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

COMMENTS OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION ON THE NOTICE OF PROPOSED RULEMAKING

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SUMMARY

The Executive Branch has a strong interest in the issues raised in the Commission's Notice, which may affect the U.S. Government's ongoing initiatives to promote open telecommunications services markets in foreign countries and to develop a Global Information Infrastructure. While the Executive Branch agrees with the Commission's goal of opening global markets for U.S. telecommunications companies, its proposed inclusion of an effective market access test under both sections 214 and 310(b)(4) does not explicitly reflect the Executive Branch's role in relation to foreign market access determinations.

On behalf of the Executive Branch, an interagency group, coordinated by the National Telecommunications and Information Administration, and comprised of the Departments of Commerce, Defense, Justice, State, Treasury, and the Office of United States Trade Representative, is presenting these comments to the Commission. These agencies have broad authority and expertise over U.S. national security, foreign relations, trade, investment, antitrust and telecommunications and information policies, as well as primary responsibility for meeting the international legal obligations of the United States and interpreting international agreements. Together, these agencies are advancing a long-term strategy to open foreign markets, including the North American Free Trade Agreement negotiations for enhanced telecommunications services, negotiations in international fora such as the World Trade Organization, and bilateral and multilateral consultations and negotiations with foreign countries. Recently, Vice President Gore stressed the Administration's support for these ongoing initiatives and stated that the United States intends to liberalize foreign investment in

telecommunications services in the U.S. market for countries that open their markets to U.S. companies.

The Commission, on the other hand, has authority over the regulation of U.S.-based telecommunications carriers in interstate and foreign commerce, as well as concurrent authority with the Executive Branch to protect competition involving telecommunications carriers by enforcing certain provisions of the antitrust laws. In carrying out its regulatory responsibilities, the Commission may help effectuate the policy goals and initiatives of the Executive Branch and promote U.S. interests in dealing with foreign countries. Accordingly, the Commission must accord great deference to the Executive Branch with respect to U.S. national security, foreign relations, the interpretation of international agreements, and trade (as well as direct investment as it relates to international trade policy). The Commission must also continue to take into account the Executive Branch's views and decisions with respect to antitrust and telecommunications and information policies.

To facilitate the U.S. Government's ongoing initiatives, described above, the Administration is urging Congress to amend section 310(b)(4) by lifting the restrictions on foreign investment in radio-based telecommunications for foreign countries that provide similar opportunities to U.S. companies. The Administration believes that the relevant market access determination should be made by the Executive Branch and include the flexibility to deviate from the market access criteria in special circumstances.

In the absence of such legislation, however, we realize the importance of the Commission's current regulatory role under section 310(b)(4) in deciding whether to permit foreign ownership in certain U.S. telecommunications companies in excess of the statutory percentage. We also recognize the Commission's significant regulatory role under section 214 in deciding whether to grant authority to provide facilities-based services, which may involve international services, as well as foreign entities whose home markets may vary in the extent to which they are open to U.S. companies. The application of the Commission's proposed "effective market access" test in the context of these regulatory responsibilities could have a significant impact on U.S. policies aimed at opening foreign markets to U.S. companies.

These comments thus highlight the respective roles of the Executive Branch and the Commission due to the overlapping areas of authority. As indicated, when such overlap occurs, the Commission must exercise great deference to the Executive Branch with respect to U.S. national security, foreign relations, the interpretation of international agreements, and trade (as well as direct investment as it relates to international trade policy). The Commission must also continue to take into account the Executive Branch's views and decisions with respect to antitrust and telecommunications and information policies. We look forward to working with the Commission to establish a process to take the respective authorities of the Commission and Executive Branch agencies into account in an expeditious manner, and we plan to address the issue of a consultative and coordinative process with more particularity in the reply round.

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COMMENTS OF THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION ON THE NOTICE OF PROPOSED RULEMAKING

The National Telecommunications and Information Administration ("NTIA")[1] respectfully submits the following comments on behalf of the Executive Branch in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.[2] Preparatory to filing these comments, NTIA convened an interagency group to address the issues raised in this Notice by the Commission's proposed "effective market access" test. Accordingly, these comments

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[1] NTIA is the Executive branch agency principally responsible for the development and presentation of domestic telecommunications and information policy. NTIA, in coordination with the Secretary of State and other interested agencies, also develops international telecommunications and information policy. See 47 U.S.C. § 902 (Supp. V 1993).

