services they offer with correspondents. To the extent that non-exclusive and non-equity arrangements are used to ensure that foreign carriers deliver the type of high quality, seamless capability necessary to support U.S. carrier global services, these arrangements provide a legitimate means to extend and promote U.S. carrier global offers.[18] Indeed, until U.S. carriers obtain effective market access in foreign countries, such services can only be delivered through arrangements with foreign carriers.

Moreover, unlike foreign carrier investments in U.S. carriers, non-equity, non-exclusive arrangements, like WorldPartners do not allow foreign carriers access to the U.S. telecommunications market or give foreign carriers potential control over U.S. carriers' operations or create incentives to use home market monopolies to disadvantage other U.S. carriers.[19] The members of WorldPartners, for example, do not have equity interests in AT&T, and do not derive revenue from the provision of AT&T's services in the U.S. In the same manner, AT&T does not derive revenue from a WorldPartners member's provision of services in its home country. WorldPartners merely provides a set of services standards by which the individual members can meet the needs of their customers. Under these circumstances, there is no reason to require non-exclusive, non-equity arrangements to be subject to foreign carrier entry regulation or post-affiliation regulation. AT&T would support a requirement that all co-marketing agreements should be reported to the Commission, provided that any such regulation was applied uniformly to all U.S. carriers participating in such relationships.

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[18] No U.S. carrier could afford to invest in every country. Marketing arrangements provide a tool to enhance the capability of bilateral services in a cost-effective fashion.

[19] For example, Singapore Telecom, a founding partner of WorldPartners, has made arrangements with BT/MCI's joint venture, Concert, to deliver Concert services in Singapore.

2. Examination of "Primary Markets"

In applying its effective market test, the Commission proposes to assess whether the primary market or markets of the foreign carrier offer effective opportunities to U.S. competitors to compete in the provision of basic, international services and facilities (NPRM, ¶ 43). The NPRM defines "primary market" as those key markets where both: (1) the foreign carrier has a significant ownership interest in a facilities-based telecommunications entity that has market power in either the international or local termination telecommunications market of the country; and (2) traffic flows between the United States and that country are significant.

The NPRM's primary market definition focuses the Commission's effective market access inquiry on those foreign markets in which the foreign carrier has the ability to leverage its market power over the international or local termination market. However, the primary market definition should be expanded to include those markets where the foreign carrier enjoys a "protected status" and thus market power that can be leveraged. For example, where the government has implemented a duopoly market structure, the second carrier has a competitive position akin to the incumbent and unavailable to U.S. carriers generally. In such instances, the foreign carrier would have the ability to offer end-to-end services, while U.S. carriers would be denied such capability. But, regardless of the foreign carrier's market power or protected status, the effective market access test still would be applied only where traffic flows between the United States and any of the foreign countries in which the foreign carrier operated were significant.[20] With the

[20] At this time, the key markets for global services all have relatively large traffic flows with the United States. For this reason, the traffic volume criterion seems appropriate.

inclusion of markets where a carrier enjoys protected status, AT&T agrees with the NPRM's "primary market" definition.

3. Application of the Test to Resale Entry

The Commission proposes that its effective market access test would apply only to foreign carriers seeking to enter the U.S. international telecommunications market -- directly or through acquisition of an interest in a U.S. carrier -- on a facilities basis. Under the Commission's proposed test, an effective market access showing would not be required where the foreign carrier sought to provide international switched or non-interconnected private line services on a resale basis.[21] Although AT&T agrees with the Commission that entry by foreign carriers to provide international facilities-based service should be subject to an effective market access standard, fulfillment of the Commission's goals requires that the effective market access standard also be applied to entry into the U.S. international telecommunications market via resale.

The NPRM acknowledges that unrestricted entry by foreign carriers from closed markets into the open U.S. market has the potential to inhibit competition, particularly with respect to the provision of global communications services to MNCs (NPRM, ¶ 28). For example, the NPRM notes that a foreign monopoly carrier operating in the U.S. could acquire 1+ access to U.S. customers and hold itself out as a ubiquitous provider of U.S. international services while U.S. carriers could not do the same in the foreign carrier's home market. Further, the foreign carrier would be able to offer its customers the

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[21] A carrier seeking to provide international switched services over resold international private lines interconnected to the public switched network is required, under the *International Resale Order*, to demonstrate that U.S. carriers enjoy equivalent opportunities in the foreign country involved. The NPRM seeks comment on whether an effective market access showing should be required in such circumstances. (See Section VIII.A, below.)

economic benefits of end-to-end facility arrangements and faster provisioning of services between its closed markets and the United States (Id.).

