

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

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

COMMENTS OF AT&T CORP.

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SUMMARY

U.S. customers today enjoy the most advanced, accessible and affordable telecommunications services in the world. The globalization of the telecommunications industry has held out the prospect that U.S. customers could come to enjoy the same high-quality, feature-rich services with global calling capability provided on an end-to-end basis. The only barriers that stand in the way of achieving that goal for U.S. customers are the legal, regulatory and market barriers to effective competition that exist in non-U.S. basic telecommunications services markets.

The lack of effective competition in non-U.S. markets adversely affects U.S. customers. Not only are U.S. customers denied the multitude of end-to-end service providers they enjoy within the U.S., but they are harmed by the exercise of foreign monopoly power. Today, foreign carriers have the ability to skew competition in the U.S. through their control of bilateral and in-country interconnection to foreign bottleneck facilities. The participation by foreign carriers in the U.S. market exacerbates the risk of U.S. customer harm because equity investments by foreign carriers in U.S. affiliates provide the economic incentive for these carriers to leverage their foreign market power to advantage their U.S. operations and injure their U.S. competitors.

The NPRM acknowledges that efforts to prevent this anticompetitive monopoly leveraging through regulatory conditions cannot work. Only effective competition in the non-U.S. home market of a foreign carrier applicant can remove the threat of anticompetitive abuse. The Commission's proposal to adopt an effective market access test to encourage the development of effective competition abroad, therefore, is a necessary and appropriate step to protect the U.S. public interest in world-wide, reasonably priced telecommunications services.

In these Comments, AT&T supports the immediate adoption of the effective market access test and its application with respect to all foreign carrier Sections 214 and 310 requests. At this time, the Commission proposes to adopt the test only with respect to facilities-based applications by foreign carriers. While AT&T demonstrates herein

that the test should also be applied to resale applications by foreign carriers, AT&T supports the adoption of the rule, as proposed, with the establishment of a Phase II of this proceeding to evaluate the expansion of the rule to resale applications.

In all other respects, AT&T supports the NPRM's effective market access proposals. The criteria defined are the minimum necessary for effective competition to develop abroad, and strict application of the criteria will provide the incentive for non-U.S. markets to make the changes necessary to comply before their incumbent carriers seek license authority in the U.S. Application of the test to foreign carrier equity investments in U.S. carriers of ten percent or more will provide the oversight authority necessary for the Commission to monitor transactions that may have a significant effect on U.S. competition and U.S. customers.

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AT&T COMMENTS

AT&T Corp. ("AT&T") submits these comments on the Notice of Proposed Rulemaking ("NPRM") released by the Commission on February 17, 1995. The NPRM correctly concludes that the U.S. public interest requires the implementation of the proposed effective market access test in order to achieve the Commission's three stated goals of: (1) promoting effective competition in the global market for communications services; (2) preventing anticompetitive conduct against U.S. carriers and their customers in the provision of international services or facilities; and (3) encouraging foreign governments to open their telecommunications markets. As demonstrated herein, the accomplishment of these objectives will enhance the competitiveness of the U.S. telecommunications market by ensuring that customer choice can be based upon the merits of each carrier's offerings -- and not dictated by the leveraging of foreign market power arising from regulatory, legal or other artificial barriers.

I. INTRODUCTION

AT&T urges immediate adoption of the effective market access standard proposed by the Commission. The effective market access test will enhance U.S. and global competition and will benefit U.S. consumers by helping to ensure that they will have a variety of carriers from which they can purchase the telecommunications services they require. Further, the proposed effective market access test will reduce foreign carrier market power, will help U.S. carriers to compete on a fair and equal basis with their foreign counterparts and will complement Vice President Gore's vision of the Global Information Infrastructure:

[T]he fruits of our cooperation should be open access to markets for all providers and users of creative content and information products, equipment and services. . . . [B]uilding the GII is going to require robust competition. And you cannot create robust competition by excluding competitors, whether those competitors are at home or abroad. . . . 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.¹

Dr. C. Fred Bergsten, the Director of the Institute for International Economics in Washington, has aptly summarized why open global telecommunications markets are vital to the U.S. public interest, and why access to the U.S. market should be used as the incentive to achieve that result:

Telecommunications traffic is a major growth area for US commerce. The market structure of the global industry will affect tens of billions of dollars of US receipts and payments in the decade ahead. It will also significantly shape the future of US carriers. . . .