[2] Market Entry and Regulation of Foreign-affiliated Entities, *Notice of Proposed Rulemaking* in IB Docket No. 95-22, FCC 95-53 (released Feb. 17, 1995).

reflect the views of the Departments of Commerce,[3] Defense, Justice, State, Treasury, and the Office of United States Trade Representative.

I. INTRODUCTION

In its Notice, the Commission sets forth three specific goals underlying the proposed changes to the regulation of the U.S. international telecommunications market: (1) to promote effective global competition; (2) to prevent anti-competitive conduct; and (3) to encourage foreign governments to open their markets to competition. In furtherance of these goals, the Commission proposes to modify the current public interest standard that it employs when considering applications under section 214 of the Communications Act of 1934, as amended ("Communications Act"), for foreign-affiliated carriers to enter the U.S. market to provide international facilities-based services.[4]

More specifically, the Commission proposes to expand its public interest test to include a market access standard as well as additional factors. Under the Commission's proposal, if a foreign carrier desires to enter the U.S. basic international facilities-based market, either directly or through affiliation with an authorized U.S. carrier, the Commission would assess whether the primary market (or markets) of the foreign carrier offers effective

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[3] NTIA, along with the International Trade Administration, represent the Department of Commerce for purposes of these comments.

[4] See 47 U.S.C. § 214 (1988 & Supp. V 1993).

opportunities to U.S. carriers to compete in the provision of basic international services and facilities.

In addition to proposing a modification of the current standard for applying section 214, the Commission solicits comments on whether the addition of the "effective market access" standard and other proposed public interest factors are appropriate in making determinations under section 310(b)(4) of the Communications Act.[5] This section, which limits the extent of foreign investment in entities holding broadcast, common carrier, and aeronautical fixed and en route radio station licenses, applies to any corporation directly or indirectly controlled by a foreign corporation. Section 310(b)(4) further provides, however, that the Commission may, if it finds it to be in the public interest, grant a license to an entity controlled by a corporation with foreign ownership or management greater than twenty-five percent.[6]

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[5] 47 U.S.C. § 310(b)(4) (1988).

[6] 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 --

* * *

> (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. Id.

II. EXECUTIVE BRANCH INITIATIVES

The Executive Branch is committed to a long-term process of promoting open and liberalized telecommunications services and equipment markets in foreign countries. The Executive Branch's strategy is multifaceted. One part of this long-term process has been the North American Free Trade Agreement (NAFTA) negotiations with Canada and Mexico for enhanced telecommunications services, which were successfully concluded in November 1993.

The Executive Branch agencies are also involved in the Negotiating Group on Basic Telecommunications (NGBT), which was created by the World Trade Organization specifically to achieve progressive liberalization of trade in telecommunications transport networks and services within the framework of the General Agreement on Trade in Services. The U.S. objective in the NGBT is to obtain similar levels of openness in the markets of other major trading partners, most of which are dominated by single providers, private or public. We hope to accomplish our objective in the basic telecommunications services sector by establishing mutually agreed-upon disciplines on interconnection, competition safeguards, transparency, and the independence of regulators from operators. These disciplines are necessary to guarantee competition once a market access agreement is reached as a result of the negotiations. The deadline for the NGBT negotiations is April 30, 1996. The United States has reserved the right to take a most-favored nation (MFN) exemption for basic

telecommunications services if the NGBT fails to produce high-level commitments to liberalize competition in basic services from a critical mass of key countries.

In addition to our participation in the NGBT, we also continue to work in other international fora such as the Organization for Economic Cooperation and Development, Asia-Pacific Economic Cooperation, the International Telecommunications Satellite Organization, the International Mobile Satellite Organization, the Inter-American Telecommunications Commission of the Organization of American States, and the International Telecommunication Union to achieve consensus on pro-competitive principles that will promote open competition.

