

U.S. carrier the exclusive right to provide joint basic services in correspondence with any particular foreign carrier<sup>49</sup>). We conclude, however, that we need to review whether our public interest goals would be served by imposing reporting requirements on U.S. carriers that participate in co-marketing arrangements for the provision of basic global network services. It appears at a minimum that, under Section 43.51 of the Commission's Rules, these types of arrangements require the filing of their co-marketing agreements.

64. Finally, we further propose to reserve the right to review any transaction that involves foreign carrier participation in which unique factors suggest Commission review would be necessary to serve the public interest, even with foreign carrier participation at levels below the investment threshold chosen. We seek comment on all of the above proposals and tentative conclusions.

**b. Affiliation for Purposes of Post-Entry Regulation**

65. After we have determined that the public interest would be served by permitting a certain foreign carrier to enter the U.S. market, the next step is to determine whether the carrier should be regulated as dominant or nondominant. Part of the decisionmaking process, as established in International Services, is a determination whether the carrier is "affiliated" with a foreign carrier. In that proceeding, we defined a U.S. carrier as an affiliate of a foreign carrier when the U.S. carrier controls, is controlled by, or is under common control with a foreign carrier. We use this definition to classify a U.S. carrier as dominant or nondominant on a particular international route, based on the market power of its foreign affiliate.<sup>50</sup> As the Commission noted, however, the order did not address the question of entry standards for foreign-affiliated entities.

66. In light of our goals, and proposed definition of

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276 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). The nonexclusive requirement is designed to mitigate any such discrimination.

<sup>49</sup> See International Services, 7 FCC Rcd at 7333, para. 11.

<sup>50</sup> 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 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, para. 10.

affiliation for purposes of regulating entry, we request comment on whether we should revise the definition of affiliation adopted in International Services to conform to the one proposed for entry purposes. One consequence of redefining affiliation at a less-than-controlling interest for purposes of applying dominant carrier regulation is that more carriers would be subject to such regulation. For instance, a U.S. carrier that is currently regulated as nondominant could now be deemed dominant on a particular U.S. international route if the foreign carrier on the other end of the route has, or acquires, a less-than-controlling ownership interest in the U.S. carrier. Likewise, if a U.S. carrier acquires a less-than-controlling interest in a foreign carrier on a particular U.S. international route, that carrier could be deemed dominant on that route.<sup>51</sup> Considering these consequences and issues of administrative simplicity, we ask for comment on whether it is desirable to conform these affiliation definitions for purposes of entry and post-entry regulation.

### 3. Definition of Facilities-based Carrier

67. Our regulation of international services relies upon a distinction between facilities-based services and resale. However, IDB's petition raises the fundamental question of whether our current rules clearly distinguish between resellers and facilities-based carriers. IDB asserts that recent Commission actions, including our International Resale Policy decision,<sup>52</sup> have caused disputes regarding the definition of a facilities-based carrier. IDB contends we have historically treated a carrier that leases a cable or satellite circuit as a facilities-

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<sup>51</sup> See 47 C.F.R. § 63.10. Although we do not propose to do an effective market access analysis whenever a U.S. carrier acquires a foreign carrier, see supra para. 50, we reiterate that dominant carrier regulation would apply if the foreign carrier acquired is a monopoly carrier, or otherwise warrants dominant carrier treatment under Section 63.10 of our rules. In addition, we propose to impose the same dominant carrier and other nondiscrimination safeguards on the U.S. carrier that we impose on foreign carrier affiliates that we authorize to enter the U.S. market.

<sup>52</sup> Regulation of International Accounting Rates, Phase II First Report and Order, 7 FCC Rcd 559 (1991) (International Resale Policy); see also Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992) (Phase II Order on Reconsideration). To prevent evasion of the settlements process through one-way resale of private lines for the provision of switched services into the United States, we require that applicants seeking authority to resell international private lines for the provision of switched services demonstrate that the country at the other end of the private line affords equivalent resale opportunities.

based carrier, but that our International Resale Policy treats those who operate by leasing private line circuits as resellers. Further, IDB notes that we have imposed upon resellers the Section 63.15(b) circuit-addition reporting requirement<sup>53</sup> that we previously applied only to facilities-based carriers.<sup>54</sup>

68. IDB urges us to adopt a consistent definition of a facilities-based carrier that turns on whether the carrier has acquired the "maximum interest" in a cable or satellite circuit permitted by law. IDB argues that, under such a rule, a carrier would be considered facilities-based in the United States if it purchases an ownership or indefeasible right of user (IRU) interest in a cable or satellite or leases satellite capacity directly from Comsat, because those are the maximum interests allowed under U.S. law. To the extent the Commission seeks to exercise jurisdiction over carriers providing the foreign half-circuit,<sup>55</sup> IDB would have us treat as facilities-based a carrier that directly leases a half-circuit, if that is the maximum interest allowed in that country. IDB believes there is no rational basis for treating carriers that lease capacity from Comsat as facilities-based, while treating carriers as resellers when they lease capacity from foreign carriers with legal monopolies over their countries' telecommunications infrastructures.

69. AT&T opposes IDB's request and characterizes it as an attempt to evade our International Resale Policy. AT&T argues that IDB's proposed "maximum interest" test would vitiate the meaning of a facilities-based carrier. AT&T notes that the International Resale Policy was prompted by a concern that "one-way resale" from countries that do not afford "equivalent" resale opportunities could increase U.S. facilities-based carriers' outpayments, increase their cost of service, and thus harm U.S. customers. IDB's proposed definition would, according to AT&T, legitimize such one-way resale by redefining all resellers overseas as facilities-based and thus exempting them from the equivalency requirement.<sup>56</sup>

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<sup>53</sup> See IDB Petition at 4-5 (citing LDDS Communications, Inc., 8 FCC Rcd 924 (1993); fONOROLA and EMI, 7 FCC Rcd 7312(1992), Order on Recon., 9 FCC Rcd 4066 (1994)).

