

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Market Entry and Regulation of)
Foreign-affiliated Entities)
)

IB Docket No. 95-22
RM-8355
RM-8392

TO: The Commission

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REPLY COMMENTS OF DEUTSCHE TELEKOM AG

DEUTSCHE TELEKOM AG

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SUMMARY

Deutsche Telekom's opening comments made four basic points: (1) the Commission lacks statutory authority to impose an "effective market access" requirement; (2) the "effective market access" test is flawed on its own terms and should be rejected; (3) even if the Commission can and should implement the "effective market access" test, now is an inopportune time to do so or to engage in this rulemaking; and (4) if the Commission nevertheless decides to impose the "effective market access" test, it should continue to define "affiliation" as control for purposes of Section 214. We further argued that if affiliation is defined to include non-controlling interests, then it makes no sense to include ownership interests while excluding non-ownership interests (such as AT&T's WorldPartners) that give rise to equivalent incentives, at least in theory, to engage in anticompetitive conduct. Every one of these points finds substantial support in the other comments. In addition, the criticisms directed at these positions by various commentators do not withstand careful analysis.

Taken as a whole, the comments demonstrate that there are serious problems with the Commission's proposal. First and foremost, the Commission has not been delegated the authority to initiate actions aimed at coercing foreign governments to open their markets to U.S. carriers. Congress (and the Constitution) have vested that authority in the Executive Branch, and previous Administrations have steadfastly resisted any encroachments by the Commission on these prerogatives. This proceeding, moreover, provides a textbook illustration of why authority for trade matters must remain in the hands of the Administration's trade professionals. The "effective market access" test proposed by the Commission, if adopted, would violate the international obligations of the United States, including the standstill agreement that is part of the GATS negotiations over trade in basic telecommunications services and other international commitments. Indeed, the mere issuance of the Notice of Proposed Rulemaking probably

violated the standstill agreement. The Notice made no mention of these important international obligations and one wonders whether the Commission was completely unaware of them.

The proposed "effective market access" test should in any event be rejected as a bad idea. At bottom, the test is ill-conceived because it seeks to achieve greater competition through a means that is fundamentally anticompetitive. In addition, it is unlikely to spur favorable actions by foreign governments. Particularly if the Commission is required (as we believe it is) to give great or complete deference to the Executive Branch's views, then foreign governments will have little incentive to undertake legal reforms in order to satisfy the Commission. That is especially true if the Commission carries through on its proposal, which is indefensible, to exempt AT&T's WorldPartners and similar ventures from its rule. AT&T is the only commentator who supports such a "free pass" for WorldPartners, and the Commission is under no obligation to take AT&T's request seriously because the company is currently taking precisely the opposite position in other legal proceedings. It would be a sad irony indeed if the ultimate effect of this proceeding is to guarantee by means of a regulatory preference AT&T's emerging dominance in the market for global services.

Implementation of the Commission's approach will only invite retrenchment and retaliation by foreign governments. Notably, the Commission has offered no support for its assumption that the "effective market access" test will be successful rather than counterproductive. That is perhaps not surprising, because the Commission, in contrast to the Executive Branch, has little experience and still less expertise in gauging the likely behavior of other nations in response to such trade initiatives.

Quite apart from its likely effect on foreign governments, the Commission's approach creates a complex, time-consuming, and expensive new hurdle for foreign investors. Given the tremendous investment in time and resources that is required to form a global alliance, foreign-

carrier investors are unlikely even to attempt to serve the U.S. market if becoming a competitor here requires subjecting oneself to the vagaries inherent in the Commission's ambiguous and discretionary "effective market access" test.

For all of these reasons, DT urges the Commission either to reject the "effective market access" test, or to terminate or postpone this rulemaking proceeding.

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REPLY COMMENTS OF DEUTSCHE TELEKOM AG

Pursuant to Section 1.415(c) of the Rules of the Federal Communications Commission ("FCC" or "Commission"), Deutsche Telekom AG ("DT"), by its attorneys, submits these Reply Comments in the above-captioned proceeding.

Our opening comments made four basic points concerning this rulemaking proceeding and the Commission's proposed use of an "effective market access" test under Sections 214 and 310(b)(4) of the Communications Act. First, the Commission lacks authority to impose such a requirement. Second, the "effective market access" test is flawed on its own terms and therefore should be rejected. Third, even if the Commission can and should adopt the "effective market access" test, now is not the time to do so or to engage in this rulemaking. And fourth, if the Commission nevertheless decides to impose the "effective market access" test, it should at least continue to define "affiliation" as control for purposes of Section 214. Every one of these arguments finds substantial support in the comments. The counterarguments raised in the comments, moreover, do not withstand analysis.