We also participate in a variety of bilateral and multilateral consultations, discussions, and negotiations encouraging more liberal and pro-competitive telecommunications structures worldwide in order to open overseas telecommunications services markets for U.S. companies. While the stages of market development in foreign countries vary, the Administration is encouraged by its success to date and will continue to seek open and liberalized telecommunications services markets worldwide.

In support of these ongoing pro-competitive market initiatives, the Executive Branch released the Global Information Infrastructure: Agenda for Cooperation (Agenda for

Cooperation) on February 15, 1995.[7] The purpose of the Agenda for Cooperation is to set forth the U.S. Government's vision of the principles[8] that should guide the development of a Global Information Infrastructure (GII) and identify the steps that the United States can take, in concert with other nations, to make that vision a reality.

In furtherance of this international process, Secretary of Commerce Ronald H. Brown and other senior U.S. Government officials met on February 25-26, 1995, with the telecommunications ministers of the other Group of Seven (G-7) countries in Brussels to discuss various aspects of international telecommunications, including competition policy, development of the GII, and the social and cultural aspects of the GII. The ministers also

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[7] The President's Information Infrastructure Task Force, chaired by Ronald H. Brown, Secretary of Commerce, Global Information Infrastructure: Agenda for Cooperation (Feb. 1995).

[8] The five principles underlying the Global Information Infrastructure, as explained in the Agenda for Cooperation, are:

(1) encouraging private sector investment;
(2) promoting competition;
(3) providing open access to the network for all information providers and users;
(4) creating a flexible regulatory environment that can keep pace with rapid technological and market changes; and
(5) ensuring universal service.

See Id. at 1.

agreed to jointly develop eleven projects demonstrating the potential of the Information Society.[9]

Clearly, the Executive Branch and the Federal Communications Commission share the same goal -- to open foreign telecommunications services markets to U.S. service providers. Vice President Gore, in his speech to the G-7 Ministerial Conference, set forth the Administration's view that we should take the broadest possible approach to ensure fair access to foreign markets. The Vice President stated that:

> Whether by new law or new regulation, we intend to open foreign investment in telecommunications services in the United States for companies of all countries who have opened their own markets.
>
> But we also recognize that the information society demands more than a piecemeal approach. The governments represented here and others have an historic opportunity to open telecommunications markets around the world in the negotiations within the General Agreement on Trade in Services. The deadline for these negotiations is April 1996.
>
> Let us resolve to meet this deadline to remove our investment barriers together.

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[9] The pilot projects are:

(1) global inventory;
(2) global interoperability for broadband networks;
(3) cross-cultural education and training;
(4) electronic libraries;
(5) electronic museums and galleries;
(6) environment and natural resources management;
(7) global emergency management;
(8) global healthcare applications;
(9) government online;
(10) global marketplace, particularly for small and medium-sized enterprises; and
(11) maritime information systems.

In the event the NGBT is not successful, however, the Executive Branch intends to work with the Congress and Commission to ensure that our common goal of effective competition in the international marketplace can be met.

The Agenda for Cooperation, the G-7 Conference, and other Executive Branch work in international fora are crucial aspects of the Executive Branch's coordinated approach to open overseas telecommunications services markets. This long-term approach has proven to be an effective and successful strategy for addressing international telecommunications issues.

III. EXECUTIVE BRANCH/COMMISSION AUTHORITY

The Constitution, along with a number of statutory provisions, gives the President and the Executive Branch agencies broad authority over U.S. national security, foreign relations, trade, investment, and antitrust policy, which include telecommunications components. Moreover, in these areas, as well as in telecommunications and information policy, the Executive Branch agencies work together in applying their broad expertise. In addition, the Executive Branch has the primary responsibility for meeting the international legal

obligations of the United States and for interpreting international agreements. Thus, the Departments of Commerce,[10] Defense,[11] Justice,[12] State,[13] Treasury,[14] and the Office