US policy should seek to open foreign markets under conditions which will enable every US carrier to offer comprehensive service to every market. . . .

¹ Speech at G-7 Ministerial Conference, Brussels, Belgium, February 25, 1995.

[F]oreign monopoly carriers can and do negotiate at a huge advantage with competitive U.S. long distance carriers and are able to leverage that monopoly power into the U.S. market. . . .

US carriers will suffer in global competition unless the Commission and US executive branch agencies act in concert to redress the imbalance of negotiating power. That is most effectively done by insisting that foreign markets be opened in ways that reduce or eliminate foreign based monopoly power. We should be seeking to level the playing field vis-à-vis the foreign carriers to obviate the advantages they now possess.

. . . Open and competitive global telecommunications will be most quickly achieved where those governments and carriers have an incentive to open their markets. Access to the US telecommunications market is such an incentive.²

Nations have the sovereign right to manage their telecommunications industries and markets in the ways that they perceive will best serve their national interests. Today, most countries maintain closed markets that do not allow U.S. carriers to provide basic services. Even those countries that allow entry usually do not provide the safeguards necessary to ensure the fair competition that foreign carriers enjoy in the U.S. The Commission properly has acknowledged that legal and market barriers in a foreign carrier's home country prevent U.S. carriers from competing in the U.S. market on fair and equal terms when a foreign carrier seeks to enter the U.S. international services market.

As a result of barriers to competition in their home markets, foreign carriers possess the power to harm U.S. carriers and their customers through discriminatory conduct and other anticompetitive behavior. The Commission's International Settlements Policy ("ISP") was developed to minimize the extent to which foreign carriers can leverage that power, even when they do not have a U.S. affiliate. As shown herein,

² Letter from C. Fred Bergsten to The Honorable Reed E. Hundt, dated January 18, 1995 (emphasis added), and filed in ISP-95-002. A copy of Dr. Bergsten's letter is filed herewith as Attachment A.

however, regulation in the U.S., even when supplemented by additional safeguards, cannot fully protect U.S. carriers and consumers against the unfair leveraging of foreign market power, particularly when a foreign carrier operates in the U.S. market as well. Such protection will only result through effective competition in the foreign market. The Commission's proposed effective market access standard therefore will promote the U.S. public interest in protecting U.S. competition and U.S. customers from the anticompetitive leveraging of foreign market power by requiring that effective competition be present in the foreign market as a condition of entry by a foreign carrier to the U.S. market.

II. SUMMARY OF AT&T's POSITION

AT&T supports the immediate adoption of the effective market access test proposed by the Commission. With the exception of the Commission's proposed exclusion of resale entry by foreign carriers to the U.S. international telecommunications market from the effective market access test, the proposed standard applies to the appropriate foreign carrier entry applications, promotes opening of the right foreign markets (*i.e.*, the foreign carrier's "primary market(s)"), and includes the proper factors as the minimum conditions necessary for effective market access.

The Commission's effective market access standard requires open, competitive markets. As Chairman Hundt has stressed:

Competition on paper does not count. Only competition in the market counts. A market can proclaim itself open or competitive, but whether it is in practice depends upon access charges, interconnection, numbering schemes and the like.³

³ Statement of Reed E. Hundt, Chairman, Federal Communications Commission, before the Subcommittee on Commerce, Trade, and Hazardous Materials, Committee on Commerce, U.S. House of Representatives ("Chairman Hundt Statement") at 9 (March 3, 1995).

If actual and demonstrable competition has not yet developed in the foreign market, the Commission should question whether sufficient legal and regulatory safeguards exist in that country to afford true opportunities to U.S. carriers to compete (Section IV.B.6).