<sup>54</sup> 47 C.F.R. § 63.15(b) (1994).

<sup>55</sup> IDB disputes the Commission's jurisdiction over foreign half-circuits. See IDB Petition at 9, n.19.

<sup>56</sup> AT&T Comments at 5. AT&T also argues that any doubts as to who should file Section 63.15 reports will be clarified in the rulemaking in CC Docket No. 93-157.

70. MFS supports IDB's rulemaking request. MFS notes that other countries are following U.S. initiatives in liberalizing telecommunications but do not yet permit carriers competing with the established carrier to own their own international transmission circuits. MFS asserts that the Commission's current definition merely prevents U.S. entities from entering overseas markets. MFS believes that IDB's proposed maximum interest definition would allow such competition to flourish. Such entry, according to MFS, would allow U.S. carriers to reduce foreign users' cost of communications service and would pressure existing carriers to reduce their prices.

71. We tentatively conclude that we should continue our current policy of treating a carrier as facilities-based in the United States if it purchases an ownership or IRU interest in a U.S. half-circuit in an international satellite or submarine cable (whether common carrier or noncommon carrier), or if it leases a U.S. half circuit from Comsat or from a noncommon carrier international satellite or submarine cable provider.<sup>57</sup> Our concern with IDB's proposal is that it could undermine our International Resale Policy by permitting carriers to interconnect foreign leased circuits with the U.S. public switched network without demonstrating that the foreign country affords equivalent resale opportunities to U.S. carriers. This would result in an undesirable increase in the settlements deficit. In addition, it could implicitly encourage foreign countries to stop short of creating full facilities-based competition by appearing to legitimize limiting competition to resale of leased circuits. Our current definition avoids this result and is consistent with the public interest goals of this proceeding. We propose to codify that definition in this proceeding. We request comment on our proposal to codify this definition of a U.S. facilities-based carrier.

#### **4. Resale Entry by Foreign Carriers**

72. We do not believe there is a need to regulate foreign carrier entry in the U.S. market for resale services as closely as we propose for facilities-based services. There is not as substantial a risk of anticompetitive harm to the global market when we allow foreign carriers into the U.S. international resale market. This risk is greatest when foreign carriers acquire U.S. international facilities. The ability to own and control facilities enables a carrier to manage competition by resellers. A reseller has minimal pricing flexibility when it must rely on a competitor that also supplies the infrastructure and underlying basic services which a reseller must use to provide its own services. In addition, the reseller cannot guarantee the quality

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<sup>57</sup> See, e.g., Phase II Order on Reconsideration, 7 FCC Rcd at 7931.

of its services because the underlying facilities necessary to provide service are not within its control.

73. We also do not believe that applying an effective market access analysis to resellers would do as much to further the liberalization of foreign markets as applying this standard to facilities-based carriers, which generally have significant influence in the liberalization debate within their primary markets. And finally, our experience indicates that our existing entry standards for resellers have encouraged vigorous and effective competition among international resellers, providing significant benefits to users. Under these circumstances, we propose to continue to apply relatively flexible entry requirements to foreign-affiliated resellers, as detailed below.

#### **a. Resale of Switched Services**

74. We tentatively conclude that our goals are well served by maintaining our open entry policy for international resale of switched services. We found in International Services that open entry for switched service resale increases the competitiveness of the international market, without resulting in substantial potential for competitive harm.<sup>58</sup> There we established the presumption that even U.S. carriers with foreign-carrier affiliations should be regulated as nondominant in their provision of resold international message telephone service (IMTS). Although we did not adopt an entry standard in International Services, we now tentatively conclude that this presumption equally holds true for entry questions, *i.e.*, that there should be a presumption that there is no competitive harm in permitting unlimited foreign-carrier entry for switched resale, even to affiliated countries. As in International Services, we propose that this be a rebuttable presumption. We invite comments on these tentative conclusions.

#### **b. Resale of Private Lines**

75. The resale of private line services raises different market entry concerns from the resale of switched services. We recognized in International Services that there is a greater potential for discrimination in the provisioning of resold private lines. When a U.S. carrier serves a foreign market through the resale of private line service, it must obtain from the foreign carrier the foreign half-circuits and any necessary local or intercity access facilities or services required to terminate U.S. traffic. A foreign carrier that owns or controls telecommunications facilities in both the United States and the destination market may have a competitive advantage over other U.S. carriers. This occurs if the foreign carrier has sufficient

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<sup>58</sup> International Services, 7 FCC Rcd at 7335, para. 31.

market power in the destination country to discriminate among U.S. carriers in the provisioning, pricing or interconnection of the foreign end of the private line.

76. **Resale of Noninterconnected Private Lines.** We currently have an open entry policy for foreign-carrier resale of noninterconnected private lines. Resale of international private lines does not directly implicate the settlements process to the extent such lines are used only to carry non-switched traffic. Given the benefits of competitive provision of noninterconnected private lines, the lack of impact on the settlements deficit, and the availability of safeguards to protect against discrimination in the provisioning of private lines, we propose to adopt a rebuttable presumption that there is no competitive harm in permitting unlimited foreign-carrier entry for noninterconnected private line resale.