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[10] National Telecommunications and Information Administration Organizational Act, 47 U.S.C. §§ 901-927 (Supp. V 1993); Communications Satellite Act of 1962, as amended, 47 U.S.C. § 701 et seq. (1988); 15 U.S.C. § 1512 (1988 & Supp. V 1993); 15 U.S.C. § 4051 (1988); 15 U.S.C. § 4721 (1988 & Supp. V 1993); 15 U.S.C. § 4727 (Supp. V 1993); Defense Production Act of 1950, § 721, 50 U.S.C. app. § 2170 (1988 & Supp. V 1993) (Exon-Florio); Presidential Determination No. 85-2, 3 C.F.R. 254 (1984); Reorg. Plan No. 3 of 1979 3 C.F.R. 513 (1979), reprinted as amended in 19 U.S.C. § 2171 note (1988); Exec. Order No. 12,870, 3 C.F.R. 653 (1993); Exec. Order No. 12,188, 3 C.F.R. 131 (1980), reprinted as amended in 19 U.S.C. § 2171 note (1988); Exec. Order No. 12,046, §§ 5-101, 5-102, 3 C.F.R. 158, 164 (1978), reprinted as amended in 47 U.S.C. § 305 note (1988); Exec. Order No. 11,858, 3 C.F.R. 990 (1971-1975), reprinted as amended in 15 U.S.C. § 78b note (1988 & Supp. V 1993).

[11] See, e.g., 10 U.S.C. § 131 et seq. (1988 & Supp. V 1993); 50 U.S.C. § 1 et seq. (1988).

[12] The Sherman Act, 15 U.S.C. §§ 1-7 (1988 & Supp. V 1993); The Clayton Act, 15 U.S.C. §§ 12-27 (1988 & Supp. V 1993) (enforcement jurisdiction over telecommunications is part of Justice's broad jurisdiction over all sectors of U.S. domestic and foreign commerce); Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1988 & Supp. V 1993).

[13] 22 U.S.C. § 2656 (1988 & Supp. V 1993); State Department Basic Authorities Act, § 35, as amended, 22 U.S.C. § 2707 (1988); Submarine Cable Landing License Act, 47 U.S.C. §§ 34-39 (1988); Communications Satellite Act of 1962, as amended, 47 U.S.C. § 701 et seq. (1988); Presidential Determination No. 85-2, 3 C.F.R. 254 (1984); Exec. Order No. 12,046, §§ 5-201, 5-202, 3 C.F.R. 158 (1978), reprinted as amended in 47 U.S.C. § 305 note (1988); Exec. Order No. 10,530, § 5(a), 3 C.F.R. 189 (1954-1958), reprinted as amended in 3 U.S.C. § 301 note (1988).

[14] Defense Production Act of 1950, §721, 50 U.S.C. app. § 2170 (1988 & Supp. V 1993) (Exon-Florio). Treasury chairs the Committee on Foreign Investment in the United States, which implements this legislation dealing generally with foreign mergers, acquisitions, and takeovers of U.S. companies.

of United States Trade Representative,[15] whose views are reflected in these comments, have significant authority and expertise bearing on international telecommunications issues.

The Commission has broad responsibility, under the powers delegated by Congress in the Communications Act, over the regulation of telecommunications carriers in interstate and foreign commerce, and specifically to promote the availability to U.S. consumers of a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[16] Moreover, the Commission has concurrent authority with the Executive Branch to protect competition involving telecommunications carriers by enforcing certain provisions of the antitrust laws, including section 7 of the Clayton Act.[17]

In exercising its responsibilities with respect to acquisitions and other transactions between the United States and foreign telecommunications carriers, however, the

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[15] The Trade Act of 1974, § 141, as amended, 19 U.S.C. § 2171 (1988 & Supp. V 1993); Trade Expansion Act of 1962, § 242, as amended, 19 U.S.C. § 1872 (1988 & Supp. V 1993); Trade and Tariff Act of 1984, § 306(c)(1), 19 U.S.C. § 2114c (1988 & Supp. V 1993) (trade in services); Trade Act of 1974, § 301, as amended, 19 U.S.C. § 2411 (1988 & Supp. V 1993); Title VII of the 1988 Trade Act, as amended, 19 U.S.C. § 2511 (1988 & Supp. V 1993) (government procurement); Telecommunications Trade Act of 1988, 19 U.S.C. §§ 3101-11 (1988); Uruguay Round Implementing Legislation of 1994, Pub. L. No. 103-465, § 135(b), 108 Stat. 4809, 4840; Reorg. Plan No. 3 of 1979, 3 C.F.R. 513 (1979), reprinted as amended in 19 U.S.C. § 2171 note (1988); Exec. Order No. 12,661, § 1-401, 3 C.F.R. 618 (1988), reprinted in 19 U.S.C. § 2901 note (1988); Exec. Order No. 12,188, 3 C.F.R. 131 (1980), reprinted as amended in 19 U.S.C. § 2171 note (1988); Exec. Order No. 11,846, 3 C.F.R. 971 (1971-1975), reprinted as amended in 19 U.S.C. § 2111 (1988).

