approval by the full Commission" and will be evaluated on a case-by-case basis.[20]

Since the TLD Acquisition Order, TLD has submitted additional 214 applications, each seeking to expand the limited authority it was granted by the TLD Acquisition Order.[21] Further, the Commission's Common Carrier Bureau has recently held for separate review TLD's portion of the Joint Section 214 Application for the COLUMBUS II and Americas-I I Cable Systems, action supported by the U.S. State Department.[22] Although the statutory reciprocity test for the cable landing applications clearly applies to the

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[20] The Commission noted that "action in this Order does not constrain the variety of factors the Commission may consider in assessing future applications for facilities-based authorizations." Id.

[21] I-T-C-92-242 (seeking authority to initiate service to the Bahamas); I-T-C-93-033 (seeking authority to initiate service to the Netherlands); I-T-C-93-091 (seeking authority to offer international private line service to the Dominican Republic); I-T-C-93-029 (seeking authority to operate 450 circuits in the COLUMBUS II Cable System between the U.S. and Spain); I-T-C-93-030 (seeking authority to operate facilities in the Americas-1 Cable System which will interconnect with the COLUMBUS II Cable System); and I-S-P-93-002-ND, 93-003-ND, 93-004-ND and 93-005-ND (seeking non-dominant regulatory status to various countries).

[22] Order of July 13, 1993, Common Carrier Bureau; Letter of June 30, 1993, to Kathleen Levitz, Acting Chief, Common Carrier Bureau, from Michael T. N. Fitch, Acting U.S. Coordinator and Director, U.S. Department of State, Bureau of International Communications and Information Policy. This order has now been appealed to the Commission by Telefonica.

COLUMBUS II and Americas-I applications,[23] the Commission's application of its Section 214 standards to TLD's incremental requests is unclear, under current Commission precedents.[24]

Even more recently, Entel Chile has sought approval to acquire a U.S. carrier, Northland Communications, holding U.S. facilities licenses. Although Chile is proposing progressive restructuring steps in its telecommunications industry (including structural separation of its telephone companies operating in monopoly and competitive market segments), as of today it nonetheless fails to offer competitive opportunities comparable to those available in the U.S. Entel's application is currently pending.[25]

Lastly, DOMTEL, a carrier wholly owned by Telepuerto San Isidro, S.A., a Dominican Republic carrier competing against the traditional provider, CODETEL, in that

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[23] Unlike the cable landing licenses reviewed in the TLD Acquisition Order, which did not land in the home country of its foreign carrier parent, COLUMBUS II and Americas-I will land or interconnect with cables that land in Spain.

[24] In its Reply Comments filed May 28, 1993, in response to the NTIA Notice of Inquiry, TLD has urged the U.S. government to adopt a different set of factors for determining foreign carrier applications after entry into the U.S. market has been permitted, than those that may apply to initial market entry.

[25] File No. ITC-93-160-TC.

country since 1989, has sought to enter the U.S. market.[26] Its application is presently under consideration, and presents issues of appropriate market access policies with respect to foreign carriers that are not the protected incumbents in their home markets.

2. Submarine Cable Landing Licenses

Applications by foreign carriers for submarine cable landing licenses have been evaluated pursuant to a different standard, as required by statute -- viz., reciprocity. Notwithstanding the broad statutory authority of the Submarine Cable Landing Act, and the decision in the case of French Telegraph Cable Company, the Commission's exercise of its right to withhold or revoke landing licenses requested by foreign carriers in order to secure reciprocal rights has been limited. Beginning with the Private Cable Carrier Decision, the Commission has focused narrowly on the rights of U.S. and foreign owners in the cables involved.[27]

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[26] File No. ITC-93-246.

