We believe that, by adopting a clear and explicit effective competitive opportunities public interest criterion, this *Report and Order* will result in a more open and competitive U.S. telecommunications market by informing foreign investors how to maximize their investment opportunities in this country. Adopting this test also will promote a competitive U.S. telecommunications market by creating additional opportunities for the Commission to find that foreign investments in excess of the Section 310(b)(4) benchmark are consistent with the public interest. We believe that the methodology outlined below provides a framework that will allow both the Commission and potential applicants to apply the test to yield predictable and consistent results in the Section 310(b)(4) context by: (1) identifying a single "home market" for each foreign investor; (2) making the comparison on a service-by-service basis; and (3) focusing in the first instance upon *de jure* restrictions on alien ownership. As we did in the context of Section 214, we will refer to this as the "effective competitive opportunities," rather than the "effective market access," analysis.

---

[243] *See, e.g., C&W*, FCC 95-422 (October 17, 1995); *Fox Television Stations, Inc.*, FCC 95-313 at ¶ 21 (July 28, 1995); *BT/MCI*, 9 FCC Rcd 3960 (1994); *Teleport Transmission Holdings*, 8 FCC Rcd 3063 (1993); *GCI Liquidating Trust*, 7 FCC Rcd 7641 (1992); *IDB Communications Group, Inc.*, 6 FCC Rcd 4652 (1991); *MMM Holdings, Inc.*, 4 FCC Rcd 8243 (1989); *GRC Cablevision*, 47 F.C.C.2d at 467-68.

A. Desirability of the Effective Competitive Opportunities Analysis for Section 310 Determinations

1. Common Carrier Licenses

184. Those parties that favor adoption of an effective market access test as part of the Commission's public interest determination under Section 310(b)(4) for common carriers do so on a number of grounds. They acknowledge that Section 310(b) is perceived by some foreign governments as a highly restrictive barrier to entry into the U.S. market and that explicitly adding this factor to our public interest analysis will help encourage other countries to open their markets, create a level international playing field, and promote global competition.[244] Because common carriers generally exercise no control over the content of their transmissions, these commenters find little basis for concern over national security.[245] They also favor having a similar test apply under both Section 310(b) and Section 214.[246]

185. Some commenters oppose including the effective market access criterion in the Section 310(b)(4) public interest analysis for indirect investment in common carrier licensees. They argue that it is unfair to hold foreign-owned firms hostage to the policies of their home governments.[247] They also contend that the proposed test would not be compatible with, and might actually constitute a *de facto* violation of, international agreements.[248]

186. We agree with the majority of commenters in this proceeding, who favor the addition of an effective market access test to our analysis as a mechanism for promoting an open and competitive communications market. Like those commenters, we recognize that foreign ownership limitations may inhibit the ability of U.S. firms to compete in foreign markets because foreign countries use Section 310(b) as a reason to deny U.S. companies entry into their markets. Lifting those limitations to the extent that other countries do so in their own markets can allow new investors and new players to compete in our market, thereby increasing competition in the provision of U.S. telecommunications services, while at the same time ensuring that U.S. investors have similar opportunities to compete in foreign markets. The promise of increased access to the U.S. telecommunications market should be a significant incentive for foreign countries to reduce or eliminate their own barriers to foreign investment.

---

244 *See, e.g.,* AirTouch Comments at 3; Arch Comments at 5; AT&T Comments at 38-40; Motorola Comments at 1; PanAmSat Comments at 2-3.

245 *See* Arch Comments at 9; Roamer Comments at 7-8.

246 *See, e.g,* France Telecom Comments at 27-28; PanAmSat Comments at 2-3; Sprint Comments at 35.

247 *See* OFII Comments at 2-3; Roamer Comments at 4-5.

248 *See* German Government Comments at 2; Korean Government Comments at 4.

187. We do not believe it is unfair to hold foreign carriers accountable for the policies of their home governments. We adopt an effective competitive opportunities test for such entities because of the incentives they have to maximize profits by impeding or foreclosing competition in the radio-based services in which they participate or with which they compete. This test gives those entities desiring greater access to the U.S. market the incentive to encourage their governments to allow more open and competitive home markets, to the benefit of competition in telecommunications markets worldwide. Those firms that operate in closed and noncompetitive markets may continue to enjoy the advantages of operating in the sheltered environment of their own home markets, but they will also remain subject to the Section 310(b) restrictions currently in place in this country. Furthermore, while non-carrier foreign investors may not have the incentive to maintain closed foreign markets, these same potential foreign investor entrants have the ability and should have the incentive to support liberalization efforts within their home markets.

188. As some commenters note, it is possible that application of the effective competitive opportunities test as part of our Section 310(b)(4) analysis could implicate international agreements. As discussed below, however, we will defer to the Executive Branch on any matter involving the interpretation of international agreements.[249] Such deference should ensure that we apply our analysis consistent with this country's international obligations.

189. We recognize that common carriers are progressing toward providing programming over common carrier facilities which they control. This is, however, still an emerging trend and is likely to be only a *de minimis* part of any common carrier's business in the near future. Thus, the traditional distinction between common carrier licenses and broadcast licenses is still valid at this time and justifies the disparate treatment accorded to those services in this *Report and Order.*

2. Broadcast Licenses

190. There was much more resistance to applying an effective market access test to indirect investment in broadcast licensees. Fox Television argues that such a test would be inconsistent with and irrelevant to the statute's underlying purpose of preventing foreign control.[250] MMTC objects on the ground that by opening the U.S. market to foreign investors, the new standard could adversely impact the prospects for minority broadcast ownership.[251] The Korean and German Governments also raise the concern that the proposed

---

249 *See* Section V.B.4, *infra.*

250 Fox Comments at 5-7; *see also* Univisa Reply at 5.

251 MMTC Comments at 2-4. MMTC argues that foreign investors will tend to finance larger U.S. companies, which typically are not minority-controlled. If the Commission nonetheless chooses to apply the effective competitive opportunities test to broadcast applicants, MMTC proposes that the Commission also adopt rules that will encourage foreign investment in minority-controlled companies

test might conflict with international agreements in this context as with common carrier licenses.[252]

191. Others support the idea of applying the effective market access test in the broadcast context. The MPAA argues that the traditional concern over the potential distribution of propaganda and misinformation by alien-owned mass media has been alleviated by the proliferation of news and entertainment sources available to U.S. customers, making room for new factors to be included in the Commission's assessment of the public interest.[253] Cook Inlet and Heftel agree that there is no basis for treating broadcasters differently from common carriers in the Section 310(b) analysis.[254] NBC contends that the social, cultural, political, and national security concerns that underlie restrictions on alien investment in foreign markets are so ingrained that only the incentive of a resulting departure from the 25 percent statutory benchmark in this country can overcome the bias against foreign ownership of broadcast facilities in other countries.[255]

192. Foreign ownership of broadcast licenses presents different questions than for other types of radio spectrum licenses, especially in view of the public trustee concept applied to broadcasting in this country.[256] Historically, foreign control of limited broadcast information outlets, particularly in time of war, was a principal consideration in adopting the foreign ownership limitations.[257] Although somewhat diminished, the same concerns exist today, namely, that foreign control of a broadcast license confers control over the content of widely available broadcast transmissions. Therefore, we should not at this time lift restrictions on the amount of foreign influence over, or control of, broadcast licenses that allow editorial discretion over the content of their transmissions. We note that the Executive

---

by, for example, allowing higher levels of foreign investment if made in a minority-controlled company. Id.

252 German Government Comments at 2; Korean Government Comments at 4.

253 MPAA Comments at 4-5.

254 Cook Inlet Reply at 5; Heftel Reply at 13-14.

255 NBC Comments at 5.

256 The public trustee concept for broadcast licensees is discussed in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

257 The legislative history of Section 310 is discussed at length in *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8468-72 (1995).

Branch shares our view of the continuing need for treating broadcast licenses differently for purposes of exceeding the benchmarks imposed in Section 310(b)(4).[258]

193. Affording broadcast licenses disparate treatment from common carrier licenses is consistent with the distinction that the Commission has consistently drawn in applying Section 310(b)(4). The language in the pending legislation before Congress also makes this distinction.[259] Although we have allowed common carrier licensees to exceed the statutory benchmark, in each case, we have noted that alien ownership of broadcast licenses would present a different issue.[260] By contrast, the Commission almost never has allowed alien ownership of a broadcast licensee to exceed that level.[261] Creating the potential for higher levels of alien ownership for broadcast licenses thus would be a far greater departure from our prior course than it is for common carrier licenses.

194. We recognize that the burgeoning number of information and entertainment sources has lessened the concern that misinformation and propaganda broadcast by alien-controlled licensees could overwhelm other media voices. Although somewhat alleviated, this concern remains a real one. We do not believe that the time has yet come to ease restrictions on alien ownership of broadcast licenses to the extent that would result from the implementation of an effective competitive opportunities test in the broadcast context.

3. Aeronautical Licenses

195. ARINC is the sole licensee for aeronautical en route and fixed services in the conterminous United States and Hawaii. It is the only party that filed comments on the application of an effective market access test in the aeronautical context. ARINC opposes use of that test for aeronautical licenses, arguing that the international marketplace for aeronautical services is fundamentally different from that which has developed for common carrier services. Moreover, because the Commission has never been presented with questions

---

258 *See Hearings on H.R. 514 Before the Subcomm. on Commerce, Trade & Hazardous Materials of the House Committee on Commerce*, 104th Cong., 1st Sess., March 3, 1995 (testimony of Larry Irving, Asst. Secretary for Communications and Information, Dept. of Commerce).

259 We note that Congress is currently considering legislation that would allow application of the effective competitive opportunities test to common carrier licenses, based on the same grounds that have led us to adopt that standard. *See* S. Rep. No. 23, 104th Cong., 1st Sess. 3, 33-34 (1995); H.R. Rep. No.204, 104th Cong., 1st Sess. 120-22 (1995).

260 *See, e.g., MMM Holdings, Inc.*, 4 FCC Rcd 8243, 8252 n.33 (1989)("Because radio common carriers are not responsible for message content,' character considerations, while relevant, do not carry the same crucial significance as in broadcast proceedings"); *GRC Cablevision*, 47 FCC 2d 467, 468 (1974) ("our action here represents no departure from our traditional policies in regulation of broadcast television," as "alien ownership in that medium presents different questions").

261 *Cf. Fox Television Stations, Inc.*, FCC 95-313 (July 28, 1995) (allowing foreign ownership of television stations to exceed benchmark level under unique historical circumstances of the case).

as to foreign ownership and control of licenses in the aeronautical en route and fixed services, ARINC argues that a general policy developed for other services would be inappropriate and that the public interest would be better served by a case-by-case determination based upon the specific facts presented should such an issue arise in the aeronautical context.[262]

196. We agree with ARINC that the effective competitive opportunities test should not be applied at this time in the aeronautical context. Aeronautical services play a critical role in aviation safety in the United States, and their proper use in supporting air navigation is vital to national security. The Commission has not had an opportunity to consider the implications of allowing foreign ownership above the 25 percent statutory benchmark in this context, and we are unwilling to establish a rule where we have no historical guidance.

B. Methodology for Implementing Effective Competitive Opportunities Analysis

197. Whenever an application presents the Commission with more than 25 percent foreign ownership of a company that directly or indirectly controls a licensee subject to Section 310(b), we must determine whether the proposed level of foreign ownership is consistent with the public interest. In this *Report and Order*, we adopt an effective competitive opportunities test as an important element in that determination as it applies to foreign investment in common carrier licensees. Many parties, whether opposed to or in favor of adoption of that test, suggest ways in which it could be implemented to best serve the public interest. In addition, Congress has given us additional guidance in the proposed legislation.

198. Under our methodology, we find that if an alien entity or combination of entities ultimately controls more than 25 percent of the capital stock of the parent company of an applicant for a common carrier license, we will determine the "home market" of each such alien entity based on an analysis of its principal place of business. We will then apply our effective competitive opportunities analysis to the radio-based service in the home market analogous to that service in which the foreign investor seeks to participate in the U.S. market.

1. Identifying the Appropriate National Market for Comparison

199. In the *Notice*, we referred to a comparison of market access in the "primary markets" served by the alien entities or investors seeking entry into the U.S. market.[263] Some commenters argue that the "primary market" concept should not be used in the Section 310(b)(4) context. Both CTIA and Motorola assert that the term might undermine Commission objectives by creating unintended limitations on entry into the U.S. market that would result in barriers to entry into foreign markets by U.S. companies. CTIA suggests

---

262 ARINC Comments at 10.

263 *Notice* at ¶ 95. *See supra*, ¶ 110.

clarifying the definition of "primary market" so as to avoid such unintended consequences.[264] Motorola finds the concept of "primary market" unworkable and, instead, prefers focusing on the foreigner's "home market."[265]

200. The arguments made by CTIA and Motorola are well taken. An alien investor could have any number of "primary markets" as that term was defined in our *Notice*. We previously decided to modify the "primary market" concept as it applies in the analytical framework of Section 214 in order to identify foreign "destination markets" in which an applicant may have sufficient market power to discriminate against unaffiliated U.S. international carriers.[266] This is an important consideration in determining the public interest in allowing a particular foreign carrier to provide U.S. international service between the United States and a market in which the carrier has monopoly or other economic market power. Under Section 214, we can apply the effective competitive opportunities test to any number of destination markets in which the foreign carrier has market power to achieve our stated goals.

201. Section 310(b)(4), on the other hand, does not necessarily focus on the consequences of affording an alien investor the ability to provide service between the United States and particular foreign markets; rather, it considers in all cases the consequences of affording an alien investor the ability to provide a service within this country. We agree with the commenters that these differing concerns call for different analytical tools. Under Section 310(b)(4), we must make a single determination to allow or prohibit the proposed foreign investment. We cannot simply assess the openness of the market at the other end of a proposed international route (if any), but instead presumably would have to simultaneously assess all markets in which an applicant had sufficient market power. Depending upon the methodology chosen for this assessment, a multinational entity could find itself effectively held hostage by the policies of a single government with a closed market. If we were instead to attempt to balance the totality of the markets in which such a corporation had market power, we necessarily would introduce uncertainty into the process. We therefore believe that, for purposes of our analysis of effective competitive opportunities under Section 310(b)(4), we must identify a "home market" upon which to perform our analysis.[267]

202. In identifying a home market for this analysis, we could look simply to the country in which the corporate entity is organized. In an age in which complicated investment, co-marketing, joint venture, and other alliance relationships are a common fact of

---

264 CTIA Comments at 6.

265 Motorola Comments at 3.

266 *See* Section III.D.3, *supra*.