[16] 47 U.S.C. § 151 (1988 & Supp. V 1993).

[17] 15 U.S.C. § 21 (1988).

Commission's authority overlaps with the more extensive and primary responsibilities of the Executive Branch. The Commission must exercise its authority with great deference to the Executive Branch with respect to U.S. national security, foreign relations, the interpretation of international agreements, and trade (as well as direct investment as it relates to international trade policy). The Commission must also continue to take into account the Executive Branch's views and decisions with respect to antitrust and telecommunications and information policies in exercising its regulatory responsibilities under the Communications Act. This is necessary to ensure consistency and promote U.S. interests in dealing with foreign nations and their telecommunications carriers. Moreover, the Commission must exercise its authority in a manner consistent with U.S. international legal obligations, including MFN commitments.

The Commission's regulatory actions should thus complement and be consistent with the broad U.S. policy goals of the Executive Branch as well as U.S. international obligations.[18] In this way, the Commission, in carrying out its responsibilities as the primary regulator of the U.S. telecommunications industry, can also help support U.S.

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[18] On behalf of the Executive Branch, NTIA previously filed comments in response to a Commission inquiry on regulatory policies and international telecommunications. In those comments, NTIA asserted that the Commission is an independent regulatory agency whose statutory jurisdiction does not include the independent formulation or implementation of U.S. trade policy. In addition, NTIA noted that the Commission has no greater authority to implement U.S. trade policy than it has with respect to foreign policy, national defense policy, and antitrust policy. See Comments of NTIA in CC Docket No. 86-494 (filed Apr. 17, 1987 & May 20, 1988).

national security, foreign relations, trade, investment, antitrust, and telecommunications and information policies.

IV. THE COMMISSION'S SECTION 214 FACILITIES AUTHORIZATION PROPOSAL

Pursuant to section 214 of the Communications Act, common carriers seeking to provide international facilities-based services must seek authorization from the Commission, which uses a public interest test to examine each application on a case-by-case basis.[19] In its Notice, the Commission proposes to expand its existing public interest test by adopting an "effective market access" entry standard, defined as the ability of U.S. carriers, either currently or in the near future, to provide basic, international telecommunications facilities-based services in the primary markets served by the carrier seeking entry into the U.S. market.

The Commission proposes to consider a variety of factors, none of which would be dispositive, to determine whether "effective market access" exists. The factors the Commission proposes to consider are:

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[19] In general, Section 214 authorizations are required for foreign-owned carriers to initiate services, acquire and operate lines, construct major facility projects, acquire capacity from any future private cable or satellite source, obtain new certification for additional circuits, and file any contracts and concessions entered into with another carrier.

Section 214(b) states that copies of applications must be given to the Department of Defense, and, for international service, the Department of State, and that those agencies have a right to be heard by the Commission. 47 U.S.C. § 214 (1988 & Supp. V 1993).

(1) whether in the carrier's primary market U.S. carriers can offer international facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States;

(2) whether competitive safeguards exist in the foreign country to protect against anti-competitive and discriminatory practices, including cost allocation rules to prevent cross-subsidization;

(3) the availability of published, nondiscriminatory charges, terms, and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services;

(4) timely and nondiscriminatory disclosure of technical information needed for interconnection with carriers' facilities;

(5) the protection of carrier and customer proprietary information; and

(6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive standards.

Once the Commission has reviewed the "effective market access" elements, it also plans to assess additional public interest factors that might weigh in favor of, or against, allowing entry into the U.S. market, including:

(1) the state of liberalization in the foreign carrier's domestic market and the availability of other market access opportunities to U.S. carriers;

(2) the status of the foreign carrier as a government or non-government entity;

(3) the general significance of the proposed entry to promotion of competition in global markets;

(4) the presence of cost-based accounting rates; and

(5) any national security implications.