[27] Tel-Optik Limited, 100 F.C.C. 2d. 1033 (1985). See also, Pacific Telecom Cable Landing license, 2 F.C.C. 2686, 2688 (1987); Transfer of Control of Corporation Holding Cable Landing License, 4 FCC Rcd. 5077, 5078-79 (1989). But see, TAT 10 Cable Landing License, 7 F.C.C. 130, 131 (1991). In Tel-Optik, the Commission concluded that in cases of joint ownership, "the objectives of the Act are satisfied if only the United States joint owner is required to obtain a cable landing license. The desired reciprocal treatment of the United States joint owner by the foreign administration is achieved because the essence of the joint ownership system is one of partnership and reciprocity." Id. at 1043-44. In subsequent decisions, the Commission has expressed

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In the TLD Acquisition Order, the Commission noted the Department of State's view that reciprocity was not at issue where the cable landing license transferred did not land or interconnect with cables that land in the home market of, or that are under the control of, the applicant's foreign carrier affiliate.

Similarly, in Optel, the Commission granted a landing license to Optel Communications, a U.S. corporation in which Teleglobe Canada owns a 20% interest, to land and operate a private cable system between the U.S. and Canada. Optel intends to use this cable in conjunction with Teleglobe to compete for U.S. customers requiring international telecommunications services. The Commission concluded that Teleglobe's 20% interest in Optel "does not represent facilities-based entry into the U.S. market by Teleglobe and, thus, does not raise the issue of reciprocity."[28] The Commission's rationale that the current

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concern for the adequate protection of "the interest of the United States" and has conditioned the grant of a Landing License on the demonstration that "U.S. entities will be provided a reasonable opportunity to participate in the planning, manufacture, installation, operation and maintenance of the proposed cable." Pacific Telecom, Inc., 2 FCC Rcd. 2686, 2688 (1987).

[28] The Cable Landing Act requires analysis of whether denial or revocation of a cable landing license would assist in the securing of reciprocal rights by U.S. firms, without regard to a specific level of foreign investment in the applicant. In fact, the particular case which led to passage of the Act involved a 100% owned U.S. carrier.

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Canadian legal and regulatory framework does not prohibit U.S. carriers from acquiring a 20 percent ownership interest "identical to the interest held by Teleglobe in Optel, in a Canadian licensee/carrier" ignored the fact, however, that no Canadian carriers, whether Canadian or foreign-owned, are permitted by Canadian regulation to compete with Teleglobe in the Canadian international telephone services market.

More recently, as noted above, the Commission has deferred Telefonica's participation in the COLUMBUS II and Americas-I cable systems because of the absence of reciprocal opportunities for U.S. carriers to land and operate cables in Spain. Similarly, the State Department has stated its view that the BT/MCI transaction, if completed, would require reconsideration of MCI's licenses recently granted for TAT-12/TAT-13.[29]

3. International Private Line Resale Applications

International private line resale provides a form of access to the U.S. market for foreign carriers which is subject to yet another standard -- viz., equivalency. In

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See AT&T Petition for Reconsideration, filed May 26, 1993, Optel Communications, Inc., File No. S-C-L-02-004.

[29] File No. S-C-L-93-004, Letter from Michael T.N. Fitch, Acting U.S. Coordinator and Director, U.S. Department of State, Bureau of International Communications and Information Policy, to Kathleen Levitz, Acting Chief, Common Carrier Bureau, dated July 2, 1993.

December 1991, the Commission issued its International Resale Order, which permitted the resale of international private lines for the purposes of providing switched services only where opportunities "equivalent to those available under U.S. law" existed for interconnection and resale in the foreign market. Much like its earlier decision in French Telegraph Cable Company, the Commission recognized that the public interest, and successful achievement of its policies, required consideration of competitive opportunities overseas. The Order, however, did not identify specifically the factors that would be considered by the Commission in its application of the "equivalency" test.