I. THE FCC LACKS THE AUTHORITY TO IMPOSE THE "EFFECTIVE MARKET ACCESS" TEST ON FOREIGN GOVERNMENTS

In our opening comments (at 3-14), we provided a detailed explanation of why the Commission lacks the authority to impose an "effective market access" test under Sections 214

and 310(b)(4) of the Communications Act of 1934. Among other things, we pointed out that such authority is inconsistent in several ways with the language and structure of the Communications Act; that the FCC itself has recognized that "a desire for reciprocity in international investment policies by itself" does not "provide[] an adequate basis for action on [its] part";¹ and that the Executive Branch has confirmed, in response to a previous FCC proposal to adopt a similar "pro-active, 'sectoral reciprocity' regime," that "[e]xisting law * * * provides no authority for the FCC to take unilateral retaliatory action" against foreign countries on trade policy grounds. NTIA Comments 3, 5 (filed Apr. 17, 1987), In re Regulatory Policies and International Telecommunications, 2 FCC Rcd 1022 (1987) ("International Telecommunications") (footnote omitted) (emphasis added) ("No. 86-494 NTIA Comments").²

Not only does the Commission lack statutory authority to impose the "effective market access" test, but as we explained in our opening comments (at 14-19), such action would be inconsistent with the endorsement by both Congress and the Executive Branch of multilateral and bilateral negotiations as the proper fora in which to pursue the goals articulated in the NPRM. If adopted, the Commission's proposal would disrupt the delicate process of international negotiations and violate the standstill provision to which the United States government has bound

¹ Memorandum Opinion and Order, In re Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service, 77 FCC 2d 73, 78-79 (1980) ("Second Cable Order").

² For later proceedings in the International Telecommunications docket, see Report and Order and Notice of Supplemental Inquiry, 3 FCC Rcd 7387 (1988), on reconsid., 4 FCC Rcd 323 (1989).

itself in the ongoing GATS negotiations over basic telecommunications services. See DT 17-18.³ And as if all of this were not enough to doom the Commission's proposal, we explained (at 19-22) that the initiative is inconsistent with the Telecommunications Trade Act of 1988, 19 U.S.C. §§ 3101-3111, which created a detailed framework according to which bilateral trade issues in the telecommunications sector are to be resolved by the Executive Branch's trade professionals — and not the FCC. Indeed, in passing that law Congress declined to give the Commission the authority it claims in this proceeding. DT 22.

Only a handful of the numerous comments filed in this proceeding discuss the issue of the Commission's authority. Most agree that the Commission's authority to undertake the measures proposed in the NPRM is open to serious doubt. See, *e.g.*, TLD 5-23 (identifying numerous problems with Commission's assertion of jurisdiction): Sprint iii, 4, 7-11 (questioning FCC's power under Section 214 to impose "effective market access" test); Britain 5-6 (proposed requirement that affiliated foreign carriers' accounting rates with other countries be filed creates "potential questions of jurisdiction."); France Télécom ("FT") iii-iv, 25-26 (requirement that accounting rates of certain affiliated foreign carriers with other countries be filed is beyond the FCC's jurisdiction).⁴

³ In the interest of space, throughout these reply comments we cite to the opening comments merely by author and page, unless otherwise indicated.

⁴ Several of these comments identify as especially flawed the NPRM's proposal to require all affiliated, facilities-based carriers that are regulated as dominant on any U.S.-international route to file a complete list of the accounting rates that their foreign carrier affiliates maintain with all other countries. NPRM ¶ 87. For example, the British government expresses "considerable concern[]" about the proposal, describing it as "tangential to the main purpose of the Notice" and as "rais[ing] questions about the basis on which judgements would be made about whether those rates are cost-based or not." Britain 5. "We also see difficulties," the British government explains, "in requiring a company outside US jurisdiction to reveal commercially confidential information which affects a third party also outside US jurisdiction * * *." *Ibid.* Other comments confirm and expand on these points. See, *e.g.*, FT iv, 25-26 (noting jurisdictional problems as well as adverse effects on competition); AmericaTel 10 (rule would function as a