Resale entry, however, provides the same opportunities to a foreign carrier entering the U.S. international services market. In the U.S., the provision of services to resellers is fiercely competitive and wholesale prices reflect that fact. Moreover, U.S. facilities-based carriers offer advanced, feature-rich services, like SDN, that were developed to respond to sophisticated business customer demand. These and similar services offer switching and billing capabilities that make entry by resale an attractive and transparent means for foreign carriers to enter the U.S. market with minimal capital investment in facilities, switches or billing systems. [22]

Through resale, a foreign monopoly carrier can establish market presence and gain valuable experience with U.S. customers. Resale permits foreign carriers to develop name recognition and grow traffic volumes to the point that facilities ownership becomes cost effective. Moreover, from a customer perspective, the availability of 1+ equal access for reseller services means that U.S. customers would be hard-pressed to distinguish between international services offered on a resale vs. facilities basis by the U.S. affiliate of a foreign carrier. Further, resale entry permits a foreign carrier with a closed home market to provide services to customers on both ends of an international route, which the Commission has recognized confers an unfair advantage on the foreign carrier.

Moreover, local exchange company ("LEC") access arrangements or interexchange carrier nodal services are published in filed tariffs, and available on a

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[22] By contrast, in most foreign markets U.S. carriers would not have the ability to compete effectively on a resale basis because of the lack of other facilities-based carriers to offer attractive terms and conditions to resellers in order to attract their business. Thus, the ability to provide competitive facilities-based services in foreign markets, both for international and domestic services, and the resulting competition amongst facilities-based carriers, is a prerequisite for resellers to compete effectively.

nondiscriminatory basis to all. Resellers thus have ready access to the information they need to plan entry decisions and pursue their business decisions. Protracted negotiations over interconnection or access are not necessary.

Participation in the U.S. telecommunications market -- the largest single telecommunications market by far[23] -- is the goal of every carrier that hopes to become a provider of global seamless services. Today, a foreign carrier can enter the U.S. domestic interexchange market -- a $70 billion market segment[24] -- on a facilities or resale basis without any concern that it might be required to open its closed home market. If this unfettered access to the U.S. domestic long distance market were coupled with the ability of a foreign carrier to provide U.S. international resale services, it would enable a foreign monopolist to provide the entire gamut of U.S. services that MNCs look for in their quest for global seamless services.

The NPRM does not address the exclusion of resale entry into the U.S. international services market in detail. Rather, it suggests only that open entry for switched services resale increases the competitiveness of the international market without resulting in substantial potential for competitive harm (NPRM, ¶ 74). Allowing foreign carriers to provide international services on a resale basis without requiring them to open their closed home markets would undercut the Commission's goals of promoting global competition, preventing anticompetitive conduct, and encouraging the opening of foreign markets. The Commission therefore should expand the application of its effective market access standard to cover market entry through resale. Nevertheless, AT&T shares the

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[23] In 1993, U.S. telecommunications traffic accounted for approximately 33% of global services traffic. *Crossed Wires* at 5. U.S. international services accounted for about 24% of global international traffic. *Crossed Wires* at 12.

[24] Federal Communications Commission, *Long Distance Market Share Report, 4th Quarter 1994*.

commitment of the Commission to implement its effective market access standard as soon as possible. Accordingly, if the analysis necessary for the Commission to extend application of the effective market access test to resale entry would delay the test's adoption, the Commission should adopt the test now for international facilities-based applications and, in its Order, initiate a second rulemaking phase to consider application of the test to resale entry.

4. 10 Percent and Above Triggering Threshold

As the NPRM tentatively concludes, application of the effective market access test to only those foreign carrier interests in U.S. carriers that are controlling would not encompass all foreign carrier investments that create the opportunity and incentive for discrimination and anticompetitive conduct. In its BT/MCI Order,[25] the Commission concluded that the creation of the joint venture and investment by BT in MCI did not result in control, but nevertheless created an incentive and means for BT to use its market power to discriminate in favor of its affiliated U.S. carrier.[26] Because financial interest of any magnitude can taint the behavior of the investor, the Commission should examine and apply its effective market access standard to transactions involving a 10% or greater equity interest in a U.S. carrier.

Ample precedent exists in analogous areas to support the Commission's adoption of a 10% threshold.[27] As the NPRM notes, the Bell Operating Companies have been

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[25] *MCI Communications Corp., British Telecommunications plc*, 9 FCC Rcd. 3960 (1994) ("*BT/MCI Order*").

[26] The Department of Justice similarly found that the joint venture and acquisition created the potential for anticompetitive abuse. *See U.S. v. MCI Communications Corp. and BT Forty-eight Co.*, 59 Fed. Reg. 33,009 (1994) (Proposed Final Judgment and Competitive Impact Statement).