In the first decision applying the equivalency standard, Fonorola/EMI,[30] the Commission focused more on "national treatment" (i.e., whether U.S. resellers were treated the same in Canada as Canadian resellers) than "equivalency" (i.e., whether any resellers in Canada have opportunities to compete equivalent to resellers in the United States) issues, and thus only superficially looked at

[30] 7 FCC Rcd. 7312 (1992). AT&T's Petition for Reconsideration of the Fonorola/EMI Order is currently pending. Since the Fonorola/EMI Order, a number of other carriers have sought to rely on the equivalency finding between the U.S. and Canada. E.g., Bescom, File No. ITC-93-258; Communications Technical Services, Inc., File No. ITC-93-225; ACC Global Corp., File No. ITC-93-034. These cases are pending.

issues of true competitive opportunity. In any event, as the subsequent proceedings with respect to BTNA's 214 application for private line resale authority indicate,[31] Fonorola/EMI fails to provide meaningful guidance for other reciprocity analyses beyond its particular facts.[32]

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Thus, the standards by which foreign carrier applications are evaluated under current policy vary based on the type of entry the foreign carrier seeks. To date, there has been no burden on the foreign carrier seeking Section 214 authorization to demonstrate comparability of market access in its home market. In contrast, some measure of "reciprocity" is required for the landing, ownership and operation of the U.S. end of a submarine cable system, and "equivalency" -- which has been defined by the Commission

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[31] Docket No. ITC-93-126. It appears, in light of the BT/MCI agreements, that this application will become moot. See Section I.D.

[32] For international private line resale applications, the Commission should continue to require a finding of "equivalency" prior to interconnection, rather than within a reasonable period of time thereafter. Unlike market entry via outbound resale of international services, private line resale applications raise issues not only of asymmetric market access, but also threaten immediate harm to U.S. carriers and their customers who will suffer the consequence of higher settlements payments unless equivalent opportunities exist. However, the Commission should consider the full range of issues included in the proposed rule for assessing "comparable opportunity" in making determinations of "equivalency" in the future.

more narrowly than the comparability necessary for market access -- is required for private line resale applications.

C. Current Regulation Does Not Adequately Address the Leveraging of Foreign Market Power in the U.S. Market

As the Commission has recognized, carriers which control essential local distribution facilities, when free of effective competition, have the ability to leverage that control to affect competition among those carriers requiring access to the facilities to complete calls. For international services, one end of the necessary access arrangements resides overseas, controlled by foreign telecom operators which in virtually all cases remain legal or de facto monopolists. When such carriers enter the U.S. marketplace, or affiliate themselves with a U.S. carrier, the opportunities and incentives for discrimination present a serious threat to competition.

The Commission has devised rules intended to prevent the discrimination by foreign carriers against unaffiliated U.S. carriers in CC Docket Nos. 90-337 and 91-360. The Commission's assessment in these proceedings of potential abusive practices was undertaken within the industry framework it has traditionally used to analyze international services -- that of a correspondent relationship between a foreign PTT and a number of U.S. carriers not affiliated with that PTT. While the rules designed in this context are directionally correct, they are insufficient because of the numerous loopholes that exist. The policies also are incomplete because they fail to address with sufficient clarity the equally important potential for abuses in the global market beyond the traditional concerns of accounting rate whipsawing and the manipulation of proportionate return.

In Phase II of CC Docket No. 90-337, the Commission imposed requirements on U.S. carriers to submit affidavits affirming that the carrier has not bargained for an exclusive accounting rate arrangement with the foreign correspondent. In addition, the U.S. carrier must certify that it has not bargained for more than its fair share of return foreign-billed traffic from the foreign carrier. In CC Docket No. 91-360, AT&T demonstrated that these self-certifications notwithstanding, there were ample opportunities and incentives for a foreign carrier to favor its affiliated U.S. carrier without clear violations of the ISP requirements. For example, a foreign carrier could return proportionately foreign-billed minutes to its U.S. affiliate and other U.S. carriers, but give to its affiliate more favorable treatment by grooming the return traffic to allow its affiliate to experience greater network efficiencies or higher call completion rates.[33] Similarly,

[33] In addition, a foreign carrier could return traffic to one U.S. carrier only on cable facilities, while requiring other U.S. carriers to maintain both cable and satellite facilities; limit the return traffic to that

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even though the foreign carrier may willingly extend the same accounting rate to all U.S. carriers, the U.S. affiliate and its foreign carrier are advantaged by the fact that an accounting rate is a "transfer payment" within the same corporate enterprise. To the extent that the accounting rate was set above-cost (albeit at the same level for all), the foreign carrier and its U.S. affiliate could engage in a price squeeze of other U.S. carriers.