The Commission also indicates that it plans to reserve the right to review "unique" factors with respect to transactions involving foreign carrier participation, without specifying the nature of such factors. Additionally, the Commission states that it plans to solicit the views of the Executive Branch on the proposed foreign carrier's entry into the U.S. market.

The Commission's exercise of its regulatory responsibilities for oversight of telecommunications carriers under the proposed test implicates issues broader than those committed to the Commission under the Communications Act and overlaps with Executive Branch authority.[20] As a result, in addressing the issue of market access, the Commission must exercise its authority with great deference to the authority and expertise of the Executive Branch by coordinating and consulting with the Executive Branch concerning U.S. national security, foreign relations, the interpretation of international agreements, and trade (as well as direct investment as it relates to international trade policy). The Commission must also continue to take into account Executive Branch views and decisions with respect to

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[20] See National Ass'n for the Advancement of Colored People v. Federal Power Comm'n, 425 U.S. 662, 669 (1976) (NAACP v. FPC) (holding public interest mandate given to the Federal Power Commission by regulatory statute is "not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation."). See also American Paper Inst., Inc. v. American Electric Power Serv. Corp., 461 U.S. 402, 417 (1983) (citing NAACP v. FPC for holding that "public interest" in regulatory statute takes meaning from purposes of regulatory legislation); Business Roundtable v. S.E.C., 905 F.2d 406, 413 (D.C. Cir. 1990) (citing NAACP v. FPC for holding that "'public interest' mandates must be limited to 'the purposes Congress had in mind when it enacted [the] legislation'"); Satellite Business Systems, *Memorandum Opinion, Order, Authorization and Certification*, 62 F.C.C.2d 997, 1073 n.138 (1977) (citing NAACP v. FPC for an "exposition of the requirement that regulatory action under a public interest standard be rationally related to the public interest in the subject matter of the regulatory agency involved").

antitrust and telecommunications and information policies. Great weight is thus due by the Commission to the views and decisions expressed by the Executive Branch with respect to market access issues because of the consequences that the Commission's actions or inaction can have for U.S. foreign relations in general as well as specific policies pertaining to areas under Executive Branch responsibility.

Subject to this requirement for deference and coordination with the Executive Branch, the Commission, in the exercise of its specific regulatory authority, may consider the extent to which foreign telecommunications markets are open to competition in determining the need for regulation of the international services of U.S. carriers with a foreign affiliation, as it already does under its dominant carrier policies,[21] or in determining whether section 214 authorizations should be granted for investment in a U.S. carrier amounting to a transfer of control. Subject to the requirement for deference to and coordination with the Executive Branch, the Commission may decline to grant a section 214 authority entirely or partially if this would promote the interests of the public in international telecommunications services. For example, such a denial may be warranted if it would accelerate the introduction of competition to foreign telecommunications monopolies or dominant carriers or otherwise inhibit the ability of U.S. carriers to exercise market power in the provision of international services between the United States and the home countries of such carriers.

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[21] 47 C.F.R. §§ 63.01, 63.10 (1994).

The Commission may also impose conditions on section 214 authorizations in order to prevent anticipated abuses. This may include prohibiting discrimination in favor of the U.S. affiliates and against other U.S. competitors (e.g., preferential pricing, differences in quality of connection or provision of facilities, provision of technical network information before disclosure to other U.S. carriers), preventing cross-subsidization by the foreign carrier of its U.S. affiliate, or obtaining assurances that U.S.-based carriers are not accepting directly or indirectly any special concessions from any foreign carrier with respect to traffic or settlement flows.[22] The Commission may also act to ensure that U.S. carriers have the benefit of published non-discriminatory rates, terms, and conditions for interconnection to foreign carriers' facilities for the termination and origination of international services, including treatment of U.S. carriers that is no less favorable than that accorded to the services and service suppliers of any other country.