The effective market access factors delineated by the Commission establish the set of minimum criteria necessary for U.S. carriers to compete on a full and fair basis in the provision of end-to-end services to U.S. customers. As a threshold matter, the proposed test properly focuses on the ability of U.S. carriers to offer international facilities-based services in the home market of the foreign carrier, but it also recognizes the need for effective competition in the domestic segment of the foreign market. In the provision of end-to-end global services, if U.S. carriers were unable to offer in-country domestic calling capability, foreign carriers would continue to enjoy an unfair advantage vis-à-vis U.S. carriers. For this reason, AT&T supports the Commission's proposal to include in its public interest analysis consideration of whether domestic basic switched services in the home market of the foreign carrier are open to competition (Section IV.B.5).

In addition, AT&T submits that the effective market access inquiry should apply not only to foreign carriers seeking to provide U.S. international services on a facilities basis, but also to those seeking to supply such services through resale of switched services (Section IV.A.3). The feature-rich services offered by multiple facilities-based carriers in the U.S. at wholesale prices that reflect the vigorous, competitive U.S. market and under equal access conditions make resale entry by foreign carriers in the U.S. a viable and attractive means to provide global, end-to-end, seamless services with minimal capital investment.⁴ The entry of foreign carriers into the U.S. market through resale thus

⁴ Resale by U.S. carriers in foreign markets, however, is not a viable entry strategy. The underlying services prices of foreign carriers reflect monopoly price levels, and service features are not as advanced or as customer-responsive as U.S. carrier service offerings.

implicates the same competitive issues as facilities-based entry, and should be subject to the same public interest analysis.

The effective market access test requires regulatory safeguards in the foreign market to ensure that there are practical market opportunities for U.S. firms to compete on fair terms. Of particular importance is the inclusion of criteria that the terms and conditions for interconnection must be standard, nondiscriminatory and publicly available. Experience in several countries, including the United Kingdom, New Zealand and Australia, has demonstrated that interconnection by negotiation simply does not work. Moreover, there is ample evidence that "nondiscriminatory" access requires the availability of access, from a technical and customer perspective, that is equal to that enjoyed by the incumbent facilities-based carrier (Section IV.B.2).

AT&T agrees that the presence of a cost-based accounting rate should play an important, if not pre-eminent, role in the Commission's public interest determination (Section IV.B.4). Above-cost accounting rates threaten U.S. carriers with "price squeezes" by foreign carriers with U.S. affiliates and provide the means for manipulation of return traffic to damage competition in the United States. Because it is likely to be some time before the competitive pressures in foreign markets are sufficient to move accounting rates to cost,⁵ the Commission should encourage the desired effect and remove

(footnote continued from previous page)

⁵ In Chile, for example, where competition among the five facilities-based carriers is fierce, the reduction in Chilean outbound calling prices has made Chilean carriers dependent on the settlements in-payment they receive on return traffic to remain profitable. The net effect is that accounting rate levels have remained significantly above cost (e.g., \$1.10 to \$1.20) despite the development of competition.

the incentive for anticompetitive conduct by requiring cost-based accounting rates as a condition of entry.

Limiting the effective market access test to proposed acquisitions of controlling interests in U.S. carriers would not ensure Commission review of all proposed ownership interests in U.S. carriers that would provide incentives for discrimination against other U.S. carriers. AT&T therefore recommends that proposals by foreign carriers to acquire ownership interests of ten percent or above should be subject to an effective market access review (Section IV.A.4). The Commission should also review combined foreign carrier interests meeting this threshold (Section IV.A.5).

Because the Commission's public interest determinations under both Sections 214 and 310 of the Communications Act must consider the impact of leveraging of foreign market power, the effective market access standard applied under Section 214 should be applied in the same manner to the Commission's public interest determinations under Section 310(b)4 with respect to common carriers (Section V). AT&T also supports adoption of the proposed amendments to the Commission's nondiscrimination safeguards, and recommends that the Commission require the filing of foreign-carrier affiliates' return traffic allocation formulas (Section VII). Further, to ensure non-discriminatory treatment of U.S. carriers, AT&T supports the proposed requirement that a complete list of the foreign affiliates' accounting rates with all other countries be filed with the Commission and updated on a regular basis.