In its decision in CC Docket 91-360, the Commission responded in part to these concerns by adding a requirement that U.S. carriers disclose their foreign carrier affiliates and certify that they have not entered into arrangements that grant special concessions by the foreign carrier to its U.S. affiliate. Unfortunately, the

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carrier during peak hours, thus causing more efficient use of that carrier's international facilities relative to other U.S. carriers; time its adjustment of proportionate return ratios to provide maximum benefit to one carrier based on the rising or falling market share of that carrier on the route; exclude from proportionate return calculations certain types of services where other U.S. carriers hold greater share; or perform calculations on a market segment rather than overall market basis, if that method favored a particular carrier. The Commission recently reaffirmed its policy of proportionate return and reiterated its historic concern that "misallocation of return traffic is a prime example of such abuse [of foreign monopoly power] by foreign entities." Altantic Tele-Network, 6 FCC Rcd. 6529 (1991); 8 FCC Rcd. 4776 (1993), petition for review filed, (D.C. Cir. Sept. 13, 1993).

Commission's reliance on "dominant" and "non-dominant" labels to address the level of regulation appropriate for affiliates of foreign carriers left unresolved many of the complex issues presented by the participation of foreign monopolists into the competitive U.S. services market -- a fact recognized by the Commission only two months later when, in approving Telefonica's acquisition of TLD, the Commission found it necessary to impose a number of other regulatory conditions -- in addition to those imposed as a result of TLD's dominant status -- to address the regulatory issues presented by the Telefonica-TLD affiliation.[34]

In addition to these proceedings, on a case-by-case basis, the Commission has applied its stated policy against exclusive arrangements between U.S. and foreign carriers. For example, in US Sprint,[35] the Commission ruled that an agreement under which Cable & Wireless committed to use Sprint's facilities for all Cable & Wireless transit traffic violated its policy against exclusivity, and warned that exclusive arrangements in network, marketing, or sales areas could also run afoul of its policy.[36]

Despite all of these statements, however, it is clear that the Commission's current regulatory framework for

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[34] TLD Acquisition Order, 8 F.C.C. Rcd at 111-13.

[35] 4 FCC Rcd 6279 (1989).

[36] Id. at 6284.

reviewing the potential for the leveraging of foreign market power in the U.S. services market is being outpaced by events. The current process, which relies on the imposition of conditions when new 214 authorizations are requested, or when existing 214 authorizations are transferred, is insufficient because it is depends on the applicant seeking Commission approval in the first instance -- a requirement that does not exist with respect to some service arrangements, and is being relaxed even where currently in effect.[37]

Equally ineffective are the Commission's general policy statements against exclusive dealing and its reliance on self-certifications.[38] There is room for foreign carriers to favor particular U.S. carriers despite these statements through favoritism with respect to services included or excluded from proportionate return calculations; discrimination with respect to operational issues (i.e., interconnection, provisioning intervals, joint testing or planning, service restoration); discrimination with respect

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[37] By deciding in Docket 91-360 to treat affiliates of foreign carriers as non-dominant on many routes, the Commission in effect will forego review of foreign carrier expansion in some instances.

[38] See AT&T Comments, CC Docket No. 91-360, pp. 15-19 (filed Feb. 26, 1992). There are situations (such as Canada) where AT&T has been informed of exclusive arrangements between MCI and foreign carriers. Such arrangements, however, are difficult to police under current Commission practices.

to commercial arrangements (i.e., packaging of monopoly with competitive service offerings, favored billing arrangements, misuse of information, refusal to offer distribution or interconnection arrangements for any but basic services); or unreasonable access prices (or "accounting rates", as they are called in this context), enabling carriers who self-correspond to gain a clear economic advantage vis-à-vis their competitors.