267 We note that the use of a single "home market," rather than either a "primary market" or "destination market," is consistent with the approach taken by congress in the pending legislative revision of Section 310. *See supra* note 259.

international business life, however, we believe that the place of organization might not be sufficient alone to identify the proper market for our effective competitive opportunities analysis. Moreover, we are concerned that potential foreign investors might try to manipulate the process by engaging in a form of international corporate "forum shopping," trying to associate themselves with liberal foreign communications markets in order to justify a departure from the Section 310(b)(4) benchmark.

203. We believe that an alien investor's home market should reflect its principal place of business, the market with which it has the most contact and therefore most fairly is associated.[268] This may often be the same as the entity's place of organization, but that may not always be the case. In fashioning a workable definition of home market, therefore, we have considered the body of law developed by the federal courts in determining a corporate entity's "principal place of business" for purposes of federal diversity jurisdiction.[269] Using the framework for determining a corporation's "principal place of business" for jurisdictional purposes as a guide can assist us in determining the appropriate market for comparison under Section 310(b)(4). This jurisdictional concept is well tailored to that analysis since it is designed to yield only one principal place of business.[270]

204. In determining an entity's principal place of business for this jurisdictional purpose, the courts look at the totality of its business activity to identify both the place in which that entity has its "nerve center" from which direction and control of its business conduct radiates and the place in which the entity carries out its business operations.[271] When

---

268 Although Motorola suggested using a "home market" rather than a "primary market" for our analysis, it did not suggest how best to determine an alien investor's "home market." *See* Motorola Comments at 3-5.

269 Federal courts have diversity jurisdiction over cases in which the parties are citizens of different states and the amount in controversy exceeds $50,000. *See* 28 U.S.C. § 1332(a). Such jurisdiction "is founded on the assurance to non-resident litigants of courts free from susceptibility to potential local bias." *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945). For purposes of diversity jurisdiction, by statute a corporation is deemed to be a "citizen" of its principal place of business. A corporation is also deemed to be a "citizen" of its state of incorporation. *See* 28 U.S.C. § 1332(c)(1) ("For purposes of this section . . . a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."). The two locations thus described can be deemed to be the corporation's center of gravity, such that it is sufficiently "local" in either jurisdiction to avoid unfair prejudice. *See Dimmitt & Owens Financial, Inc. v. United States*, 787 F.2d 1186, 1190 (7th Cir. 1986).

270 *See Gafford v. General Elec. Co.*, 997 F.2d 150, 161 (6th Cir. 1993); *J.A.Olson Co. v. City of Winona*, 818 F.2d 401, 406 (5th Cir. 1987).

271 *See Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 914-15 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1057 (1994); *Gafford*, 997 F.2d at 162; *Harris v. Black Clawson Co.*, 961 F.2d 547, 549 (5th Cir. 1992); *Vareka Inv., N.V. v. American Inv. Properties, Inc.*, 724 F.2d 907, 910 (11th Cir.), *cert. denied*, 469 U.S. 826 (1984); 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3625, at 621-24 and 161 (2d ed. and Supp. 1995).

the nerve center and the center of its business operations are not located in the same place, the courts balance the facts of each case to determine the citizenship that is most fairly attributable to the business.[272]

205. The courts have identified a number of factors that may be of use in determining an entity's principal place of business for jurisdictional purposes. These factors include the location of the investment principals, officers, and directors of the entity,[273] the location of its headquarters,[274] the location of its tangible property, including production facilities,[275] and the place from which the entity derives its greatest volume of sales and revenues.[276] All of these factors are weighed in an effort to determine the center of gravity of the entity's business function that can most fairly be said to be its "principal" location.

206. We believe that a similar analysis would be appropriate in identifying the home market of alien entities that seek to obtain indirect ownership of common carrier licensees. Since the jurisdictional analysis described above relates generally to determining which state within the United States is a corporation's "principal place of business," we will modify the factors slightly to reflect the international scope of our inquiry.

207. Therefore, in determining an alien entity's home market for purposes of our public interest determination under Section 310(b)(4), we will identify: (1) the country of its incorporation, organization, or charter; (2) the nationality of all investment principals, officers, and directors; (3) the country in which its world headquarters is located; (4) the country in which the majority of its tangible property, including production, transmission, billing, information, and control facilities, is located; and (5) the country from which it derives the greatest sales and revenues from its operations. If all five of these factors indicate that the same country should be considered to be the entity's home market, it will be presumed to be

---

272 *See United Nuclear Corp. v. Moki Oil & Rare Metals Co.*, 364 F.2d 568, 570 (10th Cir.), *cert. denied*, 385 U.S. 960 (1966); *Neat-N-Tidy Co. v. Tradepower (Holdings) Ltd.*, 777 F. Supp. 1153, 1156 (S.D.N.Y. 1991).

273 *See Quaker State Dyeing & Finishing Co. v. ITT Terryphone Corp.*, 461 F.2d 1140, 1144 (3d Cir. 1972); *KS Corp. v. Chemstrand Corp.*, 198 F. Supp. 310, 315 (S.D.N.Y. 1961).

274 *See Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991); *Riggs v. Island Creek Coal Co.*, 542 F.2d 339, 342 (6th Cir. 1976); *Masterson-Cook v. Criss Bros. Iron Works, Inc.*, 722 F. Supp. 810, 812 (D.D.C. 1989).

275 *See Grinter v. Petroleum Operation Support Serv., Inc.*, 846 F.2d 1006, 1008 (5th Cir.), *cert. denied*, 488 U.S. 969 (1988); *Quaker State*, 461 F.2d at 1144; *Anniston Soil Pipe Co. v. Central Foundry Co.*, 329 F.2d 313 (5th Cir. 1964) (*per curiam*); *Kelly v. United States Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960).

276 *See, e.g., Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990)(determination based on state from which corporation derived 61% of sales, 69% of operating income, and 64% of receivables).

so, subject only to rebuttal based on clear and convincing evidence to the contrary. If these five factors yield inconsistent results, however, we will balance them, as well as any other information that is particularly relevant to the case, to determine the appropriate home market under the totality of the circumstances.

208. In most cases, we believe that our analysis will identify a single home market relevant to any given case. The possibility remains, however, that in certain circumstances we might have to consider more than one home market. One such example could arise in the context of aggregate multiple carrier interests, in which two or more foreign carriers acquire a combined interest in a U.S. carrier which either exceeds, or causes the applicant to exceed, 25 percent and they are likely to act in concert to influence the affairs of the licensees.[277] We expect that such cases will be rare. However, where circumstances are such that our analysis should take into account competitive opportunities in a number of different markets, we will not hesitate to do so.

2. Identifying the Appropriate Market Segment for Comparison

209. Once the appropriate home market has been identified, we must decide the scope of the effective competitive opportunities inquiry. For example, we could make a market-wide determination of competitive opportunities. Such an analysis would be virtually unaffected by the particular service in which the foreign investor sought to participate in the U.S. market. In the alternative, we could break the home market down into sectors defined by the type of facility involved in the service proposed -- *e.g.*, the satellite sector vs. the wireless terrestrial sector. We also could sharpen the focus still further by analyzing the specific service in the foreign investor's home market in which it proposed to invest in the U.S. market.

210. Those parties who comment on the market definition issue differ over what the Commission should be comparing to determine effective competitive opportunities. Most advocate a service-by-service approach, arguing that it is the fairest and most practical alternative.[278] NBC proposes a slight variation on this approach that would require absolute mirror image investment rights to exist in the alien investor's home market.[279] Motorola proposes another variation that would allow a comparison within categories of similar services (*e.g.*, wireline as well as wireless services), with the goal of achieving greater flexibility.[280] Two commenters propose separating the competitive opportunities analysis entirely from consideration of particular applications, one by making a single market-wide determination for

---

277 *See* Section III.D.1.c, *supra*.

278 AirTouch Comments at 6; Arch Comments at 6-7; French Government Comments at 3; MCI Comments at 27.

279 NBC Comments at 6-7.

280 Motorola Comments at 5.

each country,[281] and the other by determining constraints on all content-based services in the home market and applying any resulting limitation to the alien's proposed investment in the United States.[282]

211. We agree with those commenters who support a service-by-service approach. This approach has a number of advantages over the less focused alternatives. First, it narrows the scope of our inquiry, which makes the analysis more practicable and less time-consuming to perform. Instead of assessing foreign entry restrictions applicable to an entire market or to a large sector of it, we need only identify those restrictions directly applicable to the relevant service. Second, this approach leads to greatest certainty and predictability of result, since it has the fewest variables. It is far less likely that a particular service will be open for some purposes but closed for others, than it is that a sector or an entire market could have some open aspects and other closed aspects. Third, this approach provides continual incentives for market opening, whether a particular service is the first one being liberalized or the last one, since each time a country opens a new service to U.S. investors, it independently has the effect of opening the U.S. market to its own investors. If instead a country were required to open an entire sector of its market, or the telecommunications market as a whole, in order to create comparable opportunities in the U.S. market, we might create a first step so daunting that many countries would refuse to take it. We believe that rewarding each step toward market liberalization will encourage a greater number of countries to act and will still enable those willing to open large sectors or their entire market to enjoy comparable opportunities in the U.S. market.

212. We therefore conclude that a service-by-service comparison will best serve our goal of encouraging foreign governments to open their telecommunications markets to U.S. participation and investment. Because liberalization of each service in a foreign market will result in additional opportunities for foreign participation in the U.S. market, this approach will also achieve our goal of promoting effective competition in this country. We therefore conduct our effective competitive opportunities analysis under Section 310(b)(4) by comparing restrictions on U.S. participation in the home market for the particular wireless service in which the foreign investor seeks to participate in the U.S. market. If the services in the U.S. and home markets are not precisely matched, we will use the most closely substitutable wireless service in the home market, as determined from the consumers' perspective.

---

281 OFII Comments at 4.

282 MPAA Comments at 5. The French government specifically opposed this approach as irrelevant to this proceeding. French Government Reply at 15.

3. Factors of the Effective Competitive Opportunities Analysis

213. Once we have identified the appropriate comparable service within the appropriate home market, we can conduct our analysis of effective competitive opportunities available within that service to U.S. companies and investors. As in the context of Section 214, we believe that the first factor -- *de jure* restrictions -- should be the initial focus of our inquiry for purposes of Section 310(b)(4). This focus also will result in greater predictability in applying our effective competitive opportunities analysis. To the extent they are relevant, however, we will also consider the practical, or *de facto*, limitations on U.S. participation, including the price terms and conditions of interconnection, competitive safeguards, and the regulatory framework of the relevant market(s).[283]

214. If we determine that U.S. interests are allowed to hold a controlling interest in a provider of the relevant service in the relevant home market, then the effective competitive opportunities test would justify placing no limit on the level of alien ownership in the U.S. service provider, absent significant *de facto* barriers. If we determine, however, that U.S. interests are *not* allowed to acquire and hold a controlling interest in a provider of the relevant service in the relevant home market, then the effective competitive opportunities test would support allowing the foreign applicant to exceed the 25 percent statutory foreign ownership benchmark only up to the level of ownership available to U.S. interests. For example, if Country A allowed a U.S. company to acquire a non-controlling forty percent interest in a cellular licensee, then an investor from Country A would be able to acquire up to a non-controlling forty percent interest in the holding company of a cellular licensee in the U.S. market.

215. We believe that this approach will encourage other countries to continue to lift restrictions, even if only incrementally, by rewarding each step taken. Were we to enforce the benchmark unless and until U.S. interests could acquire control in the home market, we would risk creating too high a hurdle for action by other countries and also unnecessarily penalize U.S. companies seeking foreign investment. Conversely, were we to adopt the suggestion of several commenters and apply the effective competitive opportunities test only when an alien enterprise seeks to acquire a controlling interest in a U.S. company,[284] we would greatly decrease the incentive for foreign governments to open their communications markets to U.S. participation at a higher but non-controlling level. We will therefore apply this test to any proposed foreign ownership above the 25 percent benchmark level. We will, however, continue to allow foreign investors to acquire ownership interests up to the statutory benchmark level even if the home market limits U.S. interests to less than the same 25 percent level of ownership.

---

283 *See supra*, Section III.B.

284 *See, e.g.*, Fox Comments at 6; France Telecom Comments at 28; Sprint Comments at 36.

4. Consideration of Additional Public Interest Factors

216. As in the Section 214 context, in addition to our effective competitive opportunities analysis, we will consider other public interest factors that weigh in favor of, or against, foreign investments subject to Section 310(b)(4). These additional factors include the general significance of the proposed entry to the promotion of competition in the U.S. telecommunications market, any national security, law enforcement, foreign policy and trade concerns raised by the Executive Branch, and the extent of alien participation in the applicant's parent corporation (in particular the presence of alien officers and directors in excess of the statutory benchmarks). These factors have always been germane to our Section 310(b)(4) analysis.[285]

217. NTIA and OFII suggest that the Executive Branch, and not the Commission, should make the determination of whether effective competitive opportunities exist and whether there is an overriding international obligation that also should affect the public interest determination under Section 310(b)(4).[286] Motorola suggests instead that the Commission coordinate with other government agencies in making its determination.[287]

218. We believe that the Commission should make the effective competitive opportunities determination as part of its overall assessment of the public interest. The Commission has been responsible for regulating foreign ownership of its Title III licensees ever since Section 310 was enacted as part of the Communications Act of 1934. The statute specifically gives the Commission broad discretion in applying Section 310(b)(4). Over the last sixty years, we have been called upon many times to determine the public interest under this section, and we see no reason to abdicate that responsibility now.

219. We also recognize, however, that other federal agencies have developed specific expertise in matters that may be relevant in particular cases, such as international trade, national security, law enforcement, and foreign policy. In any given case, a requested departure from the statutory benchmark may implicate any one or a combination of those concerns by, for example, conflicting with or having other consequences under this country's international treaty obligations or running counter to an international trade or foreign policy established by the Executive Branch. The Commission has no desire to run afoul of any such legitimate concerns. Our goal is to complement and support Executive Branch policies in these areas and, therefore, we will coordinate with appropriate executive agencies to make sure that our actions are consistent with national policy. Accordingly, in making our public interest determination, we will accord deference to the views of the Executive Branch on any

---

285 *See BT/MCI*, 9 FCC Rcd at 3964 and n. 40.