[27] Indeed, the Commission could set an even lower threshold if it determined that doing so would be in the public interest. Under the telephone company-cable television

(footnote continued on following page)

given a generic waiver from the line of business restrictions of the Consent Decree allowing them to hold, through foreign telecommunications entities, ownership interests of up to 10 percent in submarine cables or international satellite systems used by the foreign telecommunications entity to carry U.S. international traffic.[28] Holders of more than 10 percent of the securities of public-held companies are regarded as corporate "insiders" and are required to file periodic reports with the SEC under the Securities Exchange Act of 1934. Furthermore, acquisitions of voting securities "solely for the purposes of investment" are exempt from the reporting requirements of the Hart-Scott-Rodino Act where the acquiring person will not hold more than 10 percent of the issuer's voting securities.[29]

The Commission should not be dissuaded from applying such a threshold by claims that U.S. carriers would then have less ability to obtain foreign investment, or that it would be unnecessarily burdensome to entrants.[30] Similar claims can be made in

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cross-ownership rules, the Commission uses a 5 percent threshold to identify ownership interests that may provide incentives to discriminate for reasons that are directly analogous here. *See* 47 CFR § 63.54. The Commission feared that local monopoly telephone companies would otherwise leverage their control of pole lines and conduit space required by CATV systems to "favor[ ] [their] own or affiliated interests as against non-affiliated interests." *See Applications of Telephone Companies for Section 214 Certifications for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, 21 F.C.C. 2d 207, 324 (1970). The Commission has recently reaffirmed the necessity of a 5 percent threshold for such purposes in setting the limitation on the telephone company ownership of video programmers under its video dialtone rules. *Telephone Company-Cable Television Cross-Ownership Rules*, 10 FCC Rcd. 244, 277-78 (1994).

[28] *United States v Western Electric Co.*, No. 82-0192 (D.D.C. Feb. 4 1993).

[29] 15 U.S.C. § 18a(c)(9).

[30] See NPRM, ¶ 58.

opposition to any investment threshold that the Commission chooses to apply here. The key consideration is to identify the threshold most likely to separate truly passive investments from those that pose an unacceptable risk of discriminatory behavior.

Thus, the Commission should adopt a 10 percent threshold. This level would give the Commission clear authority to examine transactions that may impact competition in the United States. Further, the use of any threshold above 10 percent to trigger Commission review would exempt many transactions that would create a strong incentive in foreign monopoly carriers to leverage their market power in favor of their U.S. affiliates and therefore would not serve the public interest goals of this proceeding.

5. Combined Foreign Carrier Interests Should Trigger the Ownership Threshold

The NPRM seeks comment on the application of the effective market access test to combined foreign carrier interests in U.S. carriers. In AT&T's view, the best course would be to treat the combination of all foreign carrier interests as one in determining whether the 10 percent trigger has been reached. Such an approach would protect against substantial cumulative foreign carrier ownership interests escaping Commission review because no single foreign carrier interest would meet the entry threshold. Moreover, in many cases, combined interests may involve a consortium, joint venture, joint management agreement or other arrangement between or among the foreign carriers that might raise the possibility of concerted action being undertaken by the foreign carriers to favor their U.S. affiliate at the expense of other U.S. carriers. In cases where combined foreign carrier interests exceed the threshold, the Commission should examine the primary market of each of the foreign carriers to determine whether effective market access exists.

6. Avoidance of Post-Acquisition Review

The NPRM proposes administration of the effective market access test through the Section 63.01 application process and the Section 63.11 notification process. Under this process, a foreign carrier seeking to enter the U.S. international services market *de novo*

would file a Section 214 application under Section 63.01. If a foreign carrier sought to enter the U.S. market through acquisition of an equity interest in an existing U.S. international carrier that exceeded the Commission's threshold, the U.S. carrier would be required to make a Section 63.11 filing within thirty days of the acquisition. The Commission would use this notification to determine whether further review of the facts surrounding the acquisition is warranted, and whether the U.S. affiliate's Section 214 certificates should be designated for hearing.

AT&T is concerned that using the notification procedures under Section 63.11, which apply only after a foreign carrier acquires an equity interest in a U.S. carrier, will result in Commission review of such transactions, and application of its effective market access standard, after the fact. Such post-acquisition review will result in intense pressure upon the Commission not to undo a "done deal". To avoid this result, the Commission should, pursuant to Sections 214 and 702 of the Communications Act, require any U.S. carrier that has entered into an arrangement in which a foreign carrier will acquire an equity interest of 10 percent or more to file an application under Commission Rule 63.01, which application would not become effective until it has been formally approved by the Commission.

B. The Commission Has Selected the Proper Effective Market Access Criteria

U.S. carriers must have access to foreign markets for the provision of basic switched telecommunications services that is indeed effective and permits competition in such markets to be sustained. As Chairman Hundt has stressed, "Only competition in the market counts."[31] If fully effective competition has not developed in a foreign market, the Commission must question whether effective market access indeed exists.

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[31] Chairman Hundt Statement at 9. See page 4, above.