D. Current Policies Do Not Address Adequately the Public Interest Issues Raised By Foreign Market Entry, As Demonstrated by the BT/MCI Alliance

The Commission already has recognized that it has not satisfactorily addressed the issue of market access by foreign carriers to the U.S. for entry and expansion. Applications involving carriers such as Cable & Wireless, Telefonica de Espana, Teleglobe, Entel Chile and DOMTEL are pending. BT, which initially sought entry through private line resale, has now sought entry through investment in a U.S. carrier already holding Section 214 authority. Although much remains to be discovered about the alliance announced between BT and MCI, the following facts suffice to illustrate the challenge of assessing this transaction under the Commission's current regulatory framework.

BT plans to acquire 20% of MCI, making it MCI's largest shareholder, and to withdraw from further competition in the U.S. enhanced services and perhaps other market segments.[39] BT and MCI plan, with respect to all but basic international direct dial and private line services, to enter into global exclusive arrangements, whereby each will obtain all of their needs to support the provision of global services from "Newco" (their joint venture controlled by BT); and both commit not to compete either with each other or Newco (except for passive sales) in their allocated territories.[40] Thus, both parties will refuse to cooperate with other carriers in the provision of what the parties call "Enhanced or Value-Added services."[41] Even with

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[39] Investment Agreement, dated August 4, 1993, filed with the MCI/BT Petition for Declaratory Ruling, File No. ISP-93-013 (August 23, 1993); Joint BT-MCI Press Release, dated June 2, 1993.

[40] Joint Venture Agreement, Exhibit 10(a) to MCI's 6K, filed with the SEC on August 13, 1993 [hereinafter "Joint Venture Agreement"], Article 18.1.

[41] Although the Joint Venture Agreement refers to the services covered by the exclusive arrangements as "Enhanced and Value-Added Telecommunications Services", it is clear that the definition -- which includes all international services permitted by regulators to be offered by members of a single group (except IDDD provided on a correspondent basis, international private leased service, and services that must be offered on a correspondent basis for regulatory reasons) -- includes basic services, such as international virtual private line service as well. The Joint Venture Agreement prohibits either party from offering such services except as a distributor of Newco, thereby preventing BT, for instance, from offering such services with any other carrier -- unless required to do so by a regulator. Joint Venture Agreement, Article 18.1. The agreement further requires both parties to discontinue such current agreements as they may have with other carriers, which would violate the exclusivity principle, as soon as practicable. Article 18.2.

respect to basic voice and private line services area, there is evidence that the parties intend to favor each other, and to direct all traffic to their partner, to the extent not legally prohibited.[42]

Finally, the parties commit to offer each other telecommunications services to enable the other to provide international simple resale offerings "in a manner that will not require BT to seek US regulatory approval".[43] This provision suggests that BT and MCI either intend to move accounting rates to cost (which AT&T would applaud), or to offer each other distribution services for switched traffic at rates that do not include accounting rates -- which

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[42] This point was originally specified in the Parties Letter of Intent, Annex II-1 Section 13: "The Parents will, when regulatory conditions permit, and subject to relevant antitrust and regulatory constraints, appoint the other as its distributor of basic (IDD or IPLC) traffic." BT Group Managing Director Michael Hepher has been quoted as confirming that "[e]ventually, MCI will become BT's preferred carrier for public telephone traffic across the Atlantic." Communications Week International, June 14, 1993.

[43] Joint Venture Agreement, Articles 18.9 and 18.10. Article 18.9(c) further provides that to the extent that MCI is unable to do so, "voice international simple resale shall thenceforward be deemed for the purposes of this Agreement to be included in the definition of 'Enhanced and Value Added Services" for the purposes of this Agreement", and thereafter would be provided by NewCo (presumably without NewCo having received Commission authority). This language lends further support to the concern that the parties are attempting to avoid compliance with current regulatory rules.

should concern this Commission greatly, because it raises questions as to whether BT intends to treat MCI more favorably than other U.S. carriers.