77. **Resale of Interconnected Private Lines to Provide Switched Services.** We also propose to continue our current policy on foreign-carrier entry by resale of private lines interconnected to the public switched network. We believe that the equivalency requirement established in our International Resale Policy decision<sup>59</sup> is sufficient to ensure that a foreign monopoly carrier would be unable to exploit its market power with respect to its provision of interconnected private line services. We seek comment, however, on whether we should modify our equivalency requirement to conform to our effective market access standard. We ask for comment on whether a consistent approach to

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<sup>59</sup> See International Resale Policy, 7 FCC Rcd 559. The equivalency determination includes an analysis of whether foreign government regulation (1) permits open entry for U.S.-based carriers into the international resale market; (2) mandates nondiscriminatory treatment of U.S.-based carriers; and (3) authorizes U.S.-based carriers to interconnect international private lines to the PSN at both ends. We have also emphasized that the prices, terms and conditions afforded U.S.-based carriers should be equivalent to those available to foreign-based carriers providing service in the foreign country. We have examined foreign regulatory controls to ensure that they are sufficient to limit the ability of the foreign market facilities-based carrier(s) to favor particular carriers or to cause competitive harm to the resale market generally. Our equivalency determinations have presumed an incentive to impede competition and analyzed foreign-market regulatory controls on the ability of the foreign facilities-based carrier(s) to exercise that incentive successfully. Our International Services order also provides for dominant carrier regulation of an affiliated foreign carrier where it appears that U.S. safeguards are necessary to supplement foreign government safeguards against potential discrimination.

determining equivalency and effective market access would make this standard clearer and more administratively feasible.

78. AT&T has argued in other proceedings 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.<sup>60</sup> AT&T argues that, without such a requirement, bilateral negotiations to reduce accounting rates will be futile. In support, AT&T states that, as a direct competitor with U.S. carriers, a foreign carrier will have every incentive to maintain above-cost accounting rates to keep the costs of U.S. facilities-based carriers' services higher. AT&T states that to avoid this squeeze by the foreign carrier, U.S. facilities-based carriers will be forced to make the uneconomic decision to use private line facilities, not because they are more efficient or less costly than embedded switched facilities, but to avoid the foreign carrier's above-cost accounting rate. We invite comment on these arguments in this proceeding.

79. As a final matter, to eliminate any confusion over the scope of the prior certification requirement adopted in the International Resale Policy order,<sup>61</sup> we propose 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. This requirement applies regardless of whether the carrier owns, leases, or has an IRU interest in the U.S. half-circuit. That is, this requirement applies regardless of whether the carrier is providing service on the U.S. half-circuit as a facilities-based carrier or a reseller.<sup>62</sup> It also applies regardless of whether the carrier is originating traffic in the United States or terminating traffic in the United States. Prior certification on a country-by-country basis is necessary in order to effectively enforce the equivalency policy that we adopted in the International Resale Policy order.<sup>63</sup> We request comment, however, on whether we should permit a private line reseller that has received an initial Section 214 certificate to provide a switched, basic service using a leased foreign half-circuit to add countries without prior certification once we have

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<sup>60</sup> See Supplemental Comments of AT&T, filed October 21, 1994, in BT North America, Inc., File No. I-T-C-93-126, DA 95-120, rel. Jan. 30, 1995 (application for authority under Section 214 of the Act to provide international resale services).

<sup>61</sup> See 7 FCC Rcd at 562, para 24.

<sup>62</sup> See supra Section III.B.3 (proposing to maintain our current definition of a facilities-based carrier).

<sup>63</sup> See 7 FCC Rcd 559 (1991).

adopted an order finding such countries to afford equivalent resale opportunities to U.S. carriers. Commenters should address whether notification to the Commission of additional countries is sufficient or even necessary.

## **5. Other Forms of Market Entry**

80. AT&T requests that we make this rulemaking applicable not only to carriers that hold international facilities-based Section 214 authorizations, but also to all U.S. telecommunications services providers, both domestic and international, including enhanced service providers. As detailed below, we believe that our current rules and policies governing domestic interexchange services, enhanced services, separate satellite systems and other noncommon carrier services do not warrant change. Accordingly, we propose to apply the rules we adopt in this proceeding only to common carriers providing international facilities-based services pursuant to Section 214 of the Act. We request comments on this tentative conclusion.

### **a. Domestic Interexchange Services**

81. Historically, we have not imposed foreign-ownership restrictions on domestic interexchange services, other than the statutory requirements of Section 310 of the Act which limit foreign ownership of common carrier radio facilities. We believe that the public interest goals identified above are well served by this open entry standard for domestic interexchange service. A foreign carrier whose U.S. affiliate provides domestic interexchange service may not use its bottleneck facilities to disadvantage unaffiliated U.S. interexchange carriers where there is no direct interconnection of those facilities to the foreign carrier's U.S. interexchange facilities. We find this fact, combined with the competitive benefits of our longstanding open entry policy for domestic service, and the administrative burden of regulating entry, to outweigh any anticompetitive effects that might occur as a result of permitting foreign carriers to operate in the U.S. domestic market.

### **b. Enhanced Services**

82. As for enhanced services,<sup>64</sup> we have previously found that their deregulation under Title II of the Act has served the public interest. We have not placed any restrictions on the provision of enhanced services by foreign-owned service providers. Continuing to permit foreign carriers to provide enhanced services presents no substantial risk of competitive harm in the market for such services. Therefore, continued deregulation of these services will also serve our goal of

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<sup>64</sup> See 47 C.F.R. § 64.702.

promoting effective global competition.

**c. Separate Satellite Systems and Other  
Noncommon Carriers**

83. Finally, for similar reasons we do not propose to apply foreign carrier restrictions to participation in separate satellite systems and other noncommon carrier facilities. Foreign carriers seeking to enter the U.S. market to provide international common carrier facilities-based services would be subject to our proposed effective market entry standard whether they use separate satellites, private submarine cables, or traditional common carrier transmission facilities.