The NPRM identifies six primary factors the Commission will consider in its determination of whether effective market access exists in a foreign carrier's primary market, or markets.[32] AT&T agrees with the Commission that these factors are the minimum criteria necessary to facilitate effective market access for U.S. carriers abroad. With the clarification that the proposed interconnection criterion includes equal access in the foreign market, AT&T supports the NPRM's proposed effective market access criteria and urges that they be required in connection with any foreign carrier entry to the U.S. international services market. AT&T sets forth below its comments on some of the most critical of these factors.

1. Ability to Offer International Facilities-Based Services

The ability to offer facilities-based basic international services in a foreign carrier's primary market is essential to U.S. carriers' ability to compete effectively for international traffic to and from that market. Unless U.S. carriers can build, own and operate their own international facilities in the foreign country, they will be unable to offer all of the service features and functionalities desired by customers, *i.e.*, the software defined network capabilities, that lie at the core of global seamless services. Moreover, U.S. carriers will be unable to protect themselves from the anticompetitive conduct that may otherwise

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[32] The factors are: (1) whether U.S. carriers can offer in the foreign country 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 anticompetitive and discriminatory practices, including cost-allocation rules to prevent cross-subsidization; (3) the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services; (4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities; (5) the protection of carrier and customer proprietary information; and (6) whether an independent regulator is established to enforce competitive safeguards.

result if a foreign carrier could enter the U.S. market while controlling facilities essential to the routing and termination of U.S. outbound calls to its home country.

The legal ability to offer international services on a resale basis on the foreign end would not resolve these concerns. Unlike in the U.S., where resale competition is effective and viable because of the multiple underlying facilities-based carriers, resellers abroad do not have the same opportunities. If a U.S. carrier attempted to provide foreign-based international services via resale, the foreign monopoly carrier would still control U.S. carriers' costs and overall performance on both ends of the international route. Through its control over international accounting rates and international facilities on the foreign end, the foreign carrier would retain control over the costs and availability of U.S. outbound services, while U.S. carriers attempting to compete in-country would be at the mercy of the foreign carrier with respect to the price of underlying transport, the quality and type of interconnection, transmission performance, provisioning intervals and maintenance of the international network -- all features that are crucial to the provision of global seamless services.

In short, the Commission has correctly determined that U.S. carriers must be able to build, own and operate underlying international facilities in order to have effective market access to foreign markets.

2. Published, Nondiscriminatory Charges, Terms and Conditions for Interconnection

The Commission has rightly recognized the critical role interconnection plays in ensuring effective competition. In order for U.S. carriers to compete successfully for international services in a primary market, U.S. carriers must be assured of interconnection that is equal in all respects to the interconnection received by the incumbent. It is essential that they be able to interconnect with an incumbent's network on terms and conditions that are equal in type, quality and price to those enjoyed by the competitive arm of the incumbent carrier. Interconnection charges should be cost-justified, costs allocated to

interconnection should be open to public scrutiny and the components of interconnection should be unbundled and separately available.

The terms and conditions of interconnection should be tariffed or published in advance in order to protect against discrimination and to promote regulatory oversight -- the negotiation of interconnection terms and conditions does not work. In most countries, the monopoly international carrier also controls local termination and leaving interconnection terms to "negotiation" breeds the potential for significant abuse. Under such a negotiation approach, U.S. carriers would be faced with the prospect of their competitor: (1) acting as the arbiter of the services they could offer; (2) dictating the types of access arrangements that will be available; and (3) controlling the timing of competitive entry by refusing or delaying appropriate interconnection arrangements.[33] Indeed, discriminatory treatment is inherent in any contractual approach to interconnection as the different bargaining power of each new entrant will necessarily determine the terms of interconnection.

In order to ensure that U.S. carriers are not unfairly handicapped in their ability to compete in the foreign carrier's primary market, customers in that country must be able to access all domestic and international long distance carriers on an equal, non-discriminatory basis. Such choice may be provided through preselection of a carrier (with dial-around capability). Another viable alternative would be to allow customers to select their international and domestic long distance carrier on a call-by-call basis through the use of randomly assigned carrier access codes. Discriminatory access, whether through the use of non-parity dialing or the inequitable assignment of carrier access codes (*e.g.*, assignment to the incumbent of the access code customers have traditionally used for

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[33] For example, in the U.K. it took ACC Global 18 months to negotiate its interconnection arrangement with BT.

international calling), provides an unfair competitive advantage to the incumbent that emerging competitors will find difficult to overcome.[34]

Foreign customers should also be able to change carriers without having to change their assigned telephone number. For 800 or toll free services, customers should be allowed to port their number between carriers. If such number portability does not exist, customers may be reluctant to change service to a new service provider even if it offers a more efficient, cost effective and feature intensive service. In addition, administration of the primary market's numbering plan should be placed with an independent third party charged by the appropriate regulatory body with the responsibility to ensure fair and equitable administration of the country's numbering plan.