AT&T believes that the NPRM's effective market access test should replace the Commission's "equivalency" test for international private line resale, provided that the lack of effective market access would preclude the grant of such authority (Section VIII, A). A strict application of the effective market access test to international private line resale applications by any carrier -- whether U.S. or foreign-owned -- is necessary to prevent the adverse consequence of one-way resale identified by the Commission in the

International Resale Order.⁶ Moreover, AT&T agrees with the Commission's decision to codify its existing definition of "facilities based carrier" (Section VIII, B). Finally, in order to protect the Commission's proportionate return policy, there should be a prohibition on the refiling of foreign-originated traffic without the consent of both the originating and terminating carrier (Section VIII, C).

III. THE U.S. PUBLIC INTEREST REQUIRES AN EFFECTIVE MARKET ACCESS TEST

The proposed effective market access test will promote effective competition in the global market for communications services offered to U.S. customers. First, the Commission's effective market access test will prevent foreign carriers from gaining an unfair competitive advantage in the United States telecommunications market from their ability to provide end-to-end service on an international route, while U.S. carriers cannot. Second, by reducing the market power of foreign carriers, the proposed effective market access test will help to protect U.S. competitors and their customers from discrimination by foreign carriers in favor of their U.S. affiliates and against other U.S. carriers and their customers. Finally, implementation of the proposed effective market access standard will encourage the opening of foreign basic telecommunications markets to provide the benefits of competition to U.S. consumers and businesses.

A. An Effective Market Access Test Will Help Ensure that U.S. Carriers Can Compete on a Fair and Equal Basis in the Provision of Global Seamless Services

The globalization of the telecommunications industry has set the stage for a new portfolio of U.S. customer service offerings. U.S. customers, who long have enjoyed the most affordable, accessible and advanced network services in the world, increasingly

⁶ *Regulation of International Accounting Rates*, 7 FCC Rcd. 559 (1991).

demand that their telecommunications service provider deliver seamless, end-to-end services on a worldwide basis. These customers, especially multinational corporations ("MNCs"), want international and domestic capability in the U.S. and abroad with consistent standards of quality and service functionality regardless of where the call is originated or terminated.

The openness of the U.S. market has enabled foreign carriers to gain a marketplace advantage that follows from the capability to offer the required level of service on both ends of an international route. Foreign carriers are in growing numbers seeking to enter the U.S. telecommunications market to meet the customer demand for seamless end-to-end service. Yet, today, the ability of U.S. carriers to meet that demand is constrained by legal and market barriers that preclude them from participating in markets abroad. Without effective market access, U.S. carriers are dependent on their foreign correspondents for the high degree of cooperation required to implement the global seamless services requested by U.S. customers. For so long as foreign carriers maintain their protected positions at home, their advantage in the U.S. market will not be earned solely through skill, industry or foresight, but rather will be derived in large measure from the regulatory and legal obstacles to competition in their home markets. The Commission has acknowledged this unfair competitive advantage:

[W]e do consider the closed nature of foreign markets to be a serious problem. The absence of market entry opportunities for U.S. carriers on the foreign end of a U.S. international route raises the potential for discrimination by a foreign carrier against unaffiliated U.S. carriers seeking to terminate traffic in the foreign market. We also are concerned about the absence of such opportunities in light of demands by U.S. multinational firms for end-to-end telecommunications services and the advantages of "one-stop shopping." Foreign carriers that are permitted to offer end-to-end service on a U.S. international route could obtain an unfair competitive advantage unless U.S. carriers are permitted to do the same.⁷

⁷ *AmericaTel Acquisition Order*, 9 FCC Rcd 3993, 3996 (1994)(emphasis added).

Rightly, the NPRM proposes to redress this competitive handicap for U.S. carriers by implementing effective market access criteria for foreign carriers. Properly applied, this test will encourage foreign governments to permit full and fair competition in their markets, opening the doors for U.S. carriers to compete abroad as foreign carriers do here. With these changes, U.S. customers will gain the benefits of effective competition in the U.S. market for seamless services.