**C. Modification of Dominant Carrier and Other Operating  
Safeguards**

84. In light of our tentative conclusions with respect to market entry and affiliation issues, we seek comment on whether we should modify our existing rules for determining the regulatory status (i.e., dominant or nondominant) of U.S. carriers that are affiliated with foreign carriers.<sup>65</sup> We asked whether we should change our definition of affiliation to be consistent with whatever approach is adopted in response to the proposals in Section III.B.2, supra.<sup>66</sup> In this section, we propose to maintain the other aspects of the framework we adopted in International Services for determining the regulatory status of affiliated U.S. carriers. We believe this approach will best serve the goals of this proceeding.

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<sup>65</sup> See International Services, 7 FCC Rcd 7331 (1992); 47 C.F.R. §§ 63.01(r), 63.10, and 63.11. The Commission regulates U.S. international common carriers that are dominant because of foreign affiliations, as dominant only on those routes where their foreign affiliates have the ability to discriminate against unaffiliated U.S. international carriers through the control of bottleneck services and facilities in the foreign market. With respect to those routes for which it is regulated as dominant, an affiliated carrier must: (a) obtain Commission approval before adding (or discontinuing) circuits; (b) file cost-support with its tariffs, which are effective only after 45 days notice (as opposed to 14 days for a nondominant carrier); and (c) report quarterly (as opposed to annually) on traffic and revenues. The rules adopted in International Services did not modify the dominant carrier status, for the provision of certain international services, of AT&T, Comsat or U.S. carriers that provide international service for noncontiguous domestic points. 7 FCC Rcd at 7342, n.2.

<sup>66</sup> See supra para. 66.

85. We take this opportunity, however, to seek comment on whether we should modify the nondiscrimination safeguards that we traditionally apply to carriers regulated as dominant under our International Services decision. Our experience in recent years suggests some of our safeguards can perhaps be better tailored to meet our regulatory concerns. Accordingly, we request comment on whether we should eliminate the requirement that dominant, foreign-affiliated carriers file tariffs on 45 days notice with cost support, and allow them to comply with nondominant carrier rules (*i.e.*, file their tariffs on 14 days notice without cost-support). We propose maintaining our requirements that a carrier obtain prior Commission approval before adding (or discontinuing) circuits on those routes for which the carrier is regulated as dominant and that it file quarterly traffic and revenue reports for those routes. We request specific comment, however, on whether the prior certification requirement is necessary if we adopt the entry approach proposed in this rulemaking.

86. We also propose a new requirement, adopted in the BT/MCI Order, 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 any joint venture for the provision of U.S. basic or enhanced services in which the U.S. carrier and its foreign carrier affiliate participate. These records should be available to the Commission upon request. We also propose to require that the 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 services in which they both participate. We do not propose to change our current rule that prohibits any carrier that has an affiliation with a foreign carrier from agreeing to accept special concessions from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any foreign country. This "no special concessions" rule applies regardless of an affiliated carrier's regulatory status.<sup>67</sup> We seek comment on all these proposals and alternatives to these proposals.

87. We further propose to require that any affiliated, facilities-based carrier regulated as dominant on any U.S. international route for the provision of switched services file with the Commission a complete list of the accounting rates that its foreign carrier affiliate maintains with all other countries. We also propose to apply this transparency requirement to affiliated carriers that we regulate as dominant in their provision of switched basic services via resold private lines.

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<sup>67</sup> See 47 C.F.R. § 63.14.

The required list of accounting rates would cover and specify all traffic relations and services of the foreign affiliate. We would require that this filing be made within 60 days of release of a Commission order classifying the carrier as dominant for the provision of switched services. We would also require that the carrier file within 30 days of the end of each calendar quarter any changes in its affiliate's accounting rates agreed to during that quarter. We propose to apply this transparency requirement to all facilities-based carriers and private line resellers now or hereafter classified as dominant for the provision of U.S. international switched services.

88. It has been U.S. policy within the International Telecommunication Union (ITU) and other international fora to promote cost-based, nondiscriminatory and transparent accounting rates. Full disclosure of the foreign carrier's accounting rates will enable us to determine whether there is a noncost-based disparity between the rates maintained by that carrier with U.S. carriers and the rates it maintains with its other foreign correspondents.<sup>68</sup> Here, the information that we propose to require may assist us in monitoring the impact of foreign carrier entry, and self-correspondency, on U.S. accounting rates and whether such entry fosters or impedes progress in reducing accounting rates.

89. We propose not to apply this transparency requirement to a foreign-affiliated carrier that provides switched services on a particular route solely through the resale of U.S. carriers' switched services. Such activity has little or no impact on the level of accounting rates. In addition, affiliated carriers that resell U.S. switched services are presumptively nondominant in any event.<sup>69</sup> Because we have not found the provision of private line service to have a significant impact on the settlements process, we also do not propose to apply this transparency requirement to carriers regulated as dominant solely for the provision of private line services.

90. To the extent we modify our existing dominant carrier safeguards, we propose, with the exception noted for transparent accounting rates, to apply the new safeguards to a U.S. carrier's

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<sup>68</sup> We have directed U.S. carriers to negotiate with their foreign correspondents accounting rates that are consistent with relevant cost trends and that eliminate any non-cost-based differences between accounting rates applied by a given foreign administration within its own region and those applied for the United States. Regulation of International Accounting Rates, Phase I First Report and Order, 6 FCC Rcd 3552, 3556 (1991), recon. denied, 7 FCC Rcd 8049 (1992).

<sup>69</sup> See 47 C.F.R. § 63.10(a)(4).

provision of all basic services for which we regulate it as dominant on a particular route. These dominant carrier safeguards, with the exception of the transparency requirement, would thus apply to U.S. carriers considered dominant on particular routes whether for the provision of facilities-based or resale services.