286 NTIA Comments at 18; OFII Comments at 4.

287 Motorola Comments at 9.

national security, law enforcement, foreign policy, or trade policy concerns, or the interpretation of international agreements.[288]

VI. JURISDICTION ISSUES

220. In our *Notice*, we asked for comment on the scope of our statutory jurisdiction to consider effective market access as an important element of our public interest analysis under Sections 214 and 310(b)(4) of the Act.[289]

221. Most commenters on this issue, including Justice and NTIA, agree that we have jurisdiction to consider the availability of effective market access as part of our overall public interest analysis under Sections 214 and 310(b). Justice states that our policy is especially warranted "in light of the substantial harms that foreign carriers with monopoly rights or market power can cause to U.S. consumers of international telecommunications services and the potential for full facilities-based competition in foreign countries to redress these harms...."[290] NTIA observes that the effective market access test simply refines our established precedent of considering the character of foreign markets as part of our public interest analysis for Section 214 applications.[291] NTIA further observes that we have concurrent authority with the Executive Branch to protect competition involving telecommunications carriers by enforcing antitrust laws such as the Clayton Act.[292] A few commenters, however, argue that we are attempting to set trade policy and, thus, are encroaching on the duties of the Executive Branch.[293]

222. We believe that each of the three goals we have adopted is squarely within our mandate under Section 1 of the Act to create a "rapid, efficient, Nation-wide *and world-wide* wire and radio communications service with adequate facilities at *reasonable charges*."[294]

---

288 In order to facilitate input from the Executive Branch, the Commission will alert appropriate executive agencies whenever an applicant seeks to exceed the statutory benchmark.

289 *Notice* ¶ 39 (citing 47 U.S.C. §§ 214, 310 (1995)).

290 DOJ Comments at 22; NTIA Reply at 8.

291 NTIA Reply at 8. ("The Commission's intent in proposing a new rule...appears to be to provide a greater measure of certainty for foreign investors by formalizing considerations of market openness that were previously undertaken without specific written criteria or standards. In addition, the Commission seems to be proposing a new rule to codify past practices and to more carefully reflect competition policy.")

292 NTIA Comments at 10.

293 Deutsche Telekom Reply at 11-12; TLD Reply at 22; OFII Comments at 4; Sprint Comments at 23-25; Sprint Reply at 7-9.

294 47 U.S.C. § 151 (1995) (*emphasis added*).

Moreover, we conclude that we have jurisdiction under the Act to adopt the effective competitive opportunities analysis as part of our public interest determination under Sections 214 and 310(b)(4) as set forth in this *Report and Order,* and that this does not infringe upon trade policy or other matters within the primary jurisdiction of the Executive Branch. Further, we believe that our action in this rulemaking is consistent with our responsibilities under the Clayton Act to consider anticompetitive issues under the public interest standard.[295]

A. Jurisdiction Under Section 214

223. Section 214 expressly directs the Commission to take action as the "present or future public convenience and necessity require."[296] In applying this standard to foreign carrier Section 214 applications to enter the U.S. market, the Commission previously has considered the competitiveness of foreign markets. For example, in *International Competitive Carrier,*[297] we determined that the public interest required close monitoring of foreign carriers' U.S. international operations to ensure that markets were not manipulated in such a way that would harm U.S. consumers and U.S. carriers. Further, in *Telefonica Larga Distancia de Puerto Rico,* we stated: "We...consider the closed nature of foreign markets to be a serious problem because of the potential for discrimination among U.S. carriers terminating traffic in the foreign market."[298] We further noted that "this potential for discrimination could adversely affect the public interest by undermining the benefits of competition, and is one factor, among several, that is relevant to the Section 214 public interest determination."[299] Similarly, in *AmericaTel,* we examined the competitiveness of the Chilean telecommunications market as part of our Section 214 public interest analysis of a Chilean carrier's application to acquire control of AmericaTel, a U.S. facilities-based carrier.[300] In that case, the grant of the Section 214 application depended in part "on the

---

295 15 U.S.C. § 21(1995); 47 U.S.C. § 602(d)(1995) (authorizing the Commission to enforce Section 7 with respect to "common carriers engaged in wire or radio communication"); 15 U.S.C. § 18 (proscribing the acquisition of "the whole or any part" of the stock or assets of another corporation where the effect of such acquisition may be substantially to lessen competition); *see also United States v. F.C.C.* 652 F.2d 72 (D.C. Cir. 1980) (*en banc*) (Clayton Act gives Commission antitrust enforcement responsibilities).

296 47 U.S.C. § 214 (1995).

297 *In the Matter of International Competitive Carrier Policies,* 102 FCC 2d 812, 843 (1985)(*International Competitive Carrier*); *see also BT/MCI,* 9 FCC Rcd 3960, 3964 (recognizing that the pressures of a competitive market minimize the ability of a carrier to engage in anticompetitive conduct); *International Services,* 7 FCC Rcd 7331 (applying dominant carrier regulation to U.S. affiliates of foreign carriers on routes where the foreign carrier has the incentive and ability to discriminate against unaffiliated U.S. carriers).

298 *Telefonica Larga Distancia de Puerto Rico,* 8 FCC Rcd. 106, 109 (1992).

299 *Id.* at 108.

300 *AmericaTel Corp,* 9 FCC Rcd 3993, 4000 (1994).

degree to which we find that market conditions and regulation in Chile are adequate to protect unaffiliated U.S. international carriers from potential discrimination by ENTEL-Chile or from other unfair competitive advantages that may accrue to [AmericaTel] as a result of its affiliation with ENTEL-Chile."[301]

224. TLD concedes that the Commission acted within its jurisdiction in those cases. It attempts to distinguish these cases, however, by arguing that the Commission focused on the potential anticompetitive effects of foreign carrier entry into the U.S. market, not on the acts of foreign governments and the potential effects that foreign market structures might have on the global telecommunications trade environment.[302] TLD argues that, in contrast, the effective market access test regulates both foreign governments and their domestic telecommunications markets and, thus, exceeds our authority.[303]

225. TLD's argument depends on a fundamental misperception of our objective. Our primary goal is to promote effective competition in the U.S. market for international telecommunications services through policies that prevent anticompetitive conduct in the provision of international services or facilities and which encourage foreign governments to open their communications markets to competition. We have adopted a goal of encouraging the opening of foreign markets as a necessary means of promoting U.S. international service competition and preventing anticompetitive conduct -- not as an end in itself. As the District of Columbia Court of Appeals recently reconfirmed, we have ample authority under Section 214 to prescribe the conditions necessary to protect the public interest, convenience and necessity from anticompetitive conduct.[304] Here, we find that open foreign markets are the most effective safeguard against the anticompetitive conduct that could otherwise result from foreign carrier investment in an affiliated U.S. carrier. Further, we find that only with effective competitive opportunities to compete at the foreign end can both the benefits of foreign carrier affiliation and the prevention of anticompetitive conduct actually be achieved.[305]

226. Some commenters also argue that we do not have authority under Section 214 to adopt a foreign carrier market entry test because Section 214 does not expressly mention "reciprocity," and does not authorize us to consider the openness of foreign markets. In support, they point to Congress' express provision of a reciprocity requirement in Sections 308(c) and 310(c) of the Act and in Section 35 of the Submarine Cable Licensing Act, but the

---

301 *Id.* at 4000.

302 TLD Reply at 29-31, *see also* Deutsche Telekom Reply at 6-7.

303 TLD Reply at 24.

304 *Atlantic Tele-Network, Inc. v. F.C.C.*, 59 F.3d 1384 (DC Cir., 1995); *see supra* ¶ 223.

305 *See supra*, ¶¶ 15,16.

absence of such a reciprocity requirement in Section 214.[306] TLD further notes that Congress enacted Section 308 in 1934, the same time that it enacted Section 214, and that this further suggests that it did not contemplate a reciprocity requirement under Title II.[307] It also references legislation introduced in 1993 that, if enacted, would have granted the Commission specific authority to deny a Section 214 application based on a lack of comparable access in the applicant's home market. These commenters also cite *Regulatory Policies and International Telecommunications*,[308] as an example of an Executive Branch challenge to the Commission's authority to adopt reciprocity requirements, and *Second Cable Foreign Ownership Act*,[309] as an example of the Commission declining to adopt a rule of reciprocity for foreign ownership of cable companies.

227. We find these commenters' statutory arguments unconvincing because we are not adopting a reciprocity requirement. As explained above, we are adopting a public interest analysis that is comprised, in part, by an effective competitive opportunities analysis for those Section 214 applications filed by U.S. carriers affiliated with foreign carriers that have the ability and incentive to discriminate against unaffiliated U.S. carriers, thereby harming U.S. consumers and businesses. We apply this standard not to secure open markets as an end in itself, but rather to ensure that U.S. consumers and businesses realize the benefits of effective competition in the provision of their international telecommunications services. We find that effective competitive opportunities on the foreign end of U.S. international routes are necessary to limit the potential for anticompetitive conduct by foreign carriers and to ensure that their entry promotes rather than hinders competition in the U.S. international services market. The fact that Congress did not require us to consider specifically the openness of foreign markets under Section 214 in no way implies that this factor is not relevant under the broader concept of the public interest, convenience and necessity.[310]

---

306 Deutsche Telekom Comments at 7; TLD Reply at 27.

307 TLD Reply at 27.

308 Deutsche Telekom Comments at 14 (citing *Regulatory Policies and International Telecommunications*, 2 FCC Rcd 1022 (1987) ("*Regulatory Policies*") (inquiring into the desirability of adopting an international competitive "model," along with possible retaliatory procedures).

309 TLD Reply at 29-31; Deutsche Telekom Comments at 12 (citing *Second Cable Foreign Ownership Act*, 77 FCC 2d 73 (1980) ("*Second Cable*")).

310 *Atlantic Tele-Network, Inc. vs. F.C.C.*, 59 F.3d 1384 (D.C. Cir 1995) (upholding the Commission's decision to impose proportionate return requirement as part of its public interest analysis). *See also Southwestern Cable v. U.S.*, 392 U.S. 157, 169-170 (1968) (where the court observed that Congress' failure to adopt legislation containing a specific grant of regulatory authority to the Commission does not address whether the Commission already had such authority under its general public interest mandate).

228. The Supreme Court's analysis in *Storer Broadcasting Co.* also supports this conclusion.[311] In *Storer Broadcasting Co.*, the Commission limited the ownership of broadcast stations pursuant to its authority to determine whether the "public interest, convenience and necessity would be served" by the granting of applications under sections 308 and 309 of the Act.[312] Parties challenging these rules asserted that Sections 308 and 309 did not specifically authorize such limitations. The Commission argued that it had the authority to limit the concentration of ownership to protect the public interest. The Supreme Court held the Commission could limit ownership concentration despite the lack of express authority to do so, reasoning that even though "the challenged rules contain limitations against licensing not specifically authorized by statute...that is not the limit of the Commission's rulemaking authority."[313]

229. The *Regulatory Policies* and *Second Cable* proceedings also do not conflict with our conclusion here that the Section 214 market entry standard adopted in this *Report and Order* is within our statutory jurisdiction. In these two earlier proceedings, we considered an investment reciprocity requirement. Here we do not. In *Regulatory Policies*, the Commission was concerned not only with the potential for discrimination by foreign carriers, but also with the ability of U.S. corporations, such as equipment manufacturers, to participate in foreign markets. The Commission ultimately decided in *Regulatory Policies* that this agency should not take regulatory action solely for trade purposes. In *Second Cable*, we declined to adopt a reciprocity requirement on foreign investment in cable television systems. The Commission in that case found no nexus between the proposed reciprocity requirement and its responsibilities under the Cable Act. Unlike this proceeding, there was no concern that foreign investment in U.S. cable companies created the potential for anticompetitive effects in the U.S. cable market.

230. Deutsche Telekom and TLD further challenge our jurisdiction to adopt a market entry test by arguing that Section 2 of the Act limits our jurisdiction to communications or transmissions which begin or end in the United States. They contend that, to the extent the "global" market referred to in the *Notice* extends beyond such communications, regulation of this extended "global" market was not contemplated by Congress.[314] As we clarified in Section II, *supra*, the telecommunications market that is the focus of our regulatory concern in this rulemaking is the U.S. market for international telecommunications service, *i.e.*, telecommunication services that originate or terminate in, or

---

311 *United States v. Storer Broadcasting Co.*, 76 S.Ct. 763, 769-70 (1956).

312 47 U.S.C. §§ 308, 309 (1995).

313 *Storer Broadcasting Co.*, 76 S.Ct. at 770; *see GTE Service Corp. v. F.C.C.*, 474 F.2d 724 (1973)(Congress' failure to grant express authority to Commission to regulate data processing services did not preclude the Commission from doing so pursuant to its general mandate under Section 1 and broad and comprehensive rulemaking authority).

314 Deutsche Telekom Comments at 9-14; TLD Reply at 24.

that transit the United States. This includes the U.S. market for global, seamless network services that increasingly are being used by U.S. businesses. These services require close coordination and cooperation between U.S. and foreign carriers. Permitting dominant foreign carriers to provide U.S. international services when U.S. carriers are denied the opportunity to provide such services on the foreign end of a U.S. international route presents a substantial risk of anticompetitive effects in the U.S. international services market, denying U.S. consumers the benefits of competition among multiple full-service carriers on a given route. We believe that full competition on both ends of a communications link is far more effective than safeguards in achieving effective competition, and offers U.S. consumers the best opportunity to enjoy the benefits of price, quality and service competition.

231. Deutsche Telekom and TLD also claim that the market entry analysis that we are adopting in this *Report and Order* is really a surrogate for requiring reciprocity in investment and that Sections 2 and 3 of the Act limit our authority to "regulation of commerce or transmission" of communications, and not investment.[315] We do not agree the Act precludes us from considering whether foreign entry or investment in the U.S. market is in the public interest. The question of investor identity is also relevant to several issues we have traditionally addressed in our public interest inquiry, including national security and the prevention of anticompetitive conduct.[316]

232. Commenters such as Deutsche Telekom also argue that, even if Section 214 confers jurisdiction to apply a market entry test to transfers of controlling interests, Section 214 confers no jurisdiction to apply such a test to transfers of non-controlling interests because it does not explicitly refer to non-controlling interests.[317] We reiterate that Congress granted the Commission broad jurisdiction in Section 214 to grant applications pursuant to the public interest, convenience and necessity. Congress is not required to expressly authorize us to consider non-controlling investments where this factor is relevant to our public interest analysis.[318]

---

315 Deutsche Telekom Comments at 11. ("Section 3 defines 'foreign communication' as a communication or transmission from or to any place in the United States, to or from a foreign country, or between the United States and a mobile station located outside the United States." *Id.* Section 2 forbids Commission jurisdiction over "any carrier engaged in ... foreign communication[s] solely through physical interconnection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such a carrier."*Id.*)

316 *Cf. In the Matter of Orion Satellite Corporation*, 5 FCC Rcd 4937, 4939 (1990)(addressing investor identity in the context of national security); *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1198-1202 (1986) (adjudicated, broadcast-related violation of antitrust laws by the broadcast applicant is relevant to grant of authority); *modified in* 5 FCC Rcd 3252 (1990) (expanded to include adjudicated violations involving any media of mass communications).