These arrangements will combine MCI, the second largest U.S. interexchange carrier with BT, which retains in the U.K. a "dominant position in all areas of the network" and has about "97% of the local terminations and the most fully developed long distance network..."[44] Even though the U.K. is pursuing liberalization more aggressively than most countries, as of today, no carriers (other than BT and Cable & Wireless) are permitted to enter the international services market as facilities-based carriers; structural separation between monopoly and competitive operations is not required; equal access is not required; no access tariffs exist, cost-based or otherwise; and negotiation of interconnection arrangements with BT have been arduous and thus far unsatisfactory to would-be competitors.[45]

The BT/MCI alliance raises a number of public interest issues relevant to this Commission's

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[44] Consultative Document, "Interconnection and Accounting Separation", published June 1993 by the U.K. Office of Telecommunications.

[45] See AT&T Petition to Deny BT North America's 214 Application, Docket No. ITC-93-126, filed April 15, 1993. AT&T asks that its pleadings in this docket be incorporated herein by reference, to avoid the need to review again in detail the current market barriers in the U.K.

responsibilities under the Communications Act.[46] Permitting asymmetrical market access raises questions about the future health of U.S. services providers not so affiliated with foreign monopoly carriers. Arrangements whereby a foreign monopolist agrees to participate with one U.S. carrier but not with others in the provision of whole segments of service offerings necessarily will constrain the options for U.S. customers, especially where the excluded carriers are blocked by foreign regulation and business practices from effectively offering services without the foreign carrier's participation.[47] The declared intent of the parties to direct all basic switched and private line traffic to each other except as prohibited by regulators raises a direct challenge to the Commission's ISP, and indicates that the parties will be seeking to leverage BT's market power to benefit MCI, at the expense of other U.S. carriers, in the many ways not yet explicitly found objectionable by the

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[46] It may also raise a number of antitrust issues not specifically addressed here.

[47] In sharp contrast to the BT/MCI arrangement, the WorldPartners alliance which AT&T previously announced on May 25 explicitly permits participating carriers to participate as well in competitive arrangements, and to offer by themselves or with others services comparable to or competitive with WorldSource℠ services.

Commission.[48] And the risk of self-correspondency impedes the Commission's effort to reduce accounting rates, and reinforces BT's refusal to agree to further meaningful reductions.[49]

In the absence of a new regulatory approach, the Commission's review of this significant transaction, at best, will be fragmented. The applicability of Section 310 to BT's investment in MCI is raised by the BT/MCI Petition for Declaratory Ruling. But what of the more fundamental issues of asymmetric market access and the vertical integration of a leading U.S. interexchange carrier with a carrier having monopoly power over the distribution facilities used to complete U.S. international calls to a key market? When Sprint merged with Centel, the Commission carefully reviewed the public interest issues presented by the vertical integration between monopoly and competitive markets, and approved it in part because Centel's relatively minor (4%) share of U.S. access lines, scattered throughout the larger U.S. services market, gave it, in the

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[48] MCI itself previously has pointed out the danger of such practices, despite current Commission policies. See MCI's Comments, filed February 26, 1992, in CC Docket No. 91-360.

[49] BT's equity position in a U.S. carrier affects the parties' economic analysis of high accounting rates because 20% of the payment is now an internal transfer payment, reducing the incentive for MCI to press for or BT to grant further accounting rate reductions.

Commission's view, little chance to discriminate.[50] In contrast, here, BT controls 97% of the access facilities in the UK, without a regulatory framework requiring equal access or cost-based tariffs, and has announced its intent to favor MCI over other competing U.S. interexchange carriers. Yet -- despite clear Commission authority to do so[51] -- the Commission has no current policy of reviewing or conditioning MCI's Section 214 authorizations as part of a comprehensive review of the public interest issues presented by the transaction.