91. We also request comment on AT&T's proposal that we expressly prohibit a foreign carrier or its U.S. affiliate from refiling U.S. originating or terminating traffic, without the consent of the originating and terminating carriers. We request comment on whether an express prohibition is necessary, and how we should define the act of refiling. As for AT&T's request for a condition of proportionate return, since the 1950's, one of the guiding principles in our scrutiny of international traffic relations has been that U.S. carriers "should be permitted to share proportionately in . . . inbound traffic in order to be able to compete effectively."<sup>70</sup> We have consistently applied this principle,<sup>71</sup> waiving it only where required by the public interest, as for example, when a foreign administration lacked technology capable of providing proportionate return.<sup>72</sup> We now propose to codify our proportionate return policy as a rule of general applicability to all carriers.<sup>73</sup> That is, all carriers, whether affiliated or not, must accept only their proportionate share of return traffic from foreign correspondents. Under this rule, we will, of course, continue to grant waivers where necessitated by the public interest.

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<sup>70</sup> Mackay Radio, 19 FCC 1321, 1340 (1954).

<sup>71</sup> See, e.g., Telefonica Larga Distancia Puerto Rico, 8 FCC Rcd 106 (1992); FTC Communications, Inc., 4 FCC Rcd 5633 (Com. Car. Bur. 1989); U.S. Sprint, 3 FCC Rcd 1484 (Com. Car. Bur. 1988); American Tel. & Tel. Co., 2 FCC Rcd 6409 (Com. Car. Bur. 1987).

<sup>72</sup> See TRT Telecommunications Corp., 49 FCC2d 1408 (1974); TRT Telecommunications Corp., 46 FCC2d 1042 (1974).

<sup>73</sup> In Regulation of International Accounting Rates, Phase II Second Report and Order and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 8040, 8045 (1992), recon. pending, we requested comment on whether allowing some flexibility in our nondiscriminatory accounting rate, division of tolls, or proportionate return policies might be an appropriate means of achieving lower accounting rates as facilities-based competition is introduced in foreign countries. 7 FCC Rcd at 8046. We do not believe that this outstanding issue detracts from the desirability of codifying proportionate return as a rule of general applicability.

**D. Section 310(b)(4) Standard for Radio Licensee Ownership By Foreign Entities**

92. International Section 214 authorizations are required for the provision of international basic telecommunications services via any transmission facility on either a resale or facilities basis. In addition, authorizations under Title III of the Act are required for those entities seeking to operate specified classes of radio (wireless) station facilities. As explained in Section II.C. supra, Section 310(b)(4) establishes a 25 percent foreign ownership benchmark for the parent holding company of common carrier, broadcast, and aeronautical fixed and en route ("aeronautical") radio licenses.<sup>74</sup> We ask whether the goals of this proceeding would be served by incorporating the proposed effective market access standard into the public interest determinations under Section 310(b)(4) in situations where the foreign ownership would exceed the 25 percent statutory benchmark. Thus, related to our proposal that effective market access should be a part of the public interest showing under Section 214 of the Act, we also ask whether the same factors should be part of our public interest analysis under Section 310(b)(4) of the Act regarding applications for Title III common carrier and aeronautical fixed and en route radio licenses.<sup>75</sup> We further seek comment on whether the effective market access standard should be incorporated into the public interest

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<sup>74</sup> Section 310(b)(4) states, in pertinent part:

(b) No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by --

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(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or 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) (1982).

<sup>75</sup> We do not propose to apply the affiliation standard discussed in Section III.B.2. because the Section 310(b)(4) foreign ownership benchmark is a statutory requirement not subject to change.

determination under Section 310(b)(4) concerning applications for broadcast licenses. As discussed below, the Commission has traditionally taken a stricter approach to alien ownership determinations under this provision where broadcast licenses are involved given the control over the content of transmissions exercised by broadcasters.

### 1. Application to Common Carrier Licenses

93. Under the plain language of the Communications Act and its legislative history, the Commission has broad discretion in applying Section 310(b)(4). Indeed, the legislative history of Section 310 itself concerning foreign investment in parent holding companies reflects Congressional concern that rigid restrictions "would probably seriously handicap" U.S. companies engaged in international communications with large interests in foreign countries in connection with their international communications.<sup>76</sup> In addition, the Commission is authorized to consider reciprocal treatment under Section 308 of the Act.<sup>77</sup>

94. In those instances where the Commission has authorized foreign ownership or participation beyond the statutory benchmarks, the Commission has generally considered the level of foreign presence in light of the extent of U.S. presence in other areas (ownership, officers, or directors) relevant to a public interest determination under Section 310(b)(4).<sup>78</sup> In GRC Cablevision, Inc., for example, where the Commission allowed 60 percent alien ownership of a licensee's parent, it specifically noted that the majority of the parent's board of directors was comprised of U.S. citizens and the parent itself was a U.S. corporation. Furthermore, the Common Carrier Bureau noted in

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<sup>76</sup> S. Rep. No. 781, 73 Cong., 2d Sess. 7 (1934).

<sup>77</sup> See 47 U.S.C. § 308(c)(1982), which states "[t]he Commission in granting any license for any station intended or used for commercial communication between the United States ... and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and operation of submarine cables in the United States," approved May 24, 1921 ["Submarine Cable Landing License Act"]." The Submarine Cable Landing License Act states in part that licenses may be withheld if it will assist the United States in securing rights for the landing or operation of cables in foreign countries. See 47 U.S.C. § 35.