B. An Effective Market Access Standard Will Help Check the Abuse of Foreign Market Power by Foreign Carriers Entering the U.S. Telecommunications Market

Effective market access for U.S. carriers abroad is the best means to limit a foreign carrier's leveraging of its market power into the U.S. international services market. Only fully effective competition can remove the "bottleneck" that permits carriers controlling essential facilities to favor their own operations and injure their competitors. Today, in almost all countries, U.S. carriers are absolutely dependent upon foreign monopoly carriers for the termination of their international calls. As a result, foreign carriers can injure U.S. carriers and their customers in ways which are limited only by their imaginations. In the international arena, some of the ways in which a foreign carrier can undermine competition in the U.S. include:

- Using its control over interconnection to gain an unfair competitive advantage by denying or delaying the interconnection required to provide U.S. bilateral and global seamless services.
- Misusing customer information obtained as part of the interconnection process to market to a U.S. carrier's potential customers.
- Failing to disclose network interconnection information on a timely and nondiscriminatory basis.

- Subjecting U.S. carriers to a price squeeze by maintaining above-cost accounting rates and pricing the services of its affiliate at significantly lower levels that reflect true economic costs, not accounting rate levels. Foreign monopoly carriers can also subsidize their competitive offerings with profits from their monopoly operations even if accounting rates are at cost.
- Manipulating return traffic to give its affiliate a lower net effective settlement cost on bilateral route(s) than other U.S. carriers that correspond with the foreign carrier.

Elimination of foreign carrier market power through demonstrated, fully effective competition is the only market place condition that will eventually eliminate foreign carriers' ability to leverage their power to the detriment of U.S. customers. Regulatory conditions are a pale substitute for a competitive market. However, until such competition is a reality, regulatory conditions are absolutely required to provide minimum protection for U.S. carriers, their customers and the competitiveness of the U.S. market. Requiring implementation of a cost-based accounting rate as a condition of entry to the U.S. international telecommunications services market would reduce at least one blatant opportunity for a price squeeze by the foreign carrier and would minimize the negative consequence of (and incentive for) return traffic manipulation. This, of course, would not protect against cross-subsidization from other monopoly profits. And no regulatory condition exists that U.S. regulators could apply to prevent a foreign monopoly carrier from simply denying or delaying interconnection arrangements required by U.S. carriers to offer the services U.S. customers demand.

1. Denying or Delaying Essential Interconnection Arrangements

Without effective market access abroad, U.S. carriers remain dependent on foreign monopolies to terminate U.S. international calls. When the foreign carrier owns and operates a U.S. carrier, the foreign carrier has the financial incentive and has ample means to use its control over interconnection to discriminate in favor of its U.S. affiliate and against its U.S. competitors and their customers. Under these circumstances, U.S. carriers

that lack a cooperative monopoly carrier correspondent could suffer injury to their existing bilateral services and could be prevented from effectively competing in the global services sector.

Through its control over the facilities needed to complete calls to its primary markets, a foreign carrier could favor its U.S. affiliate and disadvantage other U.S. carriers and their customers in a myriad of ways. For example a foreign monopoly carrier could affect the delivery of U.S. calls to its home country in the following ways:

- The foreign carrier could limit the provision of seamless services by individual U.S. carriers by reducing the number of existing circuits and/or by refusing to add additional circuits with the U.S. carrier, while increasing its capacity with its U.S. affiliate. This “under-provisioning” of the networks of other U.S. carriers would cause these carriers to experience blockage during peak calling periods that is higher than that experienced by the U.S. affiliate.
- The foreign carrier also could relegate the circuits of other U.S. carriers to antiquated gateway switches while ensuring that the circuits of its U.S. affiliate terminate in modern digital facilities. By degrading the quality of service provided by others, the foreign carrier and its affiliate would gain a marketing advantage in the U.S.
- The foreign carrier could terminate its affiliate’s circuits on switches with adequate switching capacity, while terminating other U.S. carrier circuits on overloaded gateway switches.
- The foreign carrier could offer to establish circuits only via satellite with other U.S. carriers, rather than employing higher quality fiber optic facilities.