A. AT&T's Comments

AT&T offers the most detailed defense of the Commission's jurisdiction, but nonetheless fails to supply a satisfactory answer to the objections raised in the opening round of comments. Taking a cue from the NPRM (see ¶ 39 & n.29), AT&T invokes the Commission's "ancillary jurisdiction" under the Communications Act (see 47 U.S.C. §§ 151, 154(i)) as a basis for the Commission's proposed rule. AT&T 41-42 & n.44; see also PanAmSat 3. In AT&T's view, the fact that the "effective market access" test has some articulable connection to the broad goals expressed in the Communication Act's preamble (47 U.S.C. § 151) — including promoting the availability of international telecommunications services at a reasonable cost — is a sufficient basis for the Commission's authority. But see MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223, 2232-33 (1994) (in declining to sustain an FCC interpretation of word "modify" in Section 203(b) that departed from plain meaning of statute, rejecting argument that Court could rely on "the Communication Act's broad purpose of promoting efficient telephone service"). Putting aside the fact that the preamble does not represent any delegation of authority (see DT 10), AT&T's jurisdictional theory suffers from several flaws.

First, AT&T's argument proves far too much. Almost any FCC directive to a foreign government to enact some kind of pro-competitive regulatory reform would be authorized under

barrier to entry and would harm competition); Cable & Wireless 13 (noting possibility of retaliation against complying carriers and existence of sound competitive reasons for keeping accounting rates confidential). We fully agree that the Commission's proposed requirement is an undue burden on foreign carriers, an inappropriate intrusion into business relationships that have little or no connection to the United States, and ill-suited (without additional, intrusive inquiries beyond the Commission's jurisdiction) to yield information that will permit a "determin[ation] whether there is a noncost-based disparity between the rates maintained" by the foreign affiliate with U.S. carriers and the carriers of other countries. NPRM ¶ 88. The idea that a noncontrolling interest (perhaps as low as 10%) held by the foreign "affiliate" could trigger such invasive requirements is remarkable, to say the least.

AT&T's sweeping jurisdictional theory. Thus, the Commission could require foreign countries to employ price caps and to replicate American cost-accounting rules before entry to the United States market is permitted, on the theory that such measures have an articulable connection to the goal of making U.S.-international services available at a reasonable cost. On the same basis, the Commission could exercise the power to approve certain tariffs in the foreign country. But the Communications Act is not the United Nations Charter. It does not vest in the Commission the power to engage in direct, extraterritorial regulation of foreign markets, much less to enact measures whose principal purpose is to coerce action by foreign governments.

Second, it is not enough that the "effective market access" test have an articulable connection to a valid regulatory goal. To the extent that the validity of the "effective market access" test turns on an interpretation of the Communications Act, the statutory language must be capable of accommodating the Commission's interpretation and the interpretation must be reasonable. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984). Moreover, since the Commission has previously concluded that it lacks the authority to take action based solely on "a desire for reciprocity in international investment policies" (Second Cable Order, 77 F.C.C. 2d at 78-79), it must now offer a "reasoned analysis" to support reversal of current policy. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 57 (1983).⁵

⁵ We note, moreover, that the question whether the proposed "effective market access" test will actually further (rather than subvert) the goals identified in the NPRM is not a question of statutory interpretation. It requires an assessment, based on empirical knowledge (drawn from political science, game theory, and experience in international trade matters), of the likely impact on foreign governments of the Commission's effort to coerce the opening of foreign markets. Yet this is precisely the kind of assessment that the Commission previously has said is beyond its capabilities. See Second Cable Order, 77 F.C.C. 2d at 79, 81 (stating that "[q]uestions of international trade seem to us more appropriately addressed to other branches of the government" and acknowledging that Commission is not "in a position to know if * * * a policy [of reciprocity] on our part would in fact have the result intended or if, to the contrary, it would

AT&T also suggests that the proposed "effective market access" test is merely a logical outgrowth of the Commission's past practices. AT&T 42-44; accord MCI 5 ("merely an elaboration of some of the public interest factors the Commission has traditionally considered" under Section 214). Not so. It is one thing, we submit, for the Commission to consider the regulatory and economic conditions in a foreign market in determining which safeguards should be imposed on a carrier to protect competition in the market for U.S.-international services involving that country. It is quite another for the Commission to adopt a measure aimed at coercing foreign governments to liberalize their markets on pain of exclusion of carriers whose primary markets are in those foreign countries. See DT 7 n.4, 24. The latter, unlike the former, is a trade measure directed at foreign sovereigns. See also TLD 17-19.⁶