<sup>78</sup> See, e.g., GRC Cablevision, Inc., 47 F.C.C. 2d 467, 30 R.R. 2d. 827 (1974); IDB Communications Group, Inc., 6 FCC Rcd 4652 (Com. Car. Bur. 1991); and Teleport Transmission Holdings, 8 FCC Rcd 3063 (Com. Car. Bur. 1993).

Millicom,<sup>79</sup> where it approved greater than 25 percent alien presence on the board of directors, that 90 percent of the shareholders and a majority of the board were U.S. citizens. More recently, the Common Carrier Bureau approved 65 percent alien ownership in a licensee's parent where there was a 75 percent U.S. presence in the corporate roles of officers and directors.<sup>80</sup> Additionally, the Commission has also considered in its public interest analysis whether the Title III licensees involved are common carrier licensees with no control over the content of the transmissions.<sup>81</sup>

95. Section 310(b)(4) public interest determinations are often required at the same time as Section 214 authorizations when foreign carriers seek to enter the U.S. market, and many of the same policy considerations apply. We ask, therefore, whether a similar approach would be useful in both contexts. It appears that, in the case of common carrier radio licenses generally, such an approach would well serve the goals of this proceeding. Therefore, when an applicant in whom foreign ownership in the parent holding company exceeds the 25 percent benchmark seeks a common carrier radio license, or when a U.S. licensee seeks to increase the level of foreign ownership in its parent holding company beyond the 25 percent benchmark or previously authorized levels of foreign ownership, we ask whether our evaluation of the public interest should consider whether the foreign entity's primary markets pass the effective market access test.

96. Thus, for example, if a foreign entity seeks to invest in the parent holding company of an applicant for authority to provide Personal Communication Services ("PCS"), should we consider whether U.S. companies can provide PCS, or its functional equivalent, in the foreign entity's primary market? We also seek comment on whether, just as with our public interest analysis under Section 214, we should find that our effective market access finding under Section 310(b)(4) is not dispositive of our decision to license a particular entity. For instance, once we have reviewed the effective market access element of our public interest analysis, should we also assess other public interest factors which might weigh in favor of, or against, allowing entry into the U.S. market? Such factors in this context could include the state of liberalization in the foreign country's other radio-based service markets, national security, or the competitiveness of the applicant's target market in the United States. Finally, we seek comment on whether, if we do

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<sup>79</sup> See Millicom Inc., 4 FCC Rcd 4846 (1989).

<sup>80</sup> Teleport Transmission Holdings, 8 FCC Rcd at 3065.

<sup>81</sup> See, e.g., Millicom, 4 FCC Rcd at 4847; Teleport Transmission, 8 FCC Rcd at 3064-65.

consider effective market access, this would be a more tailored and predictable application of Section 310(b)(4) that will assist us in encouraging and recognizing foreign countries' efforts to liberalize their communications market.

## **2. Application to Aeronautical Licenses**

97. Section 310(b)(4) of the Act also applies to aeronautical en route and aeronautical fixed radio licenses. Aeronautical en route stations provide air-ground communications for the operational control (flight management) of aircraft by their owners or operators. Communications relate to the safe and efficient operation of aircraft.<sup>82</sup> The vast majority of en route stations are licensed to Aeronautical Radio, Inc. (ARINC).<sup>83</sup>

98. Although there have been no foreign ownership determinations made in this area, it appears there may be benefits in applying the effective market access test to these aeronautical services. With the increasing presence of foreign airlines in U.S. markets and the potential for increased foreign ownership of U.S. airlines, this issue could arise in the near future. Accordingly, we ask whether the effective market access test also should be applied to these aeronautical licensees.

## **3. Application to Broadcast Licenses**

99. Given the potential benefits of considering market access as a factor in our foreign ownership determinations for common carrier and aeronautical licensees, we believe it is appropriate to ask whether a similar approach should be utilized in evaluating broadcast applications that propose indirect alien ownership in excess of the 25 percent statutory benchmark. We note in this context that we have had a traditionally heightened concern for foreign influence over or control of licensees which exercise editorial discretion over the content of their transmissions.

100. The distinction between common carrier and broadcast

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<sup>82</sup> En route stations are the means by which companies satisfy Federal Aviation Administration requirements to maintain reliable communications between each aircraft and its dispatch office, in the case of large airlines, or maintain flight following systems, in the case of small airlines and commercial aircraft operators. Aeronautical fixed stations provide point to point communications pertaining to safety, regularity and economy of flight.

<sup>83</sup> ARINC renders its services on a non-profit basis with costs distributed in proportion to use. Its principal stockholders as well as its principal customers are the U.S. scheduled airlines.

licensees in terms of content control has been the basis for our traditionally disparate treatment of these licensees under Section 310(b)(4). While the Commission has granted applications permitting foreign ownership of a parent holding company of a non-broadcast licensee to exceed 25 percent,<sup>84</sup> the Commission has consistently declined to do so in broadcasting because of a broadcast licensee's ability to control the content of its transmission.<sup>85</sup> Thus, for example, in the GRC Cablevision case, granting a Cable Television Relay Service (CARS) construction permit to an entity whose parent was more than 50 percent foreign owned, the Commission stressed that: "[o]ur action here represents no departure from our traditional policies in regulation of broadcast television. Alien ownership in that medium presents different questions which we will deal with as they rise in concrete situations."<sup>86</sup> The Commission stated that its decision to grant the application notwithstanding the involvement of aliens was based in part on the fact that "the facility in question [would] be used for the relay of broadcast signals and [would] thus be largely passive in operation."<sup>87</sup>

101. Although there is little discussion in the case law of the Commission's consistent concern over alien ownership interests in broadcast station holding companies in excess of 25 percent, the legislative history of 310(b) suggests that alien control of limited broadcast information outlets, particularly in time of war, was a principal consideration in adopting the restrictions. As the court stated in Noe v. FCC: "the dangers from espionage and propaganda disseminated through foreign-owned

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<sup>84</sup> See GRC Cablevision, Inc., 47 F.C.C. 2d 467 (1974) (although references in this case are to Section 310(a), this Section was later recodified as Section 310(b)(4)); see also Teleport Transmission Holding, Inc., 8 FCC Rcd 3063 (Com. Car. Bur. 1993).