3. Competitive Safeguards, Including Cost-Allocation Rules; Independent Regulatory Process; Disclosure of Network Information; Protection of Proprietary Information

In most countries, the international facilities carrier also provides local termination service. In this situation, where U.S. carriers would be competing with a foreign carrier controlling bottleneck local facilities, the foreign carrier may quite easily subsidize its competitive offerings from profits made on its monopoly local termination business. The foreign carrier would have the ability and incentive to pursue a classic "price squeeze", *i.e.*, to charge all international and domestic competitors artificially high prices at the "wholesale" access level in order to use the resulting revenues to finance artificially low prices in competitive market sectors. Competitive safeguards thus are required to help prevent such a result.

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[34] Resellers and facilities-based competitors have enjoyed equal access in the U.S. for more than a decade. Although some reasonable transition to nationwide equal access in a foreign market may be appropriate, equal access should be required.

The need for competitive safeguards, including cost-allocation rules to prevent cross-subsidization, is not based on theoretical possibilities. Foreign monopoly carriers already have engaged in such anticompetitive conduct in an attempt to squeeze out competitors. For example, the German Cartel Office determined in May 1994 that Deutsche Telekom had improperly subsidized its packet switched data communications offering from its monopoly services in the amount of 1.9 billion DM.

The NPRM properly recognizes the need for an independent regulatory body to enforce competitive safeguards. Such a regulator should be responsible for regulating of carrier behavior and prices for non-competitive services, for providing timely and efficient dispute resolution in the event of anticompetitive behavior (subject to legal recourse) and for providing the opportunity for public comment on all regulatory determinations. In this regard, AT&T agrees that the Commission should consider whether the foreign carrier is government-owned (NPRM, ¶ 45). Whether the foreign carrier has been privatized or is government-owned may well impact the Commission's determination of the sufficiency of competitive safeguards in the foreign country and the independence of the regulator. For example, where a foreign government is relying upon revenue from a planned privatization of a government-owned telecommunications carrier, it may be reluctant to introduce effective competition, or to vigorously enforce competitive safeguards, because such action might lower the market value of the carrier.

In addition, timely and nondiscriminatory disclosure of network information is essential to ensure that U.S. carriers competing in a foreign market are not blind-sided by network interface changes of which their foreign carrier competitor has advance knowledge. Further, where U.S. carriers 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, enforceable rules must exist to protect against disclosure of such information to the foreign carrier's competitive arm.

4. Cost-Based Accounting Rates

The NPRM proposes that the presence of cost-based accounting rates would be part of the Commission's "total public interest analysis" to determine whether facilities-based entry to the U.S. international services market should be allowed (NPRM, ¶ 45). AT&T believes that the presence or lack of cost-based accounting rates is a key factor that should be part of the Commission's effective market access determination.

Absent cost-based accounting rates, foreign carrier entry into the U.S. telecommunications market threatens U.S. customers with continued subsidy payments because it decreases the incentive for future accounting rate reductions by the foreign carrier. 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. 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, in effect, 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 and the foreign carrier could make its affiliate whole for such above-cost "overpayment" through internal transfers. This advantage could only be removed by the establishment of cost-based accounting rates by the foreign carrier.[35]

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[35] Although AT&T agrees with the Commission that, in the long term, opening of foreign markets should result in the lowering of above-cost accounting rates, entrenched incumbents in foreign markets will be able to resist lowering of such rates -- to the detriment of U.S. carriers and their customers -- during the critical initial stages of competition in their countries. For example, although at least six international carriers now exist in Chile, AT&T has been unable to negotiate a reduction in its switched voice accounting rate with any of the Chilean carriers below the $1.10 per minute level.

The harm to the U.S. public interest will be exacerbated if the foreign carrier seeks to provide switched services between the United States and its country over international private lines. In such circumstance, the foreign carrier will have no incentive to reduce its accounting rate because its U.S. affiliate can avoid the above-cost rate by diverting its outbound traffic over international private lines.[36] At the same time, because most U.S. carriers cannot economically or technically divert all of their outbound switched traffic to international private lines, they will be forced to continue paying above-cost settlements to the foreign carrier, thereby subsidizing the foreign carriers marketing efforts in the United States and throughout the global marketplace.

The presence or lack of a cost-based accounting rate therefore should be a critical part of the Commission's public interest determination of whether to allow foreign carrier entry to the U.S. international services market. Further, because a cost-based accounting rate helps reduce the direct threat of a foreign carrier leveraging its market power through an accounting rate price squeeze or through manipulation of foreign billed return traffic, AT&T believes that the presence or lack of cost-based accounting rates should be an integral part of the Commission's effective market access test and implementation of such rates should be a pre-condition of foreign carrier entry into the U.S. international services market.[37]

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[36] Experience with BT confirms this fact. As part of the Commission's grant of international private line resale authority to BT's U.S. affiliate, BT North America ("BTNA"), the Commission ordered BTNA to file a plan setting forth significant reductions toward cost-based accounting rates with U.S. carriers over the next two years. In response, BTNA not only failed to file such a plan, it also withdrew from the bargaining table a proposed lower accounting rate and replaced it with a new proposed accounting rate 20% higher than the previous proposal. Letter from James E. Graf, II, President BTNA to William F. Caton, Acting Secretary, dated March 14, 1995, in File No. ITC-93-126.