317 Deutsche Telekom Comments at 5, 26-27; France Telecom Comments at 2; Sprint Comments at 7-10.

318 *See supra* ¶¶ 87, 228; *Cf. Storer Broadcasting Co.*, 76 S.Ct. at 770; *GTE Services Corp.*, 474 F.2d at 731.

233. Deutsche Telekom and Sprint further contend that the Commission has no jurisdiction to adopt an effective competitive opportunities analysis because *Execunet* held that Section 214 has only "a limited office with respect to regulation of service offerings on existing lines." They contend that Section 214 primarily prevents unnecessary duplication of *facilities* and that it does not regulate a carrier's provision of *services* on its authorized facilities.[319] To the extent that this Order does regulate services, *Execunet* does not prohibit us from doing so. While *Execunet* references the needless duplication of facilities as the primary purpose of Section 214, at the same time it acknowledges that through the use of proper procedures and findings, the Commission has authority under Section 214 to restrict the services that may be offered over authorized communications lines.[320] Furthermore, the use of this rulemaking proceeding potentially to alter the services a carrier may offer over previously authorized lines does not exceed our jurisdiction as alleged by Deutsche Telekom. In *Execunet*, the court addressed only whether the Commission could, in a tariff proceeding, restrict the services offered by a carrier over facilities previously authorized under Section 214 without express limitations. The court was not faced with, nor did it address, the Commission's authority to modify the terms of a carrier's existing Section 214 authorizations through a notice and comment rulemaking. It is well established that the Commission has the authority, through its broad rulemaking powers, to adopt rules of general applicability that modify existing authorizations and licenses.[321]

234. Finally, commenters argue that, in promulgating the Telecommunications Trade Act (TTA), Congress expressly gave the office of the United States Trade Representative (USTR) jurisdiction over telecommunications trade.[322] They further argue that NTIA's position that the Commission has jurisdiction, so long as it shows "great deference" to the Executive Branch, raises separation of powers concerns and may violate the Administrative Procedure Act.[323] There is no inconsistency between the market entry analysis adopted in this *Report and Order* and the TTA.[324] The market entry analysis adopted in this *Report and Order* and USTR's actions under the TTA are separate, but complementary, approaches.

---

319 Deutsche Telekom Comments at 6 (emphasis in original) (*citing MCI v. F.C.C.*, 561 F.2d 365, 375 (D.C. Cir. 1977)("*Execunet*")). *See also* Sprint Comments at 9,10.

320 *Execunet*, 561 F.2d at 377.

321 *See Committee for Effective Cellular Rules v. F.C.C. & U.S.*, No. 93-1220 (D.C. Cir. 1995)(holding that Commission could properly implement a universal change to the technical requirements for cellular licenses by rulemaking, even though the change resulted in the modification of all existing cellular licenses).

322 TLD Comments at 11-17; Deutsche Telekom Comments at 19. *See also* TLD Comments at 7-8 (FCC cannot assume to itself a power that Congress cannot constitutionally delegate).

323 Deutsche Telekom Reply at 11-12.

324 AT&T Reply at 12-13.

USTR's mandate is to remove trade barriers *per se*, and the Commission's public interest responsibilities lead it to promote competitive communications services and to prevent anticompetitive conduct.

235. We agree with Justice and NTIA, representing the Executive Branch, that the Commission's jurisdiction to protect competition through the market entry analysis adopted in this *Report and Order* does not infringe upon the Executive Branch's ultimate responsibility for trade matters.[325] In this rulemaking, we are not regulating international trade. Rather, we are seeking to promote the consumer benefits of effective competition in U.S. international services and to protect U.S. businesses, consumers and carriers from foreign carriers that have both the ability and the incentive to act anticompetitively.

B. Jurisdiction Under Section 310(b)(4)

236. Section 310, like Section 214, authorizes the Commission to act in the "public interest, convenience, and necessity."[326] Deutsche Telekom and Sprint challenge the Commission's authority to impose a market access test as part of its public interest analysis under Section 310(b)(4). Deutsche Telekom argues that the analysis under Section 310 is limited to considering the public interest benefits of granting or denying individual licenses and that market access considerations are neither explicitly nor implicitly part of the statutory mandate.[327] Sprint similarly argues that the statute does not authorize the Commission to deny foreign ownership or voting, otherwise in the public interest, merely as a device to encourage foreign governments to open their telecommunications markets.[328]

237. Other government agencies and private parties argue that the Commission does have jurisdiction to consider market access in making its public interest determination under Section 310(b)(4). Justice argues that the Commission has jurisdiction to adopt a market access test in furtherance of its general public interest mandate and in exercise of the specific authority granted in Section 310.[329] NTIA, also on behalf of itself and other Executive Branch agencies, agrees that the Commission has jurisdiction to adopt this test and that doing so would send an appropriate signal to encourage the liberalization of the global

---

325 *See supra*, ¶ 38.

326 47 U.S.C. § 310 (1995).

327 Deutsche Telekom Comments at 8-9.

328 Sprint Reply at 24.

329 DOJ Reply at 23.

communications market.[330] AT&T and MCI also agree that the proposed test falls within the Commission's jurisdiction.[331]

238. We believe that the effective competitive opportunities test is a permissible component of our public interest analysis under Section 310(b)(4). The Commission has a general mandate to promote the availability to U.S. consumers of a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,"[332] and a specific mandate under Section 310(b)(4) to allow foreign investment above the benchmark level unless the Commission determines that the investment is inconsistent with the public interest. The effective competitive opportunities test will promote increased competition in the U.S. telecommunications market, thus furthering the public interest by reducing rates charged to consumers, increasing the quality of services, and encouraging the development of new and innovative services for U.S. consumers.

C. Impact on International Trade Policy

239. Various commenters raise international trade policy concerns as reasons why we should not adopt the proposals contained in the *Notice*. We find that none of these contentions presents a persuasive reason why we cannot or should not adopt the public interest analysis set forth in this *Report and Order*. Rather, we conclude that this *Report and Order* is fully consistent, not only with our responsibility to promote the U.S. public interest, but also with the responsibility of the Executive Branch to formulate and execute U.S. international trade policy.

240. Some commenters assert that our proposed rules would interfere with the Executive Branch's exercise of authority to formulate and administer U.S. international trade policy.[333] As discussed above, we reject this contention. We also note that NTIA, in its comments on behalf of the Executive Branch, expresses its support of the proposed rules. No party has demonstrated that our decision to articulate clear standards under which we will authorize foreign entities to provide service in the United States would prevent the Executive Branch from negotiating multilateral or bilateral trade agreements. As a number of commenters have observed, such multilateral negotiations currently are underway under the auspices of the World Trade Organization (WTO). We fully support the objective of these negotiations to open world telecommunications markets. Their successful conclusion would benefit U.S. consumers and carriers by increasing opportunities for end-to-end competition in the provision of basic telecommunications services, thereby leading to lower prices and

---

330 NTIA Comments at 15.

331 AT&T Comments at 41-44; AT&T Reply at 6-9; MCI Reply at 5-7.

332 47 U.S.C. § 151 (1995).

333 *See e.g.*, TLD Comments at 7; TLD Reply at 32; Deutsche Telekom Comments at 14.

greater choice and innovation. If the Executive Branch succeeds in negotiating greater market access for U.S. carriers in exchange for still greater liberalization of the U.S. basic telecommunications market, then we would gladly amend the rules we adopt today as necessary. The ongoing negotiations, however, do not present a bar to the adoption of these rules now.

241. Some commenters similarly contend that our rules would be inconsistent with the so-called "standstill" commitment contained in the *Ministerial Decision on Negotiations on Basic Telecommunications (Ministerial Decision)*.[334] In that decision, each member of the WTO's Negotiating Group on Basic Telecommunications (NGBT) made a political commitment that, during the negotiation, it "shall not apply any measure affecting trade in basic telecommunications in such a manner as would improve its negotiating position and leverage."

242. Deutsche Telekom, for example, claims that the rules we proposed in the *Notice* would constitute measures that the Commission would apply in such a manner as would improve the negotiating position and leverage of the United States.[335] TLD contends merely *proposing* to adopt such rules constitutes applying a measure in such a manner as would improve the negotiating position and leverage of the United States.[336]

243. We find these contentions unpersuasive. Significantly NTIA, in its comments on behalf of the Executive Branch, did not suggest that the proposed rules would violate the standstill commitment of the *Ministerial Decision*. Moreover, it is not clear how our proposed rules improve the negotiating position or leverage of the United States. If the rules proposed to deny access to the U.S. market to foreign entities, this might be the case. The rules we adopt, however, establish standards for allowing foreign entities to enter the U.S. market. Foreign carriers now may not enter the U.S. market unless they file under Section 214 and/or Title III of the Act and demonstrate that their entry would serve the public interest. The rules we adopt today do not change this and, therefore, do not improve the negotiating position or leverage of the United States.

244. Finally, TLD asserts that our proposed rules would be inconsistent with the principle of Most Favored Nation (MFN) treatment established by Article II of the General Agreement on Trade in Services (GATS).[337] As TLD is aware, however, the United States currently has no MFN obligation for basic telecommunications services because neither the

---

334 *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, General Agreement on Trade in Services, Decision on Negotiations on Basic Telecommunications* (Marrakesh, 5 Apr. 1994).

335 Deutsche Telekom Comments at 18.

336 *See* TLD Comments at 22-23.

337 *See* TLD Comments at 21-22.

United States nor any other country has scheduled any commitments in basic telecommunications. If the United States schedules commitments for market access and national treatment at the conclusion of the work of the Negotiating Group on Basic Telecommunication, then we may be obliged to revisit these rules at that time. At present, however, we conclude that Article II of the GATS presents no bar to adoption of these rules.[338]

VII. REGULATORY ISSUES

245. After determining that entry of a foreign carrier is in the public interest, we must then determine the carrier's regulatory status. Whether any U.S. carrier is to be regulated as dominant or non-dominant is in part based on whether that carrier is "affiliated" with a foreign carrier, a determination currently governed by our findings in *International Services*.[339] In that proceeding, we defined a U.S. carrier as an affiliate of a foreign carrier when the U.S. carrier is under common control with a foreign carrier. We use this definition to classify a carrier as dominant or non-dominant on a particular international route based on the market power of its foreign affiliate.[340] In our *Notice*, we requested comment on whether we should revise the definition of affiliation adopted in *International Services* to conform to the one proposed for entry purposes.[341] We adopt that proposal here and, therefore, will consider foreign-affiliated any U.S. carrier with a greater than 25 percent interest (or controlling interest at any level) held by a foreign carrier and any U.S. carrier with a greater than 25 percent interest in, or control of, a foreign carrier.

246. We also proposed in the *Notice* to maintain the basic framework set forth in Section 63.10 of our rules for determining the regulatory status of U.S. international carriers that are affiliated with foreign carriers.[342] We conclude that the regulatory framework set forth in Section 63.10 of our rules has served us well and should be maintained.

---

338 Similarly, the North American Free Trade Agreement (NAFTA) does not contain market access commitments for basic telecommunications services, and thus is irrelevant to our authority to adopt these rules.

339 *Regulation of International Common Carrier Services,* 7 FCC Rcd 7331 (1992).

340 Under the framework adopted in *International Services,* we regulate a U.S. international carrier, whether U.S.- or foreign-owned, as dominant only on those routes where a foreign affiliate of the U.S. carrier has the ability to discriminate in favor of its U.S. affiliate in the provision of services or facilities used to terminate U.S. international traffic. 7 FCC Rcd at 7332-3 ¶ 10.

341 *Notice* ¶ 66.

342 *Notice* ¶ 84, note 65 (describing and citing to our current rules for classifying and regulating a carrier as dominant under our decision in *International Services,* 7 FCC Rcd 7331).

247. We additionally sought comment in the *Notice* on whether we should modify the nondiscrimination safeguards that we traditionally apply to carriers regulated as dominant under our *International Services* decision. We adopt several of those proposals as set forth below. Finally, we also will apply our dominant carrier safeguards (which we codify in this order) to U.S. carriers on routes for which they have formed a non-exclusive co-marketing arrangement or similar joint venture with a dominant foreign carrier that presents a substantial risk of anticompetitive effects in the U.S. international basic services market.[343]

A. Definition of Affiliation for the Purpose of Post-entry Regulation

Positions of the Parties

248. AT&T supports modification of the dominant carrier affiliation standard to conform with the standard we adopt for entry purposes. It finds such action necessary because carriers with affiliations that would trigger the proposed test also possess incentives to discriminate which may require regulatory oversight under our dominant carrier regulatory regime.[344] LDDS advocates a ten percent threshold, as it finds incentives to discriminate exist at this level.[345] MCI and Sprint object to our proposal to conform our two standards. They each assert that lowering the dominant carrier affiliation threshold would serve no purpose other than to conform the two standards for the sake of symmetry. Incentives to discriminate and other anticompetitive concerns could be addressed by conditions placed on the authorization, as was done in the BT/MCI authorization.[346] BTNA asserts that dominant carrier regulation of foreign-affiliated carriers is unnecessary and, similar to MCI and Sprint, maintains that conditions placed on Section 214 authorizations are adequate to address potential anticompetitive concerns.

Discussion

249. As discussed above,[347] we find it necessary to revise our assessment of the potential for anticompetitive incentives created by telecommunications carriers that hold less-than-controlling interests in other carriers. In *International Services*, we found that such incentives required us to impose dominant carrier regulation only on carriers that control, are controlled by, or are under common control with a foreign carrier with market power. In light of recent developments in the market, we now find that the affiliation standard adopted in *International Services* is no longer adequate for the reasons set out in ¶ 78, justifying the

---

343 *See infra,* ¶¶ 253-255.

344 AT&T Comments at 46.

345 LDDS Comments at 11.

346 Sprint Comments at 38-39; MCI Comments at 17.

347 *See supra* ¶ 78.