In any event, AT&T's arguments do not account for (1) Congress's failure explicitly to authorize the FCC to consider reciprocity issues under Sections 214 and 310(b)(4), in contrast to other provisions of the Communications Act where such authority has been delegated subject to special limitations (DT 7-8); (2) Congress's refusal to grant the FCC such authority in passing the Telecommunications Trade Act of 1988 (*id.* at 22) as well as more recently (see TLD 13); and (3) the jurisdictional limits that are contained in Sections 2, 214, and 310(b)(4) (DT 11;

lead to increasing trade barriers in other areas"). In addition, as explained in our opening comments (at 28-35) and below (at 19-20), there is every reason to believe that imposition of the "effective market access" test will subvert rather than advance the goal of promoting the availability of U.S.-international telecommunications services at a reasonable cost. The only evidence in the administrative record on this score, moreover, is the report entitled "A Game Theoretic Analysis of the FCC's Proposed Reciprocity Rule" authored by economists Stanley M. Besen and John M. Gale of Charles River Associates and submitted by Sprint as an addendum to its comments. That un rebutted submission establishes that the "effective market access" is unlikely to be effective in leveraging open foreign markets.

⁶ The fact that the Commission has requested comments on whether it has the authority to impose an "effective market access" test on foreign governments (NPRM ¶ 39) further shows that its proposal is not, as AT&T suggests, merely a routine application of past practice.

Sprint 4, 7-11). Nor does AT&T explain how the assertion of jurisdiction in this proceeding can be squared with the Commission's previous conclusion, in rejecting foreign ownership restrictions on cable operators as a means of leveraging open foreign markets to U.S. investment, that it lacks "responsibility for investment policy with respect to communications systems in foreign countries." Second Cable Order, 77 F.C.C. 2d at 78-79. See also ibid. ("We do not believe a desire for reciprocity in international investment policies by itself provides an adequate basis for action on our part."). Indeed, AT&T's initial comments make no attempt even to address these problems with the Commission's jurisdiction.

With regard to Section 310(b)(4), AT&T does not offer any defense of the Commission's authority to adopt an "effective market access" test except to rely, once again, on the Commission's "ancillary jurisdiction" and supposed past practice. AT&T 41, 44. In addition to the shortcomings noted above, these arguments effectively disregard the congressional purpose underlying Section 310(b), which has nothing to do with opening foreign markets and everything to do with "concern[s] for national security" and "prevent[ion of] alien activities against the government during a time of war." NPRM ¶ 16 & n.16. See DT 8-9. As NTIA and other Executive Branch agencies correctly point out, it is settled that a congressional delegation of authority to regulate "in the public interest" must be understood in light of the underlying statutory purposes. NTIA 14 & n.20; see also DT 9. Yet the Commission's proposed use of an "effective market access" test under Section 310(b) — as a tool for leveraging open foreign markets — has no logical connection to the purpose behind that provision.⁷

⁷ One commentator correctly observes, moreover, that the Commission has construed its "public interest" role under Section 310(b)(4) in a fashion that is inconsistent with the language of the statute. Sidak 2-4; see also Nynex 6 (urging FCC to reject effective market access test under Section 310(b) and to announce that burden of proof with respect to waiver applications should

B. NTIA's Comments

The Commission's authority is also discussed more generally in NTIA's comments (which are submitted on behalf of numerous agencies of the Executive Branch). As explained in our opening comments (at 13-14), those very same agencies took the position in the analogous International Telecommunications proceeding that the Commission has "no authority" under "existing law" to "take unilateral retaliatory action and, indeed, the whole notion of any such unilateral action by the FCC is inimical to the plain need for consistency in developing and implementing U.S. trade policy." No. 86-494 NTIA Comments 5 (footnote omitted).⁸ See also NTIA 11 n.18 (acknowledging previous position); TLD 14-17. The Commission has previously agreed with this assessment of its limited powers. See Second Cable Order, 77 F.C.C. 2d at 81 ("Questions of international trade seem to us more appropriately addressed to other branches of the government."). See also note 5, supra.

Moreover, as NTIA (at 11 n.18) and TLD (at 16) both point out, the Executive Branch filed a second round of comments in International Telecommunications. See NTIA Comments, No. 86-494 (filed May 20, 1988) ("No. 86-494 Additional NTIA Comments"). In that submission, the Executive Branch made even clearer its view that the Commission lacks the authority under the Communications Act to take retaliatory measures aimed at opening up

rest on objecting parties).