The foreign carrier also could delay or prevent the introduction of new services by refusing to offer the technical arrangements required,⁸ depriving U.S. customers of choice and innovative new services on that international route. Although the Commission has

⁸ For example, virtual private network services, advanced 800, international facsimile, switched digital services, country-direct services all require the establishment of routing codes that the foreign carrier must implement. If the foreign carrier chose not to supply codes for these or other new services or limited their availability, U.S. carriers could not offer U.S. customers these calling capabilities.

established policies designed to ensure nondiscriminatory treatment of U.S. carriers, U.S. regulators have no ability to compel foreign carriers to offer a particular form of access (bilateral interconnection) or to regulate the time when interconnection will be made available.⁹ Moreover, to AT&T's knowledge, no foreign regulator oversees the provision of bilateral interconnection arrangements offered to U.S. carriers, and the motivation for them to do so is lacking. Only when U.S. carriers have the means to obtain the bilateral interconnection they require from other facilities-based competitors in the foreign market - - and to establish their own networks there -- will they be capable of implementing end-to-end services without needing the cooperation of the incumbent monopoly carrier.

In addition, a foreign carrier could favor its U.S. affiliate by providing the affiliate advance notice of network interface changes. Further, because U.S. carriers often are required to provide information regarding their business plans and the needs of their customers to the foreign carrier in order to obtain essential access, the foreign carrier could improperly disclose this proprietary information to its U.S. affiliate or to its in-country competitive arm.

None of these actions should be unforeseen. In fact, "facility whipsaw", *i.e.*, the leveraging of a carrier's essential facilities, has already been employed by foreign monopolists to penalize individual U.S. carriers even where the foreign carrier has no U.S. affiliate (for example, where one carrier is attempting to negotiate a lower accounting rate). The direct financial reward that would be realized by a foreign carrier that had an equity interest in a U.S. carrier would make it all the more likely that a foreign carrier would seek to leverage its market power to enhance the U.S. affiliate's service and thereby encourage customer shifts to the affiliate. The result of such actions would be a

⁹ The only remedy the Commission could employ would be to deny all U.S. carriers the opportunity to provide a particular service if a foreign carrier did not make it available on a nondiscriminatory basis.

decrease in the overall quality and variety of services available to U.S. consumers and businesses.

2. Price Squeezes

Foreign carrier acquisitions of U.S. carriers also provide the opportunity for a foreign carrier to use its control over accounting rates to impose a "price squeeze" on rival U.S. carriers. A foreign carrier can maintain above-cost accounting rates to keep U.S. carriers' costs high, while subsidizing its U.S. affiliate through internal transfers. Imposition of high accounting rates on all United States carriers, including the U.S. affiliate, would not affect the affiliate in the same way as all other U.S. carriers because a portion, if not all, of the expense paid by the affiliate would be an internal transfer to its owners. The U.S. affiliate could ignore this portion of its settlement cost in its pricing of outbound U.S. services. Moreover, the foreign carrier could make its affiliate whole for such above-cost "overpayment" through internal transfers.

By maintaining accounting rates at above-cost levels, the foreign carrier will inflate the costs of its affiliate's U.S. rivals and disadvantage them as they attempt to compete with the end-to-end alliance. The fact that the U.S. affiliate will "pay" the same accounting rate as other U.S. carriers does not remedy this problem. This advantage must be removed by the establishment of cost-based accounting rates by the foreign carrier.¹⁰ To encourage full and fair competition in the U.S. international services market, the

¹⁰ The establishment of cost-based accounting rates would not prevent a foreign monopoly carrier from subsidizing its competitive operations with high "monopoly rents" from its monopoly operations. See Section IV.B.3, below. The Commission therefore should require effective market access, including the existence of in-country regulatory safeguards to prevent cross-subsidization, as a condition of entry to the U.S. international services market.