In the absence of Commission action, AT&T and other affected parties will need to raise these public interest issues piece-meal in the context of individual MCI Section 214 proceedings (many of which will occur after BT's acquisition of its interest), in proceedings involving

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[50] Centel/Sprint Merger, 8 FCC Rcd. 1829 (1993). The Commission in the Sprint case also relied upon the "comprehensive non-structural safeguards to protect against anti-competitive conduct" under FCC policies, none of which exist in the U.K.

[51] Under Section 214 of the Communications Act, the Commission may -- following determination that the public interest and convenience so require -- condition the use of previously authorized facilities. MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978). See also Atlantic Tele-Network, supra note 33, para. 14 ("This Commission has ample authority, pursuant to Section 214 of the Act, to impose conditions on authorizations to prevent anti-competitive conduct, such as the disproportionate allocation of return traffic and the negotiation of exclusive arrangements.")

existing or further MCI cable licenses, and in still other proceedings involving individual exclusionary or discriminatory contracts or practices engaged in by BT and MCI -- when those practices are detected.[52] Not only will this course involve substantial litigation by all parties, it also will fail to address the core market access issues the Commission has until now left unresolved. Equally important, continuation of the case-by-case approach fails to provide sufficient guidance to parties in advance of substantial decisions (such as BT's proposed $4 billion investment) and makes it virtually impossible to implement an approach consistent with, and supportive of, other U.S. government agency initiatives and objectives.

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[52] Presumably, under the TLD Acquisition Order, all MCI 214 proceedings will be reviewed by the full Commission, and subject to consideration of supplementary conditions designed to prevent discrimination and abuse as a result of MCI's affiliation with a foreign carrier. 8 FCC Rcd. at 113. Because these risks are inherent in existing as well as future 214 authorizations, AT&T believes, in the absence of a comprehensive rulemaking, that MCI's current authorizations will need to be reviewed as well. Similarly, the Cable Landing Act not only requires review of prospective cable landing licenses, but also mandates consideration of whether revocation of existing licenses is appropriate to secure reciprocal rights for U.S. companies. See July 2, 1993, letter to Kathleen Levitz, from Michael T. N. Fitch, Acting U.S. Coordinator and Director, U.S. Department of State, Bureau of International Communications and Information Policy (approving authority for TAT-12/TAT-13, but subject to modification if BT/MCI alliance is concluded.)

II. THE COMMISSION SHOULD ISSUE A NOTICE OF PROPOSED RULEMAKING.

For the reasons provided above, the Commission should issue a Notice of Proposed Rulemaking to explore the market access issues it has reserved until now, and to clarify its policies to the extent such access by affiliates of foreign monopoly carriers is permitted. NTIA is investigating these same issues from a broad policy perspective,[53] and AT&T believes the Commission should seek the views of NTIA and other agencies of the U.S. government to assure consistency between the Commission's public interest analysis and the actions and objectives being pursued by other U.S. government agencies.[54] However, the increasing pace of entry by foreign carriers into the U.S. makes it imperative for the Commission to act promptly if

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[53] Comprehensive Evaluation of the Regulation of International Telephone Service, Docket No. 92151-2351. AT&T asks that its Comments and Reply Comments, dated April 15, 1993 and May 28, 1993, respectively, be incorporated herein by reference.

[54] In the Uruguay Round of GATT negotiations, the U.S. government has stated its willingness to commit to Most-Favored Nation treatment regarding market access issues for telecommunications on the condition that the governments of other major telecommunications markets make similar commitments to market access. The standards and timing for such market access are the subject of negotiations which resume this week in Geneva. Without acknowledging the broader context in which it is acting, the Commission's efforts to promote competition and the public interest may be ineffective or undermined by other events.

the piece-meal and after-the-fact review of these critical issues is to be avoided.