⁸ See also No. 86-494 NTIA Comments 7 ("Executive branch agencies are responsible for the development and implementation of U.S. trade policy under existing law. Regulatory agencies including the FCC may have a limited role to play, subject to the overall direction of the Executive branch, but there is no room under existing law — nor should there be — for unilateral initiatives undertaken by independent regulatory agencies in the trade policy field."); id. at 3 ("The FCC is an independent regulatory agency and its statutory jurisdiction does not include the independent formulation or implementation of U.S. trade policy."); id. at 6 ("[W]e do not believe that [the FCC] has authority to commence proceedings solely for trade reasons, or to base communications regulatory actions solely on trade grounds.").

foreign markets to U.S. companies. The Commission, the Executive Branch explained, "does not have any authority to dictate procurement practices or standards to foreign governments." No. 86-494 Additional NTIA Comments 12 (emphasis added); see also id. at 9 ("Although the Commission clearly has a proper regulatory role in the establishment of open and transparent telecommunications standards for the United States * * * it does not possess such authority with respect to standards and procurement practices of foreign nations."). As for the Commission's suggestion that it might exercise "leverage" though "some sort of reciprocity consideration as the basis for denial of Part 68 consideration," the Executive Branch stated that "[t]he possibility that the FCC might unilaterally pursue a trade policy that runs diametrically opposite" to Executive Branch initiatives in this area "demonstrates the danger of an independent agency attempting to exercise such authority." Id. at 11.

These views were further confirmed in the Executive Branch's petition for reconsideration in International Telecommunications. No. 86-494 Petition for Reconsideration (filed May 16, 1988). In that submission, the Executive Branch asked the Commission to revisit its decision to impose (1) on foreign-owned telecommunications carriers certain notification and reporting requirements concerning the provision of common carrier services within the United States and (2) on large common carriers a reporting requirement concerning their purchases of core network equipment. The Executive Branch explained:

Despite the clear admonition from the Executive Branch that the Commission did not have the authority to act independently on trade policy grounds, most of the rationale given for the information gathering imposed by the Order is clearly trade related. Broad language used in the Order leaves the clear implication that the Commission might, independently, in the future consider using this information for trade purposes. This exceeds the FCC's statutory authority, improperly interferes with the trade policy responsibilities of the Executive Branch and fails to account adequately for the Administration's comments filed in opposition to the original Notice. Any information collection that the FCC may undertake must be based on, and can only extend as far as, its authority under the Communications Act. The Commission cannot and must not take action, even with respect to information collection, on trade policy grounds.

No. 86-494 Petition for Reconsideration 4-5 (emphasis added). Although the "gathering of information is, as a general matter, well within the authority and normal practice of the Commission" under the Communications Act, the Executive Branch added, an information-gathering requirement that is justified out of trade concerns "implies an even broader trade policy role beyond information gathering" and "exceed[s] [the Commission's] regulatory mandate." Id. at 5, 7.⁹

In its comments filed in this proceeding, the Executive Branch does not similarly maintain that the Commission lacks such statutory authority. On the contrary, the Administration suggests (without providing any persuasive explanation or analysis) that the FCC's "current regulatory role" under Section 214 and 310(b) can accommodate the Commission's "effective market access" test. NTIA iii, 10-11. At the same time, the Executive Branch maintains that the "the proposed test implicates issues broader than those committed to the Commission under the Communications Act." Id. at 14 (emphasis added). In essence, the Executive Branch argues that in this area of partially concurrent or overlapping authority, where the Executive Branch's "responsibilities" are "more extensive and primary,"¹⁰ the FCC "must exercise its authority with great deference to the Executive Branch with respect to * * * foreign relations, the interpretation of international agreements, and trade (as well as direct investment

⁹ Notably, all of the Executive Branch's submissions in International Telecommunications were filed before Congress enacted the Telecommunications Trade Act of 1988, which removed any doubt about the Executive Branch's authority in this area and assigned to the Commission the limited role of rendering advice and gathering information.

¹⁰ The NTIA comments supply numerous citations to statutes that delegate authority over trade and international matters to the Executive Branch. NTIA 8-11 & nn. 10-15. These citations further demonstrate that Congress intends Executive Branch officials, not FCC members, to exercise authority of the kind involved in this proceeding.

as it relates to international trade policy)." *Id.* at 11 (emphasis added). See also *id.* at 15 (Executive Branch views must be accorded "great weight").

In sum, the Executive Branch now suggests that the Commission has the authority to implement the "effective market access" test, so long as it affords "great deference" and "great weight" to the Administration's views. It is a fair question, we submit, whether the Commission would ever be free to disregard the views of the Administration's trade professionals. Could the Commission grant a 214 authorization based on a determination that a foreign market provides "effective access" over the Executive Branch's contrary conclusion (or instruction to deny entry for diplomatic or other reasons)? Alternatively, could the Commission deny such an application despite the Executive Branch's contrary instruction? The answers to these questions should be found in NTIA's promised reply comments. See NTIA 16 n.23.