25 percent affiliation standard for entry purposes.[348] We reject the lower ten percent standard for the same reasons as set out in ¶ 85. We will therefore consider foreign-affiliated those U.S. carriers with a greater than 25 percent interest or a controlling interest at any level held by a foreign carrier, as well as those U.S. carriers with interests of more than 25 percent in, or control of, a foreign carrier.[349] Under our *International Services* decision, a carrier may be regulated as dominant where it is affiliated with a foreign carrier that possesses market power in the destination market.[350] In order to implement our modified definition of affiliation, we adopt the *Notice*'s proposal to require that U.S. carriers notify the Commission within 30 days of the acquisition of an affiliation with a foreign carrier. This notification period will apply except in those cases where prior approval of the affiliation or ten percent investment interest is required.[351]

250. We note that a U.S. carrier is presumed non-dominant under Section 63.10(a)(1)[352] of our rules where it is not affiliated with a foreign carrier within the above definition. We may, however, find that a U.S. carrier should be regulated as dominant where it has a foreign carrier investment that falls below our 25 percent affiliation threshold but which nonetheless presents a significant potential impact on competition. This approach corresponds with that which we adopt in the entry context.[353] We find it may be necessary to apply dominant carrier regulation to such carriers because an investment that presents a significant potential impact on competition may require application of safeguards to ensure that foreign carriers are unable to leverage their market power into the U.S. market for international services through an investment in a U.S. carrier.

251. We do not lower our foreign affiliation threshold merely for the purpose of keeping our dominant carrier regulations symmetrical with our effective competitive opportunities analysis. Although adoption of a dominant carrier affiliation standard at the same level as our new entry standard provides greater administrative feasibility and certainty, the level of both standards is determined by our assessment of the potential for anticompetitive effects. The same anticompetitive dangers that require application of the effective competitive opportunities analysis to foreign carrier investments of greater than 25

---

348 *See International Services,* 7 FCC Rcd 7331.

349 *See also supra* ¶ 92 describing the aggregation of multiple foreign carrier interests for purposes of our affiliation rules and ¶ 87 describing the application of our affiliation rules to foreign carriers that are under common ownership and control.

350 *Id.* at 7334.

351 *See supra* Section III.D.1.e. (specifying the circumstances where prior approval is required). *See also,* Appendix B, Section 63.11, as amended.

352 47 C.F.R. § 63.10(a)(1)

353 *See supra* ¶ 34.

percent in U.S. carriers require that we evaluate such carriers under our dominant carrier regulatory regime. Further, even if this were not the case, we find that it would not be in the public interest to adopt a control standard for application of dominant carrier safeguards and then apply a different set of safeguards, similar to those imposed in the *BT/MCI* transaction,[354] to carriers with less-than-controlling foreign interests, as suggested by MCI and Sprint. Such a two-tiered approach would create a needlessly complicated regulatory regime. We therefore do not find practical the approach advocated by Sprint and MCI. We discuss in Section VII.C., *infra*, the operating safeguards we will codify and apply to U.S. carriers regulated as dominant under our *International Services* decision.[355]

B. Application of Dominant Carrier Regulation to Non-Equity Business Relationships

252. As outlined above, in Section III.D.1.d, we proposed in the *Notice* not to apply the effective competitive opportunities analysis to non-equity business relationships. In response, several commenters voiced serious concern with these arrangements. Many opposed our proposal not to apply the effective competitive opportunities analysis to these agreements and suggested that anticompetitive incentives require that we closely regulate participants in these arrangements.[356] Justice states that the Commission should retain the ability to impose reporting requirements and safeguards. Justice found that it is possible for a relationship closely related to the core monopoly activities of a foreign carrier to give rise to anticompetitive problems even without an equity stake.[357]

253. We conclude, based on the comments submitted for the record, that non-equity business relationships between a U.S. and a dominant foreign carrier that affect the provision of U.S. basic international services could potentially create a risk of anticompetitive conduct that requires regulatory scrutiny. We will therefore impose dominant carrier regulation on a U.S. carrier for its provision of international basic service on particular routes where a co-marketing or other arrangement with a dominant foreign carrier presents a substantial risk of anticompetitive effects in the U.S. international services market. We will apply the guidelines set forth in Section 63.01(r) of our rules for purposes of determining the scope or degree of an allied foreign carrier's market power.[358] We recognize that scrutiny of certain agreements

---

354 *See BT/MCI*, 9 FCC Rcd 3960.

355 *See International Services,* 7 FCC Rcd 7331.

356 *See* ACC Comments at 8-12; BTNA Reply at 9; Deutsche Telekom Reply at 32-34; MFSI Comments at 3-4, 9.

357 DOJ Reply at 16-17.

358 *See* 47 C.F.R. 63.01(r)(7) (to be renumbered as paragraph (r)(8)). This section requires a carrier seeking to be regulated as non-dominant for a particular route to show that its foreign affiliate does not have the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck services or

may be necessary in order to determine whether a carrier should be regulated as dominant as well as to determine whether a co-marketing agreement violates our prohibition on exclusive arrangements. To the extent such agreements are not required to be filed with the Commission under Section 43.51 of our rules, we have ample authority to require that such agreements be filed under Section 211 of the Communications Act in cases where we believe such a review is appropriate.

254. We decline to adopt in this proceeding other specific conditions on U.S. carrier participation in co-marketing or other non-equity arrangements. MFSI proposes a condition that would require an allied (but unaffiliated) foreign carrier to make correspondent agreements freely available "without substantial entry barriers" to U.S. carriers with which it is not allied.[359] We do not find that the record on this issue is sufficiently developed to support such a requirement. We do note, however, that our "no special concessions" requirement prohibits a U.S. carrier from entering into an agreement with any foreign carrier that would preclude the foreign carrier from granting an operating agreement to another U.S. carrier. We also will not adopt MFSI's proposed condition that would require an allied foreign carrier to make available to all U.S. carriers on a simultaneous basis any accounting rate reductions negotiated with its U.S. partner. We previously rejected, in CC Docket No. 90-337, Phase I, a requirement of simultaneity as an unsatisfactory means of addressing discriminatory treatment of U.S. carriers in the settlements process.[360] We adopted other specific measures in that proceeding to address potential discrimination, and there is not sufficient evidence in the record that these measures would fail to protect unaffiliated carriers from discrimination in this context.

255. As a final matter, we see no evidence in this record to contradict the conclusion that *exclusive* co-marketing or other agreements affecting the provision of U.S. basic international services pose an unacceptable risk of anticompetitive harm where the agreement is between a U.S. carrier and a dominant foreign carrier. We view such exclusive agreements as within the scope of the "no exclusive arrangements" condition we have placed on numerous Section 214 authorizations and cable landing licenses stating that: "[the] carrier shall not acquire or enjoy any right for the purpose of handling or interchanging traffic. . . that is denied to any other U.S. carrier."[361] We also view such exclusive agreements as prohibited by the special concessions prohibition applied to foreign-affiliated U.S. carriers under Section 63.14 of our rules.[362] We will continue to enforce these provisions to prohibit any exclusive co-marketing agreement or joint venture between a U.S. and a dominant foreign

---

facilities in the foreign country.

359 MFSI Reply, at 4.

360 *Regulation of International Accounting Rates*, 7 FCC Rcd 8049 (1992).

361 *See e.g., MFS International, Inc.*, 9 FCC Rcd 2275 (1994).

362 *See infra,* note 363.

carrier that, either on its face or in practice, grants exclusive rights to the U.S. carrier for the provision of basic telecommunications services originating or terminating in the United States. We will look favorably on requests to waive these provisions where the U.S. carrier can demonstrate that its allied foreign carrier lacks market power, *i.e.*, the ability to discriminate among U.S. international carriers in the provision of bottleneck services or facilities used to terminate U.S. international traffic. We discuss further in the next section our special concessions prohibition and our traditional "no exclusive arrangements" condition.

C. Operating Safeguards

1. "No Special Concessions" Requirement

256. The *Notice* did not propose modifying our rule that prohibits affiliated U.S. carriers from agreeing to accept special concessions[363] from any foreign carrier or administration regardless of the U.S. carrier's regulatory status as dominant or non-dominant. BTNA requests that we amend and standardize the special concessions prohibition and the "no exclusive arrangements" condition discussed in Section VII. B., *supra*. It also asks that we clarify that the special concessions prohibition is not intended to apply to those carriers that are affiliated with the reseller on the foreign end of a private line. BTNA argues that we have recognized that such affiliations should not pose a threat of discrimination, citing *International Services*.[364]

257. We agree with BTNA that we should conform our special concessions prohibition and our "no exclusive arrangements" condition that we regularly place in our facilities-based and private line resale Section 214 authorizations. We view these provisions as coextensive. We also consider it just as important to our goal of promoting competition to forbid unaffiliated U.S. carriers, as we do affiliated carriers, from accepting special deals from carriers with market power. It is for this reason that we have regularly placed the no exclusive arrangements condition in the above Section 214 authorizations. It is also for this reason that we proposed in the *Notice* to require that any co-marketing arrangement be nonexclusive, or if not, then to be subject to the market entry standard we adopt. Although we have not in the past applied our no special concessions prohibition to all switched resale Section 214 authorizations, any exclusive arrangement or special concession granted to a particular U.S. carrier by a foreign carrier with market power poses an unacceptable risk of anticompetitive harm in the U.S. international services market. The record in this proceeding

---

363 Section 63.14 prohibits affiliated U.S. carriers 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. *See* 47 C.F.R. § 63.14. Section 63.01(r)(3)(i) of the rules, 47 C.F.R. 63.01(r)(3)(i), defines a "special concession" 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 U.S. international carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route.

364 BTNA Comments at 12, n. 22.

confirms this conclusion.[365] Rather than continue to recite the "no exclusive arrangements" language in Section 214 authorizations, we amend Section 63.14 to apply to *all* U.S. international carriers. We will entertain requests to waive this provision where the U.S. carrier can demonstrate that the foreign carrier granting the concession lacks the ability to discriminate against U.S. international carriers in the provision of facilities or services used to terminate U.S.-originated international traffic. We find that a waiver process is necessary in order to assess the market power of the foreign carrier granting the concession. We will revisit our approach to regulating exclusive arrangements as foreign markets eliminate restrictions to entry and adopt competitive safeguards.

258. We thus will continue to prohibit all U.S. carriers, regardless of their regulatory status or whether they have a foreign affiliate, from agreeing to accept special concessions from any foreign carrier. We believe this general rule is necessary because, as we found in *International Services*, in certain cases a foreign carrier may have sufficient market power to discriminate among U.S. carriers in provisioning and pricing of facilities and services.[366] We recognize BTNA's concern that, on its face, this rule prohibits a U.S. carrier from entering into an exclusive arrangement for the exchange of traffic with a foreign reseller. We also agree that, where a foreign reseller has no market power on the foreign end of a U.S. international route, it may not be necessary to prohibit the U.S. affiliate from entering into an exclusive arrangement with its foreign correspondent. Indeed, there may be no harm in permitting the foreign reseller to exchange its resold traffic on an exclusive basis with its U.S. counterpart where, for example, we have made an equivalency determination. We will look favorably upon requests to waive our special concessions prohibition in such circumstances or in other circumstances where the U.S. carrier can demonstrate that the foreign carrier granting the concession lacks the ability to leverage control over bottleneck services or facilities into the U.S. international services market. We believe it remains necessary, however, to maintain our general rule prohibiting foreign-affiliated U.S. carriers from agreeing to accept special concessions from a foreign carrier or administration.

259. We also proposed in the *Notice* to require that a dominant, foreign-affiliated U.S. carrier obtain a written commitment from its foreign carrier affiliate not to offer or provide, with respect to the provision of basic services, any special concessions to any joint venture for the provision of U.S. basic or enhanced international services in which they both participate. AT&T and MCI support this proposal for the reasons stated in the *Notice*.[367] We conclude, however, that such a requirement is unnecessary. We shall maintain our special

---

365 *See e.g.,* Deutsche Telekom Reply at 32-34; BTNA Reply at 9; Teleglobe Comments at 30.

366 *See International Services,* 7 FCC Rcd at 7336. Contrary to BTNA's characterization of our findings in *International Services*, we stated there that: "[W]hile the U.S. carrier's foreign [resale] counterpart may fall within our definition of an affiliated foreign carrier, there appears to be no substantial risk of discrimination against unaffiliated U.S. carriers *where the foreign carrier-affiliate does not own any telecommunications facilities in the foreign market.*" *Id.* at 7334. *(emphasis added).*

367 AT&T Comments at 47; MCI comments at 23.

concessions prohibition and require that all U.S. carriers -- whether or not foreign-affiliated -- certify in their Section 214 applications that they have not agreed to accept special concessions and will not enter into such agreements in the future. Our authority to enforce these provisions against any U.S. carrier that violates our rules or makes a misrepresentation to the Commission, constitutes a sufficient deterrence mechanism.

2. Tariffing Requirements

260. We asked whether we should eliminate the requirement that dominant, foreign-affiliated carriers file tariffs on 45 days' notice with cost support and allow them instead to comply with current non-dominant carrier rules (*i.e.*, file their tariffs on 14 days' notice without cost support).[368] The British Government and Cable & Wireless support the idea because they believe it will reduce administrative burdens and allow carriers to respond more quickly to changes in the marketplace. GTE supports a 14-day notice period if it applies equally to all dominant U.S. carriers.[369] AT&T cautions that shortening the notice period would give foreign carriers a competitive advantage, and MCI argues that it would not give the Commission sufficient time to address possible ratemaking concerns.[370]

261. We adopt modified tariffing requirements for carriers regulated as dominant because of an affiliation or alliance with a foreign carrier. First, we eliminate the requirement that dominant, foreign-affiliated carriers file cost support with their tariffs. We find that the benefits derived from requiring the submission of such information are as a general rule outweighed by the burden imposed by this filing requirement. Moreover, we believe that competition in the market for international services is a better constraint on unreasonable prices than Commission review of a foreign carrier's cost support showing. We have due authority to request such information under the Act, and we will do so when necessary to review the lawfulness of particular tariff filings. As we concluded in Section III.C., *supra*, we are not convinced that foreign carriers can successfully engage in a sustained "price squeeze" harmful to U.S. consumers or carriers. We welcome the price competition that new entrants can bring to the U.S. international services market.