[37] Implementation of cost-based accounting rates also would remove some of the threat of foreign carrier refile of U.S.-destined traffic. See Section VIII.C, below. Cost-

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5. Ability to Provide Services in Other Markets, Especially In-Country Domestic Long Distance

In determining whether a foreign carrier's primary market (or markets) affords effective market access for U.S. carriers, the Commission will look to see whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States. Although the Commission will initially focus on the ability to offer international facilities-based services, the Commission will also consider the extent of liberalization and the availability of other market access opportunities to U.S. carriers (NPRM, ¶ 45). Indeed, even if market access exists for international facilities-based services, the balance of the public interest may weigh against granting entry to a carrier if all other telecommunications markets are closed (NPRM ¶ 41).

AT&T agrees that the availability of other market access opportunities should be part of the Commission's public interest considerations. In particular, AT&T believes that, in certain primary markets, the ability to provide facilities-based, domestic long distance service may be of vital importance to a U.S. carrier's ability to meet the needs of global customers and thereby compete effectively in the global marketplace. For example, if Bayer AG seeks global services linking its locations in Munich, Hamburg, and New York City, and Deutsche Telekom ("DT") were permitted to enter the U.S. market through investment in a U.S. carrier without effective market access existing for German domestic long distance service, DT and its U.S. affiliate would possess a competitive

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based accounting rates would not remove the threat of cross-subsidization from the foreign carrier's monopoly operations. Only fully effective competition can achieve that result. However, requiring cost-based accounting rates is a necessary protection until such competition develops.

advantage in providing such service over other U.S. carriers who -- with effective market access for U.S. carriers limited to international facilities-based services -- could provide both ends of the U.S.-Germany route, but could not competitively provide the Munich-Frankfurt link.

Even where U.S. carriers are permitted legally to offer limited domestic services, such as "value added" services, on a resale basis in the foreign carrier's home market, U.S. carriers that seek to supplement their bilateral capability with calling capability within the foreign country -- as they must to compete for MNC end-to-end service requirements -- still suffer a major competitive handicap. As resellers of a foreign monopolist's infrastructure, U.S. carriers must rely on the foreign carrier with respect to all the features that are crucial to providing global seamless services. The effect of foreign market prohibitions on U.S. carriers providing facilities-based services is therefore to allow foreign carriers with market power over infrastructure in their home markets to control U.S. carriers' costs and overall performance.

For the above reasons, AT&T supports the Commission's determination to examine as part of its public interest analysis the extent to which U.S. carriers have access to markets other than the market for international facilities-based services.

6. Existence of Competitive Opportunities

The NPRM suggests that market access for U.S. carriers "either currently or in the near future" should satisfy the effective market access test.[38] In AT&T's view, effective market access requires, at a minimum, the existence of legal and regulatory conditions that provide actual competitive opportunities for U.S. carriers. As Chairman Hundt has emphasized, "Competition on paper does not count."[39] The true test of whether effective

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[38] NPRM, ¶ 40.

[39] Chairman Hundt Statement at 9.

market access exists is whether effective competition presently exists in the foreign market. If such competition is lacking, one must question whether the legal and regulatory regime promotes and protects competition.

The Commission should require the presence of legal and regulatory conditions that provide real competitive opportunities for U.S. carriers, *i.e.*, that permit facilities-based competition and commercially feasible resale, as evidenced by actual competition. As discussed above, the existence of the market access factors enumerated by the Commission, such as the ability of U.S. carriers to offer international facilities-based services, the existence of competitive safeguards, including an independent regulator, and the availability of published, non-discriminatory terms and conditions for interconnection, comprise the minimum factors necessary to provide such opportunities. For the Commission to require anything less, such as allowing an additional period of time for countries to develop the necessary conditions, would be to accept a major competitive disadvantage for U.S. carriers, with no assurance that the necessary opportunities would actually become available to U.S. carriers in the stated time period.

V. SECTION 310(b) COMMON CARRIER PUBLIC INTEREST DETERMINATIONS SHOULD APPLY EFFECTIVE MARKET ACCESS CRITERIA

AT&T supports the Commission's suggestion that the effective market access standard proposed for Section 214 applications be incorporated into the Commission's public interest determinations under Section 310(b)(4) in common carrier radio license applications where the proposed foreign ownership would exceed 25 percent.[40] As the Commission notes, foreign carrier entry into the U.S. international services market frequently requires both Section 214 authorizations and public interest determinations

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[40] NPRM, ¶ 95.

under Section 310(b)(4).[41] In some instances, the proposed entry of a foreign carrier will give to rise to an application for the waiver of Section 310(b)(4) before Section 214 authorizations are sought.[42] The Commission's public interest determinations under both sections require it to consider the impact that the proposed entry will have upon U.S. competition and U.S. customers. For this reason, and to ensure a consistent approach under both provisions, the market access standards that the Commission proposes to apply under Section 214 should be applied in the same manner to the Commission's determinations under Section 310(b)(4) where foreign carriers seek to use common carrier radio licenses to provide international services within the U.S. The Commission's market access findings should also carry the same weight under both sections.