<sup>85</sup> See, e.g., Primemedia Broadcasting, Inc., 3 FCC Rcd 4293 (1988).

<sup>86</sup> 47 F.C.C. 2d at 468.

<sup>87</sup> Id. at 468. See also Teleport 8 FCC Rcd at 3065 ("Finally, we note that the two licenses involved are common carrier licenses" and that the licensee "will exercise therefore no control over the content of the transmissions"); GCI Liquidating Trust, 7 FCC Rcd 7641 (1992) ("licenses involved are in the point-to-point microwave service where the licensee will exercise no control over content of the transmission"); Millicom Inc., 4 FCC Rcd 4846-47 (1989) ("licensed stations provide common carrier service, and as a result, they involve facilities in which the licensee exercises no control over the content of the transmissions").

radio stations in the United States prior to and during war brought about the passage of the Radio Act of 1927 (superseded by the Communications Act of 1934)...."<sup>88</sup>

102. It may be appropriate now to revisit our restrictive approach to alien investment in broadcasting. In contrast to the situation that existed in 1927, there are currently a plethora of broadcast and other mass communications facilities available to the general public. Additionally, even if we incorporate the effective market access standard in our evaluation of broadcast applications, the nature of the case-by-case review conducted under Section 310(b)(4) is such that we retain the discretion to deny particular applications if warranted by the facts of a specific case.

103. Accordingly, we seek comment on whether we should consider effective market access as a factor in Section 310(b)(4) determinations involving broadcast licensees and, if so, what restrictions, if any, we should place on the level or type of interests which aliens would be permitted to hold. We invite commenters to submit any other proposals they believe would be appropriate in defining our Section 310(b)(4) analysis for broadcast licensees, including those which might permit alien control of a licensee's parent company. We emphasize, however, that any such proposals should carefully evaluate the risks and benefits to the public interest, paying particular attention to the fact that control of mass media facilities confers control over the content of widely available broadcast material.

#### IV. CONCLUSION

104. In this Notice, we tentatively 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 facilities-based services. In proposing this standard, we wish to promote three goals: (1) effective competition in the global market for communications services; (2) the prevention of anticompetitive conduct in the provision of international services or facilities; and (3) opening of foreign communications markets. We tentatively conclude that an important element of the public interest standard we would consider is whether there is, currently or in the near future, effective market access to U.S. carriers seeking to provide basic, international telecommunications facilities-based services in the primary markets of the foreign carrier desiring entry. We also propose to continue to consider other factors under our public

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<sup>88</sup> Noe v. FCC, 260 F.2d 739, 741 (D.C. Cir. 1958) citing Letter from the Secretary of the Navy (March 22, 1932), Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 26 (1934).

interest analysis. We suggest two alternative levels of foreign carrier ownership that would trigger this analysis: interests of greater than either 10 percent or 25 percent. We do not propose to change our approach to foreign carrier Section 214 applications for reselling international switched or private line services, or for providing domestic interexchange or enhanced telecommunications services.

105. We also ask whether we should adopt the effective market access test as an important element of the Section 310(b)(4) public interest analysis applicable to foreign entities seeking to acquire an indirect ownership interest in U.S. radio facilities. Thus, when a foreign entity seeks to acquire an indirect ownership interest of more than 25 percent in a common carrier, aeronautical radio or broadcast facility, we seek comment on whether we should find that an important element of the public interest requirement of Section 310(b)(4) has been met if the primary markets of the foreign entity offer effective market access to U.S. carriers to provide the same type of radio-based services as requested in the United States. We ask whether we should also consider other factors under our public interest analysis. We seek comment on all aspects of the proposals described above, and invite additional suggestions on how the Commission may best reach its stated goals.

106. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A, Section II. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice (see Appendix A, Section III), but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1980).

#### **V. ORDERING CLAUSES**

107. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory action described above, and that COMMENT IS SOUGHT on the proposals in this Notice.

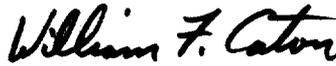
108. IT IS FURTHER ORDERED that AT&T's petition for rulemaking is GRANTED IN PART to the extent that we are initiating a rulemaking to address foreign carrier entry into the U.S. market, and denied in all other respects.

109. IT IS FURTHER ORDERED that IDB's petition for rulemaking is GRANTED IN PART to the extent that we clarify our definition of what is a facilities-based carrier and seek comment on our definition, and denied in all other respects.

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

111. For further information on this Notice contact Troy F. Tanner or Susan O'Connell, Attorney-Advisors, Policy and Facilities Branch, Telecommunications Division, International Bureau, (202) 418-1470.

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton  
Acting Secretary

**APPENDIX A**  
**Procedural Matters**

**I. Ex Parte Rules - Non-Restricted Proceeding**

This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

**II. Initial Regulatory Flexibility Act**

**A. Reason for Action**

This rulemaking proceeding is initiated to obtain comment regarding proposed changes to the Commission's entry standard for foreign carriers desiring to enter the U.S. international telecommunications market, as well as changes to the Commission's public interest standard for foreign entities that seek to acquire an indirect interest in a U.S. common carrier, aeronautical, or broadcast radio license. Comment is also requested on proposed modifications to the Commission's dominant carrier safeguards as well as to other non-discrimination safeguards. Comment is also sought on the Commission's definition of an international facilities-based carrier.