262. Second, we adopt the proposed 14-day notice period for the filing of international service tariffs by dominant, foreign-affiliated carriers. This notice period also will apply to carriers regulated as dominant because of an alliance with a foreign carrier

---

368 *Notice* ¶ 85. Since issuing our *Notice* in this proceeding, we have proposed to reduce to one day the notice period for the international service tariffs filed by non-dominant carriers. *See Streamlining the International Section 214 Authorization Process and Tariff Requirements*, Notice of Proposed Rulemaking, IB Docket No. 95-118, FCC 95-286, released July, 17, 1995 ¶ 52. This proposed change does not affect the rule we adopt here for dominant affiliated or allied carriers.

369 GTE Comments at 7-8; *See Petition of GTE Hawaiian Telephone Company Inc. for Reclassification as a Non-dominant International MTS carrier*, CC Docket No. 85-107 (May 22, 1995).

370 MCI Comments at 22; AT&T Comments at 45, note 56.

which does not involve an equity affiliation. A shortened notice period will provide these carriers with additional flexibility to respond to customer demand. Because we find no reason to continue to require cost support, as a general rule, we also find a 14 day notice period sufficient to permit interested parties and the Commission an opportunity to assess the lawfulness of these tariffs. While we adopt a shortened notice period, we will not accord the international service tariffs filed by these dominant carriers a presumption of lawfulness. The modified notice period that we are adopting for the filing of international service tariffs by dominant, foreign-affiliated or allied carriers does not change the notice period applied to certain U.S. carriers, such as GTE Hawaiian, that are regulated as dominant for the provision of certain international services. Because the regulatory status of these carriers is not based on a foreign carrier affiliation or alliance, this proceeding is not the proper forum for addressing changes in their regulatory treatment.

3. Facilities Authorization and Reporting Requirements

263. We proposed maintaining our requirements that a dominant, foreign-affiliated U.S. carrier obtain prior Section 214 approval before adding (or discontinuing) circuits on those routes for which the carrier is regulated as dominant and that the carrier file quarterly traffic and revenue reports for such routes.[371] Cable & Wireless argues that such a prior authorization requirement is superfluous and allows competitors to discern the business plans of their rivals with no corresponding benefit. It also contends that quarterly traffic and revenue reports provide adequate information for identifying discriminatory behavior.[372] AT&T and MCI, on the other hand, support our proposal to maintain our prior authorization requirement.

264. We do not agree with Cable & Wireless that the prior authorization requirement is superfluous. We must retain the ability to remedy promptly any abuses of foreign market power in the provision of U.S. international services, whether such abuses occur as a result of foreign carrier investment in a U.S. carrier (or vice versa) or as a result of a business alliance between a U.S. and a foreign carrier. Our prior authorization requirement provides us with the ability to monitor the addition of circuits on affiliated routes. Such additions can reveal deviations from expected traffic flows -- for example, in the flow of return traffic from an affiliated country. To the extent a U.S. carrier is engaged in collusive behavior with a foreign carrier, the prior authorization process allows the Commission to condition the grant of additional circuits or to otherwise deny them, rather than to engage in what could be a lengthy revocation process.

265. We recognize that prior authorization imposes costs on all dominant carriers, including AT&T, Comsat and U.S. carriers regulated as dominant for the provision of IMTS

---

371 *Notice* ¶ 86.

372 Cable & Wireless Comments at 11.

for noncontiguous domestic points.[373] These costs include filing fees as well as delays in activating new capacity. We will endeavor to act on these applications as expeditiously as possible. We recently removed the requirement that the full Commission review Section 214 applications for international facilities filed by foreign-affiliated carriers, except to the extent particular applications raise matters reserved for Commission review under our general delegation of authority to the International Bureau.[374] This action should help expedite the processing of these applications. We find that the prior authorization requirement for additions and deletions of international circuits by dominant carriers is necessary to limit the potential for anticompetitive conduct. For the same reason, we maintain the requirement that carriers regulated as dominant because of a relationship with a foreign carrier file quarterly traffic and revenue reports.

4. Recordkeeping Requirement

266. We proposed a new requirement, imposed as a condition in our decision in *BT-MCI*,[375] that a dominant, foreign-affiliated carrier maintain complete records of the provisioning and maintenance of network facilities and services it procures from its foreign carrier affiliate, including, but not limited to, those it procures on behalf of customers of joint ventures for the provision of U.S. basic or enhanced services. AT&T and MCI support this proposal because they find these measures necessary in order to deter discriminatory conduct by a foreign carrier in favor of its U.S. affiliate.[376] Cable & Wireless opposes the proposal. It views such requirements as unnecessary in light of the prohibition on special concessions and other nondiscrimination safeguards.[377] We find that this recordkeeping requirement would constitute a minor burden and that such information would be useful in guarding against improper discrimination. We believe this information is readily available and can be maintained without creating burdensome new procedures. We therefore find that requiring a dominant, foreign-affiliated or allied carrier to maintain such information with respect to network facilities or services it procures from its foreign carrier affiliate or ally would serve the goals of this proceeding and the public interest. We require that this information be available to the Commission upon request.

---

373 Although AT&T has recently been classified as non-dominant for its domestic service, *see Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* FCC 95-427, adopted October 12,1995, we have not yet ruled on AT&T's status for international service.

374 *See Telefonica Larga Distancia de Puerto Rico,* FCC 95-375, released September 5, 1995.

375 9 FCC Rcd 3960.

376 AT&T Comments at 47; MCI Comments at 23.

377 Cable & Wireless Comments at 12.

5. Disclosure of Accounting Rates

267. In our *Notice,*[378] we proposed to require that any foreign-affiliated, facilities-based carrier regulated as dominant on any U.S. international route for the provision of switched service file with the Commission a complete list of the accounting rates that its foreign carrier affiliate maintains with all other countries. We further proposed to apply this transparency requirement to affiliated carriers that we regulate as dominant in their provision of switched basic services via resold private lines. The required list of accounting rates would cover, and specify, all traffic relations and services of the foreign affiliate. We proposed not to apply this requirement to foreign-affiliated carriers that provide switched services on a particular route solely through the resale of U.S. facilities-based carriers' switched services, and also not to apply it to carriers regulated as dominant solely for the provision of private line services.

268. Commenters supporting this proposal argue that such disclosure would be an important step in reducing foreign carriers' ability to discriminate and that such information will assist efforts to obtain lower, cost-based accounting rates.[379] AT&T also argues that the reluctance of some of the commenting parties to file their accounting rates is in and of itself evidence as to why effective market access is needed and why cost-based accounting rates should be a condition of entry.[380]

269. Commenters opposing such a condition argue that the Commission is "overreaching," and lacks jurisdiction over the affiliated foreign carrier.[381] They also argue that it raises serious issues with respect to comity and sovereignty.[382] The British government further elaborates that it is problematic for the Commission to require non-U.S. companies to disclose sensitive commercial information which affects third companies outside of U.S. jurisdiction, that may have no interest in the U.S. market.[383]

270. Other opposing commenters argue that the requested information will be unavailable to U.S. carriers with only a very small amount of foreign investment, that we did not explain how it would be used, and that it is intrusive, burdensome, will add needless cost

---

378 *Notice* ¶ 87-89.

379 ACC Comments at 9; AT&T Comments at 48; SDN Comments at 1; ESI Comments at 4. ACC argues that this proposed requirement should apply to allied carriers.

380 AT&T Reply at 35 n.78. Cost-based accounting rates as a condition to entry is discussed *supra* ¶ 65.

381 France Telecom Reply at 12,13; British Government Comments at 5-7; TLD Comments at 75.

382 *Id.*

383 British Government Comments at 5; France Telecom Comments at 25, 26; TLD Comments at 75.

and delay, and raises questions of confidentiality and the proprietary nature of data.[384] TLD also opposes this proposal on the additional grounds that the requested information is unrelated to foreign entry into the United States. It suggests that if the Commission considers the data essential, it should require this information not just from those U.S. carriers that are owned by foreign carriers but also from U.S. carriers that own foreign carriers.[385] AmericaTel argues that such a precondition could become a significant barrier to entry, and may be used by foreign governments to exclude U.S. companies seeking a toehold abroad.[386] Telex-Chile, likewise, opposes this proposal, arguing that current regulations are adequate to protect U.S. carriers and to promote international competition.[387]

271. We agree with AT&T, ESI and SDN that transparent accounting rates are a helpful competitive safeguard and would be an effective way of reducing discrimination. Indeed, we have consistently reiterated this message in every available international forum. We also recognize, however, that foreign carriers and governments may view this information as proprietary. We therefore decline to adopt our transparency proposal. We will instead consider the disclosure of the U.S. carrier's foreign affiliate's accounting rates as a factor in our general public interest analysis as to whether to grant applications for foreign carrier entry.[388] The absence of such disclosure will not preclude entry into the U.S. market; however, a foreign carrier's disclosure of accounting rates will have a significant and favorable impact upon our analysis. There is evidence that disclosure of accounting rates is occurring. For example, Oftel, the U.K. telecommunications regulator, has decided to publish rates for traffic between the United Kingdom and other OECD countries.[389] This is an encouraging sign that countries are moving in the direction of transparency on their own accord. Because we are adopting a policy of voluntary disclosure we need not address arguments that mandatory disclosure is outside our jurisdiction, overly intrusive and burdensome.

---

384 AmericaTel Comments at 9-11; France Telecom Comments at 25,26; Telex-Chile Comments at 1.

385 TLD Comments at 75-76.

386 AmericaTel Comments at 9-11.

387 Telex-Chile Comments at 1, 2.

388 *See supra*, ¶ 65.

389 *See Statement Issued by the Director General of Telecommunications, Oftel*, released October 3, 1995, p. 3. The Organization for Economic Cooperation and Development (OECD) currently includes the 24 most developed countries.

D. Codification of Proportionate Return

272. In our *Notice,* we proposed to codify our proportionate return policy as a rule of general applicability to all facilities-based carriers.[390] This would mean that all facilities-based carriers, whether affiliated or not, must accept only their proportionate return of traffic from foreign correspondents. We also proposed, however, to grant waiver requests in the public interest.

273. Commenters supporting codification argue that such a requirement is essential in order to keep foreign carriers from discriminating in favor of their U.S. affiliates.[391] They also argue that some carriers have the incentive and the opportunity to command, and in some instances have received, more than their proportionate share of return traffic.[392] Commenters opposing this argue that proportionate return confers a competitive advantage to established international correspondents by encouraging the entrenchment of existing market arrangements.[393] Further, they believe that codification could contravene the spirit of fostering competition and reducing international accounting rates, and may eliminate the flexibility the Commission now has.[394]

274. Due to the importance of this issue we have decided to defer action on it and transfer its corresponding record to a separate proceeding focused on accounting rate issues.[395] We believe that this issue would better be addressed in the context of a proceeding which considers a comprehensive approach to accounting rates and related issues such as proportionate return.

E. Refile

275. We requested comment in the *Notice* on AT&T's proposal to prohibit expressly a foreign carrier or its U.S. affiliate from refiling U.S. originating or terminating traffic. AT&T and MCI urge the Commission to prohibit the refiling of international traffic

---

390 *See, e.g., Telefonica Larga Distancia de Puerto Rico,* 8 FCC Rcd 106,112 (1992); *FTC Communications, Inc.,* 4 FCC Rcd 5633, 5637, n.25 (Com. Car. Bur. 1988); U.S. Sprint, 3 FCC Rcd 1484, 1487 (Com. Car. Bur. 1989) *American Tel. & Tel. Co.* 2 FCC Rcd 6409, 6410 (Com. Car. Bur. 1987).

391 MCI Comments at 24; *see generally,* AT&T Comments at 15-16; AT&T Reply at 21-22.

392 Sprint Comments at 166, 31; TLD Reply at 9, 16.

393 GTE Comments at 9.

394 *Id; see also* SCT Comments at 16.

395 *See, e.g., Regulation of International Accounting Rates,* Phase II, Second Report and Order and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 8040 (1992).

without the consent of both the originating and terminating administrations. AT&T and MCI allege this practice violates ITU regulations and the Commission's proportionate return policy and also injures U.S. carriers and customers.[396] Sprint and Cable & Wireless urge us to defer this issue to a separate proceeding addressing refile.[397] In light of the pending petition for declaratory ruling filed by MCI regarding Sprint's reorigination practices,[398] we will transfer the record in this rulemaking and defer consideration of this issue to that proceeding.

VIII. CONCLUSIONS

276. In this Order, we conclude that the public interest requires that we modify our public interest standard for considering foreign carrier applications to enter the U.S. market to provide international services. We establish three Commission goals that we seek to promote when reviewing such applications: (1) effective competition in the U.S. international telecommunications services market; (2) the prevention of anticompetitive conduct in the provision of international services or facilities; and (3) opening of foreign communications markets. Towards this end, we adopt as an important element of the Section 214 public interest standard consideration of whether there are, currently or in the near term, effective competitive opportunities for U.S. carriers seeking to provide basic, international telecommunications services in the destination markets of the foreign carrier desiring entry. We will continue to consider other factors under our public interest analysis.

277. We also adopt an effective competitive opportunities test as an important element of the Section 310(b)(4) public interest analysis applicable to foreign entity seeking to acquire an indirect ownership interest in U.S. radio common carrier licenses. Thus, when a foreign entity seeks to acquire an indirect ownership interest of more than 25 percent in a common carrier wireless licensee, we will find that an important element of the public interest requirement of Section 310(b)(4) has been met if the home market of the foreign entity offers effective competitive opportunities to U.S. entities to provide the same type of radio-based services as requested in the United States.

IX. PROCEDURAL MATTERS; ORDERING CLAUSES

278. The analysis pursuant to the Regulatory Flexibility Act of 1980[399] is contained in Appendix C.

---

396 AT&T Comments at 52; MCI Comments at 24, Reply at 23; *see also* GTE Comments at 9.

397 Cable & Wireless Comments at 12 n. 22; Sprint Comments at 40, 41.

398 MCI Petition for Declaratory Ruling, ISP-95-004, filed January 27, 1995.

399 5 U.S.C. § 608(1995).

279. Accordingly, **IT IS ORDERED** that the policies, rules, and requirements adopted herein, except those needing OMB approval, **WILL BECOME EFFECTIVE** thirty days after publication in the Federal Register.

280. Matters subject to OMB approval, pursuant to the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, **WILL BECOME EFFECTIVE** upon such approval.

281. This action is taken pursuant to Sections 4, 214, 219, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154, 214, 219, 303(r) and 403.