Commission should require the establishment of a cost-based accounting rate as a condition of foreign carrier entry.¹¹

3. Misuse of Proportionate Return

Because the return of foreign-billed traffic to U.S. international carriers directly impacts the prices paid by U.S. customers, a foreign carrier has the ability to damage competition in the United States through its control of the allocation of foreign-billed return traffic among competing U.S. carriers. By returning a disproportionate share of traffic to its U.S. affiliate, the foreign carrier would provide its affiliate a lower effective settlement rate on the route and would increase the settlements costs of the affiliate's U.S. competitors.

While such action would violate the Commission's existing proportionate return policy, there are no complete remedies available to U.S. carriers that may be injured by such violations. Though a foreign carrier is not likely to take the bold step of returning all of its traffic to its U.S. affiliate, it could make significant, but not easily detectable, changes in traffic allocation that would have a direct impact on the price of U.S. outbound services and the competitiveness of the U.S. market. U.S. regulatory agencies would have limited ability to detect or eliminate such behavior. Even assuming prompt detection --

¹¹ That accounting rate reform should be a condition of foreign carrier entry is illustrated by the events in the BTNA proceeding. In that case, the Commission recognized that BT would be less likely to reduce its accounting rate toward cost once it received its Section 214 authorization to engage in international private line resale between the U.S. and the U.K. To address this concern, the authorization was expressly conditional on BTNA submitting BT's plan to make significant movement toward cost-based accounting rates within two years. On March 14, 1995, BT, through BTNA, submitted a "statement of intent" that described its decision to withdraw an accounting rate reduction that had been on the negotiating table and that otherwise failed to comply with the specific instructions of the Authorization Order. This challenge to the Commission's authority supports adoption of a policy to order a cost-based accounting rate as a pre-condition of any Commission authorization of foreign carrier entry.

which is not available under current Commission rules¹² -- the ability to correct such shifts would be limited at best. To prove the shift was caused by discriminatory conduct, all other potential rationales would have to be ruled out, and the evidence to make that showing, in most cases, would lie in the foreign carrier's possession.

In sum, as the Commission has recognized, conditions imposed by a U.S. regulator cannot completely remove the threat of anticompetitive actions by a foreign carrier or the potential for harm to U.S. customers that would flow therefrom. The only effective counter to the unfair use of monopoly power is removal of the monopoly. The proposed effective market access standard would facilitate the market opening needed to achieve that result.

C. An Effective Market Access Test Will Encourage the Opening of Foreign Telecommunications Markets

The Administration, the Congress and U.S. policy makers universally support the opening of closed telecommunications markets abroad. As Vice President Gore recently emphasized at the G-7 Ministerial Conference in Brussels, open, competitive markets are essential to an effective Global Information Infrastructure.¹³ Chairman Hundt has stressed the need for an effective market access standard to promote the U.S. Government's goal of opening foreign telecommunications markets in order to protect U.S. competition and the U.S. public interest:

¹² As discussed in Section VII below, the amendment of the Commission's rules to require the filing of the return traffic allocation formulas used by the foreign carrier affiliates of U.S. carriers would reduce the potential scope of such behavior, but would not allow the detection of all possible shifts in traffic.

¹³ See page 2, above.

Foreign investment can enhance the competitiveness of our markets, but our companies must also be able to compete effectively in the foreign investors' home countries. Unrestricted entry by foreign carriers from closed markets into the U.S. market will do more to inhibit competition than enhance it.¹⁴

Barriers to the participation of U.S. carriers in foreign telecommunications services markets impose a very real cost on U.S. firms and consumers. A recent report by the Economic Strategy Institute estimates that U.S. telecommunications providers would capture at least 10 percent of foreign local and long distance markets and a minimum of 20 percent of international calls originating outside the United States if these markets were open and competitive.¹⁵ In addition, a study by Strategic Policy Research estimates that the elimination of foreign market barriers to competition by U.S. carriers and the reduction of accounting rates to cost would result over the next ten years in the creation of 120,000 to 260,000 new U.S. jobs, cumulative growth of \$120 to \$210 billion in U.S. GDP, and accumulated improvement in the U.S. balance of trade of \$50 to \$60 billion.¹⁶

Rather than leading foreign governments to take concrete steps to open their closed telecommunication markets, open entry to the United States telecommunications market has encouraged foreign carriers to enter the United States where they are able to

¹⁴ Chairman Hundt Statement at 3. The U.S. Congress also has made clear through the Telecommunications Trade Act of 1988 that foreign countries should open their telecommunications services to competition by U.S. carriers. The Act specifically recognizes the existence of market barriers in other countries and endorses the principle that the U.S. should not grant open access to the U.S. telecommunications market where there is an imbalance in competitive opportunities. 19 U.S.C. §§ 3101(a)(3)-(6).