The Commission should also apply an effective market access test as part of its public interest determination in response to Section 310(b)(4) waiver requests from foreign carriers seeking to use radio facilities to provide other common carrier services, such as Personal Communications Services ("PCS"), in the United States. In applying its effective market access test in such circumstances, the Commission should examine whether U.S. carriers can offer in the foreign country substantially similar services, on

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[41] Common carrier radio license applications by foreign entities other than telecommunications carriers would not raise the same public interest concerns of leveraging of foreign market power. However, such applications may raise trade concerns that could be addressed in other fora.

[42] Foreign carriers have also entered the U.S. without implicating Section 310 at all. Section 310 does not place any restrictions on the lease and operation of licenses to broadcast and radio facilities by foreign firms. As a result, foreign firms like Telefonica de Espana have acquired U.S. entities holding broadcast and radio licenses and have circumvented Section 310 by transferring those licenses to a U.S. corporation and leasing back the necessary rights to use the licensed facilities. Section 310 also does not prohibit the foreign ownership of cable or fiber facilities. Foreign companies like Cable and Wireless are therefore able to operate facilities networks throughout the United States without requiring any waiver from the Commission under Section 310(b)(4).

both a facilities and resale basis, to those the foreign carrier seeks to provide in the U.S. To ensure the existence of real competitive opportunities for U.S. carriers to provide the relevant services in the foreign country, the Commission should also apply the other elements of the effective market access test, such as the existence of competitive safeguards, the availability of published non-discriminatory terms and conditions for interconnection, and the existence of an independent, effective regulator. The scope of the services subject to examination under the effective market access test should be determined first by the services that the foreign carrier seeks to provide in the U.S. and, second, by the services that U.S. carriers would need to be able to provide in order to compete effectively in that market. Moreover, further application of the effective market access test should be required before a foreign carrier authorized to provide certain services may provide additional services.

AT&T believes that, as recently stated by Vice President Gore, those countries that provide U.S. carriers with open market opportunities should not be subject to U.S. foreign ownership restrictions. AT&T therefore supports removing the U.S. foreign ownership restriction on common carrier services embodied in Section 310(b)(4) as part of trade agreements providing full and effective access to foreign telecommunications services markets. In the interim, the Commission should recognize individual country liberalization by granting waivers of Section 310(b)(4) to carrier applicants from those countries that have opened their markets to full and effective competition.[43]

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[43] The NPRM also requests comment on whether a market access test should be employed in evaluating broadcast license applications under Section 310(b)(4). Although AT&T takes no position on this issue, the treatment of broadcasting under Section 310(b) implicates issues relating to the foreign control of content that do not generally arise in the common carrier field.

VI. THE COMMISSION HAS AMPLE JURISDICTION TO IMPLEMENT THE EFFECTIVE MARKET ACCESS TEST

Under Section 1 of the Communications Act, the Commission is required to exercise its regulatory powers "so as to make available, so far as possible, to all the people of the United States, a rapid, efficient Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[44] The consideration of foreign market opportunities for U.S. carriers as part of the Commission's public interest determinations under Sections 214 and 310(b)(4) falls well within the scope of this statutory mandate. Indeed, as shown below, the Commission has taken detailed account of the openness of foreign markets in public interest determinations made under both provisions.

Foreign market barriers have a direct impact upon the achievement of the public interest goals of Section 1 of the Communications Act. As described in Section III above, U.S. carriers' lack of access to foreign markets directly affects the price, quality and functionality of international telecommunications services that are provided to U.S. consumers. The Commission's goals in this proceeding of providing effective competition in the global market for communications services and of encouraging foreign governments to open their markets indisputably serve its statutory mandate to promote the availability of efficient telecommunications services at reasonable rates.[45]

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[44] 47 U.S.C. § 151. Section 2(a) of the Act states that its provisions shall apply "to all interstate and foreign communication by wire or radio . . . which originates or is received within the United States, and to all persons engaged within the United States in such communication." 47 U.S.C. § 152(a). Section 4(i) provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).

[45] NPRM, ¶ 26; 47 U.S.C. § 151.