282. **IT IS FURTHER ORDERED** that this proceeding **IS HEREBY TERMINATED.**

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A
List of Parties Filing Comments

ACC Global Corp. (ACC)
Aeronautical Radio, Inc. (AIRINC)
Airtouch Communications (Airtouch)
AmericaTel Corporation (AmericaTel)
Ameritech
Arch Communications Group (Arch)
Aronson, Professor Jonathan D., Annenberg School for Communication, USC
AT&T Corporation (AT&T)
Australian Government
British Government
BT North America Inc. (BTNA)
Cable & Wireless, Inc. (CWI)
Cellular Telecommunications Industry Association (CTIA)
Citicorp
Columbia Communications Corporation (Columbia)
Communication TeleSystems International (CTS)
Cruisephone, Inc.
Deutsche Telekom AG
DOMTEL Communications, Inc. (DOMTEL)
Economic Strategy Institute (ESI)
E.F. Johnson Company
fONOROLA Corp. (fONOROLA)
Fox Television Stations Inc. (FTS)
France - Directorate General for Posts and Telecommunications
France Telecom
German Government - Bundesministerium Für Post und Telekommunikation
GTE Service Corporation (GTE)
IDB Mobile Communications, Inc. (IDB Mobile)
IDB Communications, Inc. (IDB)
K&S International Communications, Inc.
Korean Government (South)
LDDS Communications, Inc. (LDDS)
Loral/QUALCOMM Partnership, L.P.
MCI Telecommunications Corporation (MCI)
Melillio, Joseph
Mexico Government - Secretary of Communications and Transportation
MFS International, Inc. (MFSI)
Minority Media and Telecommunications Council
Motion Picture Association of America, Inc (MPAA).
Motorola, Inc. (Motorola)
National Telecommunications and Information Administration (NTIA)
National Broadcasting Company, Inc.

NYNEX Corporation (NYNEX)
Organization for International Investment
Orion Atlantic
PanAmSat Corporation (PanAmSat)
Roamer One, Inc. (Roamer)
Sidak, J. Gregory
SDN Users Association, Inc.
Sprint Communications Company L.P. (Sprint)
Swidler & Berlin, Chartered (S & B)
Telecommunications Resellers Association (TRA)
Telefonica Larga Distancia de Puerto Rico, Inc. (TLD)
Teleglobe Inc. (Teleglobe)
Telex-Chile, S.A.
Transworld Communications (U.S.A.), Inc. (Transworld)
TRW, Inc. (TRW)
Univisa, Inc. (Univisa)

List of Parties Filing Reply Comments

ACC Global Corp.
AmericaTel
AT&T
BTNA
Cable & Wireless, Inc.
Canadian Government
Citicorp
Columbia Communications Corporation
Communications Telesystems International
COMSAT
Cook Inlet Region, Inc.
Deutsche Telekom
DOMTEL
European Union
France Telecom
GE American Communications, Inc.
German Government
GTE
Heftel Broadcasting Corporation
Department of Justice (Justice)
MCI
Mexican Government
MFS International
NTIA

Sidak, J. Gregory
Sprint
Teleglobe
TLD
Transworld Communications (USA), Inc.
Univisa, Inc.
US West, Inc.

APPENDIX B

FINAL RULES

Part 63 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 63 -- EXTENSION OF LINES AND DISCONTINUANCE OF SERVICE BY 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. secs. 151, 154(i), 15(j), 201-205, 218, 403, and 533 unless otherwise noted.

2. Section 63.01 is amended by revising paragraphs (k)(5) and (r), redesignating paragraph (k)(6) as paragraph (k)(7), and adding new paragraphs (k)(6), (s) and Notes 1-4 to read as follows:

§ 63.01 Contents of applications.

*****

(k) ***

(5) The procedures set forth in this subsection are subject to Commission policies on resale of international private lines in CC Docket No. 90-337 as amended in IB Docket No. 95-22. If proposed facilities are to be acquired through the resale of private lines for the purpose of providing international switched basic services, applicant shall demonstrate for each country to which it seeks to provide such services that that country affords resale opportunities equivalent to those available under U.S. law. In this regard, applicant shall:

(i) State whether the Commission has previously determined that equivalent resale opportunities exist between the United States and the subject country; or

(ii) Include other evidence demonstrating that equivalent resale opportunities exist between the United States and the subject country, including any relevant bilateral agreements between the administrations involved. Parties must demonstrate that the foreign country at the other end of the private line provides U.S. carriers with:

(A) The legal right to resell international private lines, interconnected at both ends, for the provision of switched services;

(B) Nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carrier facilities for termination and origination of international services, with adequate means of enforcement;

(C) Competitive safeguards to protect against anticompetitive and discriminatory practices affecting private line resale; and

(D) Fair and transparent regulatory procedures, including separation between the regulator and operator of international facilities-based services.

(6) Except as otherwise provided in this paragraph, any carrier authorized under this part to acquire and operate international private line facilities other than through resale shall, for each country for which it seeks to provide switched basic service over its authorized private lines facilities, request such authority by formal application. Such application shall be accompanied by a demonstration that that country affords resale opportunities equivalent to those available under U.S. law. In this regard, applicant shall include the information required by paragraph (5) of this subsection.

(i) No formal application is required under this paragraph in circumstances where the carrier's previously authorized private line facility is interconnected to the public switched network only on one end -- either the U.S. or the foreign end -- and where 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.

(7) If proposed facilities are to be acquired through the resale of the international switched or private line services of another U.S. carrier for the purpose of providing international communications services,

(i) The specific service and the type of service (switched or private line) that the applicant seeks authority to resell; and

(ii) The name(s) of the U.S. carrier(s) and the specific FCC tariffs(s) to be resold.

*****

(r) A certification as to whether or not the applicant is, or has an affiliation with, a foreign carrier.

(1) The certification shall state with specificity each foreign country in which the applicant is, or has an affiliation with, a foreign carrier. For purposes of this certification:

(i) Affiliation is defined to include:

(A) A greater than 25% ownership of capital stock, or controlling interest at any level, by the applicant, or by any entity that directly or indirectly controls or is controlled by it, or that is under direct or indirect common control with it, in a foreign carrier or in any entity that directly or indirectly controls a foreign carrier; or

(B) A greater than 25% ownership of capital stock, or controlling interest at any level, in the applicant by a foreign carrier, or 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; or by two or more foreign carriers investing in the applicant in the same manner in circumstances where the foreign carriers are parties to, or the beneficiaries of, a contractual relation (*e.g.*, a joint venture or market alliance) affecting the provision or marketing of basic international telecommunications services in the United States. A U.S. carrier also will be considered to be affiliated with a foreign carrier where the foreign carrier controls, is controlled by, or is under common control with a second foreign carrier already found to be affiliated with that U.S. carrier under this section.

(ii) Foreign carrier is defined 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, see Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art. 1.

(2) In support of the required certification, each applicant shall also provide the name, address, citizenship and principal businesses of its 10 percent or greater direct and indirect shareholders or other equity holders and identify any interlocking directorates.

(3) Each applicant that proposes to acquire facilities through the resale of the international switched or private line services of another U.S. carrier shall additionally certify as to whether or not the applicant has an affiliation with the U.S. carrier(s) whose facilities-based service(s) the applicant proposes to resell (either directly or indirectly through the resale of another reseller's service). For purposes of this paragraph, affiliation is defined as in paragraph (r)(1)(i) of this section, except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(4) Each applicant that certifies under this section that it has an affiliation with a foreign carrier and that proposes to acquire facilities through the resale of the international private line services of another U.S. carrier shall additionally certify as to whether or not the affiliated foreign carrier owns or controls telecommunications facilities in the particular country(ies) to which the applicant proposes to provide service (i.e., the destination country(ies)). For purposes of this paragraph, telecommunications facilities are defined as the underlying telecommunications transport means, including intercity and local access facilities, used by a foreign carrier to provide international telecommunications services offered to the public.

(5) 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 (r)(3) and (4) 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 30 days file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided. This information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

(6) Each applicant that certifies that it is, or that it has an affiliation with, a foreign carrier, as defined in paragraph (r)(1)(i)(B) and (ii), respectively, in a named foreign country and that desires to operate as a U.S. facilities-based international carrier to that country from the United States shall provide information in its application filed under this part to demonstrate that either:

(i) The named foreign country (*i.e.*, the destination foreign country) provides effective competitive opportunities to U.S. carriers to compete in that country's international facilities-based market; or

(ii) Its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the destination country.

(A) The demonstration specified by paragraph (6)(i) of this subsection should address the following factors:

(*1*) The legal, or *de jure*, ability of U.S. carriers to enter the foreign market and provide facilities-based international services, in particular, international message telephone service (IMTS);

(*2*) 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;

(*3*) Whether competitive safeguards exist in the foreign country to protect against anticompetitive practices, including safeguards such as:

(*i*) Existence of cost-allocation rules in the foreign country to prevent cross-subsidization;

(*ii*) Timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities;

(*iii*) Protection of carrier and customer proprietary information; and

(*4*) Whether there is an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other safeguards; and

(*5*) Any other factors the applicant deems relevant to its demonstration.

(B) The demonstration specified in paragraph (6)(ii) of this subsection should include the same information requested by paragraph (8) of this subsection.

(7) Each applicant that certifies that it is, or that it has an affiliation with, a foreign carrier, as defined in paragraph (r)(1)(i)(B) and (ii), respectively, in a named foreign country and that desires to resell the international switched or non-interconnected private line services, respectively, of another U.S. carrier for the purpose of providing international communications services to the named foreign country from the United States shall provide information in its application filed under this part to demonstrate that either:

(i) The named foreign country (*i.e.*, the destination foreign country) provides effective competitive opportunities to U.S. carriers to resell international switched or non-interconnected private line services, respectively; or

(ii) Its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the destination country.

(A) The demonstration specified by paragraph (7)(i) of this subsection should address the following factors:

(*1*) The legal, or *de jure*, ability of U.S. carriers to enter the foreign market and provide resold international switched services (for switched resale applications) or non-interconnected private line services (for non-interconnected private line resale applications;

(*2*) Whether there exist reasonable and nondiscriminatory charges, terms and conditions for the provision of the relevant resale service;

(*3*) Whether competitive safeguards exist in the foreign country to protect against anticompetitive practices, including safeguards such as:

(*i*) Existence of cost-allocation rules in the foreign country to prevent cross-subsidization;

(*ii*) Timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities;

(*iii*) Protection of carrier and customer proprietary information; and

(*4*) Whether there is an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other safeguards; and

(*5*) Any other factors the applicant deems relevant to its demonstration.

(B) The demonstration specified in paragraph (7)(ii) of this subsection should include the same information requested by paragraph (8) of this subsection.

(8) 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 international communications service to that country may provide information in its application filed under this part to demonstrate that its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the named foreign country. See § 63.10, Regulatory Classification of U.S. International Carriers.

(i) Such a demonstration should address the factors that relate to the scope or degree of the foreign affiliate's bottleneck control, such as:

(A) The monopoly, oligopoly or duopoly status of the destination country; and

(B) Whether the foreign affiliate has the potential to discriminate against unaffiliated U.S. international carriers through such means as preferential operating agreements, preferential routing of traffic, exclusive or more favorable transiting agreements, or preferential domestic access and interconnection arrangements.

(ii) Such a demonstration may also address other factors the applicant deems relevant to its demonstration, such as the effectiveness of public regulation in the destination country.

(s) Each applicant shall certify that the applicant has not agreed to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the U.S. and any foreign country which the applicant may serve under the authority granted under this part and will not enter into such agreements in the future.

(1) For purposes of this paragraph, and of §§ 63.11(c)(2)(iii), 63.13(a)(4), and 63.14, special concession is defined as any arrangement that affects traffic or revenue flows to or from the U.S. that is offered exclusively by a foreign carrier or administration to a particular U.S. international carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route.

(2) The special concessions certification required by this paragraph and by §§ 63.11(c)(2)(iii) and 63.13(a)(4) 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.

Note 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2: The term "U.S. facilities-based international carrier" means one 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.

Note 3: The assessment of "capital stock" ownership will be made under the standards developed in Commission case law for determining such ownership. *See, e.g., Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995). "Capital stock" includes all forms of equity ownership, including partnership interests.

Note 4: In applying the provisions of this section, ownership and other interests in U.S. and foreign carriers will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Attribution of ownership interests in a carrier that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 30% of company X, which owns 60% of company Y, which owns 26% of "carrier," then X's interest in "carrier" would be 26% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in "carrier" would be 7.8% (0.30x0.26). Under the 25% attribution benchmark, X's interest in "carrier" would be cognizable, while A's interest would not be cognizable.]

3. Section 63.10 is amended by revising paragraph (a)(1)-(3), and adding paragraph (c) to read as follows:

§ 63.10 Regulatory classification of U.S. international carriers.

(a) ***

(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) will presumptively be considered non-dominant for the provision of international communications services on that route;

(2) A U.S. carrier that is, or that has or acquires an affiliation with a foreign carrier that is a monopoly in a destination country will 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 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 the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck services or facilities in the destination country. Such a demonstration should address the factors that relate to the scope or degree of the foreign affiliate's bottleneck control, including those listed in § 63.01(r)(8).

*****

(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 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 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 U.S. and foreign carrier participate, which information shall be made available to the Commission upon request;

(3) Obtain Commission approval pursuant to § 63.01 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 within 90 days from the end of each calendar quarter.

4. Section 63.11 is amended in its entirety to read as follows:

§ 63.11 Notification by and prior approval for U.S. international carriers that have or propose to acquire ten percent investments by, and/or an affiliation with, a foreign carrier.

(a) Any carrier authorized to provide international communications service under this part that, as of the effective date of this rule as amended in IB Docket No. 95-22, is, or has an affiliation with, a foreign carrier within the meaning of Section 63.01(r)(1)(i)(A) or (r)(1)(i)(B), or that as of such date knows of an existing ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier by a foreign carrier, or that after the effective date of this rule becomes affiliated with a foreign carrier within the meaning of Section 63.01(r)(1)(i)(A), shall notify the Commission within thirty days of the effective date of this rule or within thirty days of the acquisition of the affiliation, whichever occurs later. For purposes of this section, "foreign carrier" is defined as set forth in § 63.01(r)(1)(ii).

(1) The notification shall certify to the information specified in paragraph (c) of this section.

(2) Any carrier that has previously notified the Commission of an affiliation with a foreign carrier, as defined by Section 63.01(r)(1) immediately prior to the rule's amendment in IB Docket No. 95-22, need not notify the Commission again of the same affiliation.