The rules AT&T proposes would address these issues in two complementary ways. First, building on the Commission's expressed policies against exclusive dealings and discriminatory arrangements, the rule would require in a number of areas that foreign carriers deal with other U.S. carriers in the same manner as their U.S. affiliate. This includes not entering into exclusive arrangements with respect to the provision of services, offering of unbundled interconnection arrangements to all U.S. carriers on a non-discriminatory basis, elimination of above-cost, discriminatory accounting rates which enable those "self-corresponding" to gain an artificial cost advantage, and other terms which will minimize the extent to which a foreign carrier can leverage its market power to skew competition among U.S. carriers. These terms in virtually all circumstances can be implemented by the carriers themselves without a change in foreign regulatory policies. Thus, they should be implemented, without delay, as a prerequisite to entry or expansion.

Equally important, but more difficult to accomplish, is the need to secure for U.S. carriers the ability to enter foreign markets and to have the same opportunities to compete as foreign carriers have here. Competitive fairness would require that no further entry or expansion by foreign carriers should be authorized until U.S carriers are offered comparable opportunities to compete in those carriers' home markets as well. AT&T recognizes, however, that such a decision by the U.S. government could be interpreted incorrectly by some as a move by the U.S. to close its own market rather than to insist, appropriately, on reciprocal access elsewhere. Thus, at some risk, AT&T would support the Commission continuing to lead the world by example in supporting market liberalization and open competition, but with one caveat: as now, the Commission would permit entry into the U.S. by foreign carriers; unlike now, the Commission would assess in each case whether the home market of the foreign carrier was committed to, and in the process of, opening its own market to comparable competition by U.S. carriers (among others) within a reasonable period of time not to exceed two years.[55] If not, the Commission should recognize what the USTR and others have already concluded -- that we can no longer assume that all countries are interested in "following" and liberalizing their own markets, and continued unilateral

[55] AT&T also believes that the rules proposed, while absolutely essential today, ultimately will become unnecessary following the opening of foreign markets and the development of effective competition. The rules are predicated on the existence of foreign market power, which arises either because of the protected status of the foreign carrier in its own market, or because of that carrier's control over the distribution facilities necessary to complete international calls. As such power is eroded, the need for regulatory oversight will diminish and ultimately disappear.

action with respect to such countries undermines rather than supports efforts to preserve competition in the U.S. market and to promote global competition.[56]

CONCLUSION

For the reasons stated above, the Commission should initiate a rulemaking proceeding to investigate foreign market access, and the nature of necessary regulation in the international services market, and implement the rules proposed herein to address asymmetric market access, and the leveraging of foreign market power.

Respectfully submitted,

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[56] E.g., Letter from USTR Mickey Kantor to Congressman Barcia, dated July 15, 1993 (warning that permitting transactions like BT/MCI without U.S. firms securing meaningful access in foreign markets could undermine U.S. trade goals).

Attachment I

Text of Proposed Rule

xx.01 No new facilities shall be acquired or operated by, nor any licenses or rights granted to, foreign carriers or their U.S. affiliates for the provision of domestic or international common carrier services in the United States without prior Commission authorization under Section 214 of the Communications Act and Part 63 of the Commission's Rules. In addition, U.S. carriers holding authorizations under Section 214 shall not become affiliates of foreign carriers as defined herein without prior authorization from this Commission. Such authorizations will not be granted unless and until the applicant:

(1) Demonstrates that comparable competitive opportunities exist for U.S. carriers in all countries in which the foreign carrier or its affiliates operates;

(2) Certifies as a condition of its operating authority that upon commencement of service and continuing thereafter:

(a) neither the foreign carrier nor its affiliates will enter into any exclusive arrangements for the provision of basic or enhanced services;

(b) the foreign carrier will not return more than a proportionate share of foreign-billed traffic to its U.S. affiliate, or allocate foreign-billed traffic among U.S. carriers in a manner that discriminates in favor of its U.S. affiliate; nor will the U.S. affiliate bargain for or agree to accept more than its proportionate share of return traffic from the foreign carrier, or bargain for or agree to accept any allocation of return traffic that discriminates in favor of itself;

(c) the foreign carrier agrees that it will within thirty (30) days reduce accounting rates for all U.S. carriers to the lesser of cost-based levels, as defined by this Commission, or the lowest rate charged by the foreign carrier to