The third goal of the Commission in this proceeding, the prevention of anti-competitive conduct in the provision of international services or facilities, falls squarely within the Commission's authority to ensure "just and reasonable" practices and the avoidance of "undue preference or discrimination in charges, practices, classifications, regulations, facilities, or services for, or in connection with, communications services."[46] Further authority for the Commissions' exercise of jurisdiction in this manner is provided by its role in enforcing the Clayton Act and by the competitive considerations that are an integral part of its public interest determinations.[47]

Moreover, encouraging the entry of U.S. carriers into foreign markets has been a long-standing Commission objective. In the International Competitive Carrier Policies Order, the Commission observed that it remained "concerned about the opening of foreign markets to U.S. carriers" and that it would consider conditioning foreign carrier Section 214 certificates on "reciprocal entry by additional U.S. carriers."[48] Concern with the entry barriers and discriminatory treatment that face U.S. carriers in foreign markets has been a major influence on the Commission's dominant carrier regulation of the U.S. affiliates of foreign carriers.[49] As the NPRM notes, in Section 214 public interest determinations concerning international private line resale, the Commission evaluates

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[46] 47 U.S.C. § 202(a), (b).

[47] *See* 47 U.S.C. § 702(d); 15 U.S.C. § 21. *United States v. Federal Communications Comm'n*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (competition is an important part of the public interest standard under Section 214).

[48] *International Competitive Carrier Policies*, 102 F.C.C. 2d 812, 843 (1985). *See also Regulation of International Common Carrier Services*, 7 FCC Rcd. 7331 (1992) (referring to the Commission's "goal of encouraging competitive entry in foreign markets").

[49] *See International Competitive Carrier Policies*, 102 F.C.C. 2d at 842; *Regulatory Policies and International Telecommunications*, 4 FCC Rcd. 7387, 7428 (1988).

whether U.S. carriers are afforded opportunities in foreign markets equivalent to those available under U.S. law.[50]

The Commission has given explicit consideration to the openness of foreign markets in two recent Section 214 public interest determinations related to foreign carrier entry into the U.S. market. In approving the acquisition of TLD of Puerto Rico by the Spanish monopoly carrier Telefonica de Espana, the Commission stated that the "closed nature of foreign markets" was "a serious problem because of the potential for discrimination among U.S. carriers terminating traffic in the foreign market."[51] The Commission continued:

> This potential discrimination could adversely affect the public interest by undermining the benefits of competition, and is one factor, among several, that is relevant to the Section 214 public interest determination.

The Commission also warned that unaffiliated U.S. carriers would remain vulnerable to monopoly abuse "for as long as competitive entry is not permitted."[52]

The Commission conducted a lengthy and detailed analysis of whether effective opportunities for competition were present in the Chilean telecommunications market in making an affirmative Section 214 public interest finding in AmericaTel Corp.[53] The Commission noted that the absence of foreign market entry opportunities for U.S. carriers not only raised the danger of potential discrimination by the foreign carrier, but also

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[50] *See, e.g.*, *ACC Global Corp.*, 9 FCC Rcd. 6240 (1994).

[51] *Telefonica Larga Distancia de Puerto Rico and LD Acquisition Corp.*, 8 FCC Rcd. 106, 108 (1992).

[52] *Id.* at 109.

[53] *AmericaTel Corp.*, 9 FCC Rcd. 3993 (1994). The Commission's analysis was "based on the criteria we have previously applied in ruling on application of foreign carriers to enter the U.S. telecommunications market." *Id.* at 3996.

unfairly disadvantaged U.S. carriers in competing with foreign carriers to deliver "end-to-end" services. The Commission stated:

> Asymmetrical market access could adversely affect the U.S. public interest by undermining the benefits of our open door entry policy. For this reason, consistent with existing Commission policy, we will consider, as one factor in our public interest analysis, the degree to which Chile's telecommunications market and regulatory regime provide U.S. firms with effective opportunities to compete . . . [54]

The Commission has also examined the openness of foreign markets in making its public interest determinations under Section 310(b)(4). In approving the partial acquisition of MCI by BT, the Commission took account of the openness of the UK market in formulating its safeguards against discriminatory behavior.[55]

Thus, the Commission not only has clear jurisdiction to consider the availability of effective access to foreign markets as part of its public interest determinations, but has exercised this jurisdiction in ways that are directly relevant here. A consistent concern has been the need for competition in foreign markets to prevent foreign monopoly carriers from taking anticompetitive actions against U.S. carriers. The Commission's existing public interest criteria also take account of the adverse impact of asymmetrical market access on U.S. carriers' ability to provide international "end-to-end" services. Accordingly, the application of the effective market access test that the Commission proposes would not only be within the Commission's jurisdiction, but would also be consistent with its own past practice.

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[54] *Id.* (emphasis added).

[55] The Commission found that it was "germane to our analysis that considerable regulatory steps have been taken, and should continue to be taken, to facilitate the develop of effective competition to BT." *MCI Communications Corp., British Telecommunications plc*, 9 FCC Rcd. 3960, 3964 (1994).