(b) Any carrier authorized to provide international communications service under this part that knows of a planned investment by a foreign carrier of a ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier shall notify the Commission within sixty days prior to the acquisition of such interest. The notification shall certify to the information specified in paragraph (c) of this section.

(c) The notification required under paragraphs (a) and (b) of this section shall contain a list of all affiliated foreign carriers and shall state individually the country or

countries in which the foreign carriers named in paragraphs (a) and (b) of this section are authorized to provide telecommunications services offered to the public. It shall additionally specify 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.

(1) The carrier should also specify, where applicable, those countries named in paragraph (c) for which it provides a specified international communications service solely through the resale of the international switched or private line services of U.S. facilities-based carriers with which the resale carrier does not have an affiliation. Such an affiliation is defined as in § 63.01(r)(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 § 63.01(r)(2);

(ii) Where the carrier is authorized as a private line reseller on a particular route for which it has an affiliation with a foreign carrier, as defined in Section 63.01(r)(1)(i), a certification as required to be submitted pursuant to § 63.01(r)(4); and

(iii) A "special concessions" certification as required to be submitted pursuant to § 63.01(s).

(3) The carrier is responsible for the continuing accuracy of the certifications provided under this section. Whenever the substance of any certification provided under this section is no longer accurate, the carrier shall as promptly as possible, and in any event within 30 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)(iii) of this section are no longer true. *See* § 63.01(s)(2). This information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

(d) Unless the carrier notifying the Commission of a foreign carrier affiliation under paragraph (a) of this section qualifies for the presumption of non-dominant regulation pursuant to § 63.10(a)(4), it should submit the information specified in § 63.01(r)(8) to retain its non-dominant status on any affiliated route.

(e) The Commission will issue public notice of the submissions made under this section for 14 days.

(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) In the case of a planned investment by a foreign carrier of a ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier, 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 acquisition raises a substantial and

material question, then the carrier shall not consummate the planned investment until it has filed an application under §63.01 and submitted the information specified under paragraphs (r)(6) or (7), as applicable, and (8) of that section, and the Commission has approved the application by formal written order.

5. Section 63.12 is amended by revising paragraph (c)(1) to read as follows:

§ 63.12 Streamlined processing of certain international resale applications.

*****

(c) ***

(1) The applicant has an affiliation within the meaning of § 63.01(r)(3), with the U.S. facilities-based 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); or

6. Section 63.13 is amended by revising the last sentence of paragraphs (a)(3), (a)(4), and (a)(5), to read as follows:

§ 63.13 Streamlined procedures for modifying regulatory classification of U.S. international carriers from dominant to nondominant.

*****

(a) ***

(3) *** For purposes of this paragraph, "telecommunications facilities" are defined as in § 63.01(r)(4).

(4) Any carrier filing a certified list pursuant to paragraph (a)(2) of this section must also provide the "special concessions" certification as required to be submitted pursuant to § 63.01(r)(3).

(5) *** *See* § 63.01(s)(2).

7. Section 63.14 is amended to read as follows:

§ 63.14 Prohibition on agreeing to accept special concessions.

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 or administration with respect to traffic or revenue flows between the United States and any foreign country served under the authority of this part and from agreeing to enter into such agreements in the future. For purposes of this section, foreign carrier is defined as in § 63.01(r)(1)(ii); and special concession is defined as in § 63.01(s).

8. A new Section 63.16 is added to read as follows:

§ 63.16 Special Provisions For U.S. International Common Carriers

(a) Unless otherwise prohibited by the terms of its Section 214 certificate, a U.S. common carrier authorized under this part to provide international private line service, whether as a reseller or facilities-based carrier, may interconnect its authorized private lines to the public switched network on behalf of an end user customer for the end user customer's own use.

(b) Except as provided in paragraph (b)(5) of this section, a U.S. common carrier, whether a reseller or facilities-based, may engage in "switched hubbing" to countries not found to offer equivalent resale opportunities under Section 63.01(k)(5) and (6) under the following conditions:

(1) U.S.-outbound switched traffic shall be routed over the carrier's authorized U.S. international private lines to an equivalent country, and then forwarded to a third, non-equivalent country only by taking at published rates and reselling the International Message Telephone Service (IMTS) of a carrier in the equivalent country;

(2) U.S.-inbound switched traffic shall be carried to an equivalent country as part of the IMTS traffic flow from a non-equivalent third country and then terminated in the United States over U.S. international private lines from the equivalent hub country;

(3) U.S. common carriers that route U.S.-outbound traffic via switched hubbing through an equivalent country shall tariff their service on a "through" basis from the United States to the ultimate foreign destination.

(4) No U.S. common carrier may engage in switched hubbing under this section to a country for which it has an affiliation with a foreign carrier unless and until it receives specific authority to do so under Section 63.01. For purposes of this paragraph, "affiliation" and "foreign carrier" are defined as set forth in Section 63.01(r)(1)(i)(B) and (ii), respectively.

APPENDIX C
FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to Section 603 of Title 5, United States Code, 5 U.S.C. § 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rule Making in CC Docket No. 95-22. Written comments on the proposals in the Notice, including the Regulatory Flexibility Analysis, were requested.

A. NEED AND PURPOSE OF RULES.

This rulemaking proceeding establishes an effective competitive opportunities analysis as an important public interest factor in the Commission's overall public interest analysis of applications filed by foreign carriers to enter the U.S. international telecommunications market pursuant to Section 214 of the Communications Act. It also adopts a similar analysis for determining whether the public interest would be disserved by permitting indirect foreign investment in common carrier licensees in excess of the benchmarks contained in Section 310(b)(4) of the Act. In addition, this proceeding modifies existing rules and policies relating to the definition of a U.S. international facilities-based carrier, the regulation of dominant carriers in the provision of international service, and other rules governing the provision of switched services over international private lines.

B. ISSUES RAISED BY THE PUBLIC IN RESPONSE TO THE INITIAL ANALYSIS.

This rulemaking imposes new regulatory obligations on applicants for international Section 214 authority and authorized U.S. carriers that may have, or seek to have, foreign carrier equity participation. It also imposes new regulatory obligations on U.S. carriers that have significant ownership interests in foreign carriers, and may result in increased regulation of U.S. carriers involved in certain joint venture arrangements with foreign carriers.

We initially proposed to apply an effective market access test to the primary markets of a foreign carrier seeking to operate as a U.S. international facilities-based carrier on any route, whether directly or through an investment in a U.S. carrier. A number of parties raised issues about this approach and offered alternative proposals. These parties argued that such an approach was overly broad, and would be burdensome on applicants and the Commission. As a result of these comments, we have significantly modified our proposed market entry standard, and adopted some of the suggested alternatives. Our more focussed approach will add clarity and certainty to applicants seeking to enter the U.S. market to offer international services. We have adopted a similarly more focussed approach for the effective competitive opportunities analysis under Section 310(b)(4).

C. SIGNIFICANT ALTERNATIVES CONSIDERED.

We have attempted to balance all the commenters' concerns with our public interest mandate under the Act in order to adopt a clear and administratively feasible approach to market entry by foreign carriers. Instead of examining whether effective competitive opportunities exist for U.S. carriers in every primary market where a foreign carrier operates, regardless of whether the foreign carrier seeks to serve such market, we will focus our analysis under Section 214 only on destination countries where the foreign carrier holds market power. Our route-by-route approach reduces the regulatory burden on all U.S. carriers seeking an affiliation with a foreign carrier. We have not adopted the suggestion of some parties to exempt small U.S. carriers from the market entry rules. Whether a dominant foreign carrier makes a significant investment in a small U.S. carrier or a large one, there is a substantial risk of anticompetitive effects. Therefore, we decline to exempt small U.S. carriers from these rules.

We proposed to modify our standard for determining when a U.S. carrier is affiliated with a foreign carrier for purposes of both the market entry analysis and post-entry regulation. We considered investment levels ranging from greater than ten percent to controlling interests at any level. We also considered adopting an affiliation standard based on: the dollar amount of the investment; the percentage of the investment; or the amount of traffic carried by the U.S. carrier in correspondence with the foreign carrier. We additionally considered adopting a reciprocal affiliation standard. Based on the record, we have modified our definition of affiliation and will now consider affiliated any U.S. carrier with either: (i) a greater than 25 percent interest (or a controlling interest at any level) held by a foreign carrier; and (2) any U.S. carrier with a greater than 25 percent interest in, or control of, a foreign carrier.

We will apply our effective competitive opportunities analysis to the first category of affiliated U.S. carriers on routes where the affiliated foreign carrier has market power in the destination country. We will apply our dominant carrier safeguards to <u>all</u> affiliated U.S. carriers on routes where the affiliated foreign carrier has market power. These safeguards will also now apply to U.S. carriers on routes for which they have formed a non-exclusive co-marketing arrangement or other joint venture with a dominant foreign carrier, where such arrangements present a substantial risk of anticompetitive effects.

We have eliminated the requirement that dominant, foreign-affiliated carriers file cost support with their tariffs. This will reduce burdensome filing requirements. We also adopt our proposed 14-day notice period (currently 45 days) for the filing of international service tariffs by dominant, foreign-affiliated carriers. We adopt a new recordkeeping requirement that a dominant, foreign-affiliated carrier maintain complete records of the provisioning and maintenance of network facilities and services it procures from its foreign affiliate or ally. We find that although this requirement is a minor burden, its benefit in preventing anticompetitive conduct outweighs such a burden. We adopt new rules related to the provision of switched services using international private lines. These rules will enhance opportunities for U.S. carriers to serve U.S. consumers more efficiently. We also adopt a

definition of "U.S. international facilities-based carrier" that may facilitate the ability of smaller U.S. carriers to obtain operating agreements.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: *Market Entry and Regulation of Foreign-affiliated Entities*

By today's action, the Commission adopts standards for regulating the entry of foreign carriers into the United States market for international telecommunications services. Until now, the Commission has acted on foreign carriers' applications to provide such service on an ad hoc, case by case basis. Some have argued that this form of review fails to give foreign entities clear guidance on the Commission's criteria in this area. The Commission has now established a clear standard of review by establishing an effective competitive opportunities ("ECO") analysis for foreign carriers seeking to provide facilities-based or resale services in the United States. In addition, the Commission will apply the ECO analysis to foreign investors who wish to invest in excess of the benchmarks contained in Section 310(b)(4) of the Communications Act.

I write separately to emphasize my belief that the Commission's Order achieves the underlying goals of: (1) promoting effective competition in the global market for communications services; (2) preventing anticompetitive conduct in the provision of international services or facilities and (3) encouraging foreign governments to open their telecommunications markets. I join my colleagues in their belief that effective competition directly advances the public interest and the Commission's paramount goal should be to make available a rapid, efficient, worldwide wire and radio communication service with adequate facilities at reasonable charges.

We are certainly witnessing a period of transition within the international telecommunications market. Foreign markets are undergoing increased privatization and liberalization, which ultimately will lend itself to increased competition in the global telecommunications marketplace. For there truly to be effective competition, I believe that U.S. carriers must be able to participate in competitive overseas markets. As a result, I think that the factors which the Commission will review in conducting its ECO analysis will ensure that we adequately address issues relating to foreign markets that are either closed or have erected barriers for U.S. carriers.

While I support the objectives of this Order, I cannot help but wonder whether the application of the ECO analysis to

switched resale and the resale of non-interconnected private lines will indeed encourage foreign governments to open their markets. However, I am persuaded that a delicate balance must be struck so as to address the competitive inequities that could arise for U.S. carriers that are not permitted to compete in a country, but must compete against that country's carrier in a more open U.S. market. To that end, I hope that the message conveyed here to foreign governments is clear and not viewed as a barrier to U.S. market entry by foreign telecommunications players.

November 28, 1995

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: *Market Entry and Regulation of Foreign-affiliated Entities*

The market entry rules we adopt today will open our markets to foreign carriers and will provide incentives for the development of competition in the global services arena. The time is right for this decision and I strongly support it.

The Commission's action should send a clear signal that we are ready and willing to act favorably upon applications for foreign entry in the U.S. telecommunications market that serve the public interest. The United States welcomes and encourages effective competition in the provision of telecommunications services, including global network services. Competition will speed innovation and the deployment of new, cost-effective technologies for consumers.

Two of the critical building blocks for the creation of the Global Information Infrastructure (GII) are competition and open access. These policies, as Vice President Gore has emphasized, cannot be implemented on a "piecemeal" basis, but require cooperative efforts among governments and industries: "[B]uilding the GII is going to require robust competition. And you cannot create robust competition by excluding competitors, whether those competitors are at home or abroad."[400] Our market entry rules represent part of the U.S. effort to advance the creation of the GII by encouraging competitive opportunities both in the U.S. market and in foreign telecommunications markets.

The rules we adopt today address well-recognized prerequisites for effective competition in the U.S. telecommunications market. The Commission's international regulatory policies have long focused on the ability of foreign carriers to abuse their market power to the detriment of U.S. carriers and consumers. Similarly, in its public interest analysis of requests for foreign carrier entry, the Commission has always considered whether U.S. companies enjoy similar opportunities in foreign markets.

The "effective competitive opportunities" criteria are intended to make this aspect of our public interest analysis concrete and predictable. Much of the uncertainty has been

---

[400]Remarks by Vice President Al Gore to G-7 Ministers Meeting on the Global Information Initiative, Brussels, Belgium, February 25, 1995.

removed. The opportunities are great; the limitations are carefully tailored. Where a foreign carrier seeking entry into the U.S. market lacks market power in its home market or seeks to provide service from the U.S. to foreign markets other than where it has market power, our rules invite participation. But when a foreign carrier seeks to provide international service, on a facilities or resale basis, from the U.S. to the country where it has market power or when a foreign entity seeks to invest at levels in excess of the Section 310(b)(4) benchmarks, our rules make clear the conditions that are necessary, absent other public interest factors, for approval.

To achieve a truly competitive international telecommunications services market that will benefit consumers worldwide, we seek to increase opportunities for foreign carriers in the U.S. and to encourage foreign countries to remove the entry barriers that exist in their telecommunications markets, on a wholesale or incremental basis. This rulemaking is only one, interim step in the U.S. efforts to advance these goals. The passage of legislation, such as that currently pending before Congress, would be welcome to further liberalize the foreign ownership restrictions for entities from countries offering comparable opportunities to U.S. entities. Ultimately, it is only a multilateral agreement among all members of the global community that will achieve the GII goals. My hope is that the current negotiations on basic telecommunications in the World Trade Organization will lead to a far-reaching agreement among participating countries around the world to fully liberalize the basic telecommunications market.