Given the overlapping responsibilities of the Executive Branch and the Commission, we plan to work with the Commission to establish a process by which international section 214 applications can be resolved expeditiously, while ensuring that the respective authorities of the Executive Branch and Commission are taken into account.[23]

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[22] See e.g., MCI/BT, *Declaratory Ruling and Order*, 9 FCC Rcd. 3960 (1994).

[23] We plan to address the issue of the consultative and coordinative process with more particularity in our reply comments. We also recognize that any process we develop must take into account the respective authorities of the Commission and the Executive Branch and must also be consistent with the constitutional principle of separation of powers, which prevents one branch of government from usurping the functions of another.

V. THE COMMISSION'S SECTION 310(b)(4) PROPOSAL

In addition to the proposal to apply the "effective market access" test to section 214 applications, the Commission also raises the issue of whether it should apply its proposed "effective market access" test, as well as other public interest factors, to determinations with respect to section 310(b)(4), which places a 25% limit on foreign ownership in parent companies of entities holding common carrier or broadcast licenses.[24] Under its current approach to this provision, if the Commission determines it to be in the public interest, it may permit foreign ownership interests that exceed that statutory benchmark.

A. Need for Legislation

We share the Commission's concerns about the need to update the current public interest test for permitting foreign investment exceeding the benchmarks under section 310(b)(4) of the Communications Act. However, while the Commission proposes to modify its current public interest test under section 310(b)(4), the better approach would be to amend section 310(b)(4).

On March 3, 1995, NTIA's Assistant Secretary for Communications and Information, Larry Irving, testified on behalf of the Administration before the House Commerce Subcommittee on Commerce, Trade, and Hazardous Materials. The

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[24] 47 U.S.C. § 310(b)(4) (1988).

Administration urged that the Congress amend section 310(b)(4). Under the Administration's proposal, section 310(b)(4) restrictions would not apply to investments in common carriers when the home country of the investor provides similar investment opportunities or when international obligations of the United States precludes its application. The Administration further recommended that the foreign ownership restrictions for broadcast licenses remain in place, because of the public trustee concept applied to broadcasting in this country, and because foreign control of a broadcast license confers editorial control over public broadcast transmissions.

In Assistant Secretary Irving's testimony, the Administration proposed that the determination of whether a particular country has opened its markets, or whether there is an overriding international obligation, would be made by the Executive Branch. In addition, the Executive Branch authority would include the ability to deviate from the market access criteria when it finds that access to the U.S. telecommunications market by a foreign carrier would nevertheless be in the national interest. Absent such a provision, the United States may be confronted with the situation where a foreign carrier has developed a unique technology that would otherwise be unavailable for use in the United States.[25]

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[25] The Department of Defense notes that it is still evaluating some potential concerns that may lead to some further recommendations in relation to the Administration's proposed legislation.

B. Commission Action Under the Current Statutory Provision

While the Administration has urged amendment of section 310(b)(4), it realizes that the Commission presently has an important regulatory role in determining whether it is in the public interest to permit indirect foreign investment that exceeds the statutory benchmark. On policy grounds, we agree that it is appropriate for the Commission to liberalize its approach to section 310(b)(4) by signalling that foreign entities that open their markets to U.S. companies may have increased investment opportunities in U.S. radio licensees. As with section 214, however, this authority must be exercised with great deference to the authority of the Executive Branch with respect to U.S. national security, foreign relations, the interpretation of international agreements, and trade (as well as direct investment as it relates to international trade policy). The Commission must also continue to take into account the Executive Branch's views and decisions with respect to antitrust and telecommunications and information policies.

Executive Branch policies and determinations in these areas, in relation to market access issues, must play a significant role in the Commission's evaluation of the public interest. In this way, the Commission will remain within its proper role as an independent regulatory agency and avoid reaching into the policy realm of the Executive Branch. As noted above in our discussion of section 214 applications, we will work with the Commission to establish a process for expeditious consideration of section 310(b)(4) applications that will

take the respective authorities of the Executive Branch agencies and the Commission into account.

We believe this approach will allow both the Commission and the Executive Branch to ensure that our common goal of effective competition in the international telecommunications marketplace is met. At the same time, both the Executive Branch and the Commission will be able to carry out their respective statutory and constitutional responsibilities through a process that ensures appropriate coordination and consultation where areas of interest overlap.