**B. Objectives**

The Commission seeks to establish standard rules and procedures to regulate foreign entry into the U.S. marketplace in order to promote effective competition and prevent anti-competitive conduct in the market for international communications services, as well as to open foreign communications markets.

**C. Legal Basis**

The proposed action is authorized under Sections 4 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303(r).

**D. Reporting, Recordkeeping and Other Compliance Requirements**

The actions contained in this Notice of Proposed Rulemaking may affect large and small carriers. We propose to require that dominant, foreign-affiliated carriers maintain or provide certain records regarding their foreign affiliates. These carriers may be required to comply with proposed requirements to file certain

reports, but this is not estimated to be a significant economic burden for these entities.

**E. Federal Rules That Overlap, Duplicate or Conflict With These Rules**

None.

**F. Description, Potential Impact, and Number of Small Entities Involved**

To the extent that the proposals discussed in this Notice of Proposed Rulemaking propose to make equity investment by foreign telecommunications carriers in U.S. carriers more difficult, carriers seeking foreign investment greater than the proposed threshold will be adversely affected. These proposals are intended to ensure that U.S. carriers can compete effectively in international markets and to open closed foreign markets. Copies of this Notice will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

**G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives**

The Notice solicits comment on a variety of alternatives to achieve Commission objectives.

**III. Comment Dates**

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before March 28, 1995 and reply comments on or before April 28, 1995. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554.

**Separate Statement  
of  
Commissioner James H. Quello**

**February 7, 1995**

Re: Market Entry and Regulation of Foreign-Affiliated Entities  
(IB Docket No. 95-22 ).

I am concerned about the timing and scope of this Notice of Proposed Rule Making. While it is commendable for this Commission to clarify our rules regarding foreign carrier entry in an evolving and increasingly international communications marketplace, I am troubled that we are proposing review of Section 310 of the Communications Act when Congress has targeted foreign ownership as a subject for legislative action. Although I have long maintained that a Commissioner may ask any question of interest in a Notice of Proposed Rule Making, I believe that it is our role to seek and accept guidance from Congress; particularly when a subject is under active consideration in the Legislative Branch of our Federal Government. I believe that it unnecessarily complicates the resolution of this docket to incorporate a review of Section 310 into what could have been more expeditiously handled by a clarification of Section 214, as requested by the parties.

In what I believe is a misguided attempt to reach legal symmetry, this NPRM raises the issue of the application of possible revisions of Section 310 to broadcast facilities. I note, however, that we do not draw a tentative conclusion but, rather, merely seek comment on whether any revisions in our analysis of Section 310, if adopted, should apply to other than telephone carriers.

In clarifying our analysis under our statutory mandate, we must recall the history of the Communications Act. Restrictions on control of broadcast facilities were a bedrock principle of the Communications Act. In addition to legislative intent underlying the Communications Act of 1934, we must be mindful of current legislative activity. Telecommunications reform legislation attracted broad bipartisan support and came very close to passage in the previous Congress. Comprehensive telecommunications legislation has been identified as a priority in this current 104th Congress. Therefore, I believe that the Legislative Branch of our Federal Government, rather than this Commission, properly should take the lead in any reconsideration of Section 310, as they have indicated they are so doing.

In light of these concerns, I specifically ask commenters to address the issue of the appropriate scope of this proceeding.

February 7, 1995

SEPARATE STATEMENT  
OF  
COMMISSIONER SUSAN NESS

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

Global business and global competition require global telecommunications services. By one estimate, the global telecommunications services industry will generate close to \$1 trillion in revenue by the end of the decade. Access to foreign markets is therefore critical to the competitiveness of American companies seeking to enter this worldwide telecommunications market. The U.S. communications market is attracting foreign investment and increasing numbers of foreign carriers. Yet a recent study concludes that prohibitive market entry and foreign investment regulations of our trading partners are restricting the ability of our carriers to compete globally.

The Notice of Proposed Rulemaking we adopt today asks fundamental questions about the relevance of asymmetric market conditions to the entry of foreign entities into U.S. communications markets. Our approach is both cautious and well-reasoned. The Notice tentatively proposes to make the openness of a foreign carrier's home markets an explicit factor in our public interest analysis of that carrier's Section 214 application to enter the international services market in the United States. It further asks whether this same market access approach is appropriate when considering requests under section 310(b)(4) to exceed the statutory benchmarks for foreign ownership of radio licensees.

The Notice correctly notes the historical difference in the FCC's treatment of foreign ownership of broadcast radio facilities and common carrier facilities. I support our affirmation of the continued need under our public interest analysis for heightened scrutiny where a foreign entity will exercise editorial control over the content of transmissions.

Market access will not be the only factor in our analysis, nor will it be dispositive. We will continue to consider other public interest factors in making our determinations, such as the promotion of competition in global markets, the presence of cost-based accounting rates and any national security implications.

FCC consideration of foreign market access in these contexts should be welcomed by those countries, like the United Kingdom, that have significantly liberalized their telecommunications markets, and should provide renewed incentive to those markets that are moving, although more slowly, toward liberalization. I believe that this Notice reflects the good faith of the United States by proposing a further liberalization of our telecommunications market and by clarifying our policy on foreign carrier entry.

**The Notice lays important groundwork as U.S. companies move increasingly into the global telecommunications services market. A thorough examination of the issue of market access also signals to the world our awareness that open markets are essential components in a Global Information Infrastructure (GII). As Vice President Gore stated in his speech to the World Telecommunications Development Conference in Buenos Aires, Argentina: "The commitment of all nations to enforcing regulatory regimes to build the GIi is vital to world development and many global social goals."**

**I welcome the debate on this extremely important subject.**