¹⁵ Economic Strategy Institute, *Crossed Wires, How Foreign Regulations and U.S. Policies are Holding Back the U.S. Telecommunications Services Industry* (Dec. 1994) ("Crossed Wires"), at 71, 73.

¹⁶ Strategic Policy Research, *The U.S. Stake in Competitive Global Telecommunications Services: The Economic Case for Tough Bargaining* (Dec. 16, 1993) at 2.

leverage their monopoly power and obtain a competitive advantage over U.S. carriers. Dr. Bergsten correctly advises that foreign markets will be opened most quickly where foreign governments and carriers have an incentive to do so, and that access to the United States telecommunications market -- the largest telecommunications market in the world - - provides such an incentive.¹⁷ Adoption of the Commission's effective market access standard will reward those carriers and countries whose telecommunications markets are effectively open with entry to the U.S. market -- thereby promoting the Commission's goals of opening foreign markets and ensuring that U.S. carriers may compete internationally on fair and equal terms. The U.S. public interest therefore requires that the Commission implement its effective market access test.

IV. THE COMMISSION SHOULD IMMEDIATELY ADOPT THE PROPOSED EFFECTIVE MARKET ACCESS TEST TO PROTECT THE U.S. PUBLIC INTEREST

The proposed effective market access test correctly focuses on those conditions that are necessary to ensure that U.S. carriers are able to enter foreign markets and to compete on a fair and equal basis in the provision of basic switched telecommunications services. AT&T therefore supports the Commission's test and urges that it must be applied in a consistent way with no exceptions to motivate foreign governments to open basic telecommunications services to effective competition. Moreover, the U.S. public interest demands prompt implementation of an effective market access standard. If resolution of the resale entry and other issues identified by AT&T in these Comments would delay Commission adoption of the proposed effective market access standard, the Commission should consider these issues separately in a Phase II proceeding. It is vital to recognize, however, that a foreign carrier can effectively provide end-to-end service

¹⁷ See page 2-3, above.

through reselling the numerous competitive service offerings in the U.S., thus obtaining a competitive advantage over U.S. carriers. The Commission should address this issue quickly in a Phase II proceeding if it fails to do so here.

A. The NPRM Proposes the Correct Application of the Effective Market Access Test

1. Application to Foreign Carriers

The NPRM properly limits the effective market access test to those situations in which the foreign market power of a carrier can be used to undermine fair competition in the United States telecommunications market. To promote open basic telecommunications markets abroad and to protect against the unfair leveraging of foreign market power into the U.S. services market, the effective market access test should apply when a foreign carrier seeks to enter the U.S. international services market. There can be no dispute that if a foreign carrier controlling essential facilities in its home country (or countries) enters the U.S. international telecommunications market, it has both the incentive and the power to discriminate in favor of its U.S. affiliate and against other U.S. carriers.

The Commission has correctly excluded from its effective market access test those situations in which a U.S. carrier acquires an ownership interest in a foreign carrier. One of the Commission's key goals in adopting an effective market access test is to promote the opening of foreign telecommunications markets to U.S. carriers. U.S. carriers should be encouraged to expand their provision of services beyond the U.S. borders through investment in, and business arrangements with, foreign carriers. Requiring an effective market access showing in these circumstances would hamper efforts by U.S. carriers to inject competition into foreign markets.

The NPRM correctly exempts non-exclusive, non-equity arrangements between U.S. and foreign carriers from the effective market access entry criteria. U.S. carriers long have relied on marketing arrangements with foreign carriers to promote the bilateral