If the comments filed by the Executive Branch in previous years are any indication, the answer to both questions will be a resounding no. See No. 86-494 Additional NTIA Comments 6 (FCC's procedures for consultation "'should provide that [the FCC] will routinely consult with the Executive branch with respect to trade policy and, where allowed by law, follow its guidance.'") (emphasis added) (quoting No. 86-494 NTIA Comments at 4); No. 86-494 NTIA Comments at 7 ("Regulatory agencies including the FCC may have a limited role to play, subject to the overall direction of the Executive branch * * * .") (emphasis added). If the present Administration does not adhere to this position, it will face several rather serious problems. First, as the NTIA recognizes (at 16 n.23), complete subordination of the FCC's authority to the Executive Branch could raise separation-of-power concerns. In other words, if Congress did in fact delegate the authority to the Commission, an independent agency, to adopt and implement an "effective market access" test under Sections 214 and 310 of the Communications Act, then the Executive Branch has no business insisting on a veto of that delegated authority. Second,

as explained in greater detail below (at 19), if the Executive Branch is indeed to have the final and decisive word then there will be virtually no incentive for foreign governments to satisfy the Commission's "effective market access" test. On the other hand, if the "great deference" owed the Executive Branch is something less than absolute deference, then NTIA will be hard-pressed indeed to explain why the Executive Branch is now willing to cede to the FCC authority that was previously claimed as an exclusive presidential prerogative. That task will be all the more difficult because the Executive Branch is now taking the position in commenting on new telecommunications legislation that any "relevant market access determination[s] should be made by the Executive Branch." NTIA ii.¹¹

C. The United States' International Obligations

Various comments correctly point out that the Commission's proposal may violate the United States' international commitments. For example, TLD echoes the important concern expressed in our opening comments (at v, 18) that this rulemaking proceeding violates the standstill agreement relating to the multilateral GATS negotiations on basic telecommunications services. TLD 22-23. The standstill agreement provides as follows:

Commencing immediately and continuing until the implementation date to be determined [upon conclusion of the negotiations], it is understood that no participant shall apply any measure affecting trade in basic telecommunications services in such a manner as would improve its negotiating position and leverage.

¹¹ It goes without saying that the Executive Branch cannot, through mere acquiescence in an FCC initiative, confer jurisdiction on the Commission that Congress has failed to delegate. Nor is it plausible to interpret the NTIA's comments in this rulemaking proceeding as an attempted delegation of Executive Branch power to the Commission. Without expressing any view on the legality of such a delegation, we note that it could not be accomplished without more formal presidential action (such as an Executive Order). See 3 U.S.C. 301, 302; see also 19 U.S.C. §§ 2901-2906. Apart from that formal deficiency, the substance of the NTIA comments — which takes note of the Administration's efforts in Congress to secure recognition of Executive Branch authority to make "effective market access" determinations — hardly suggests an intent to make such a delegation.

Ministerial Decision on Negotiations in Basic Telecommunications § 7 (emphasis added). We agree with TLD that the "effective market access" rule "flatly violates this commitment." TLD 23. The FCC's proposal falls squarely within the language of this standstill provision, because the Commission is proposing to "apply" various existing "measures" — Sections 214 and 310 — that clearly "affect[] trade in basic telecommunications services" and to do so in a manner that "would improve [the United States'] negotiating position and leverage." Notably, the plain language of the standstill provision does not require any intent on the part of a governmental actor to influence trade matters; it is enough that the effect of the governmental initiative will be to improve the negotiating position of a party, which is plainly true here. For that reason, as TLD correctly points out, the mere "act of publishing the proposal could reasonably be viewed" as a violation of the standstill agreement. TLD 23.¹²

Relatedly, the British Government complains that the Commission's approach "may be difficult to reconcile with the concept of national treatment under the WTO agreement, which requires signatories to treat foreign suppliers of a service in the same way as suppliers of the nationality of the country in question." British Government 7. We fully agree. Here again, the International Telecommunications proceedings are illuminating. There, in response to a Commission proposal to impose certain reporting requirements solely on foreign-owned carriers, the Executive Branch filed a petition for reconsideration which strenuously maintained that such requirements violated the principle of national treatment, which the United States had long championed and had committed itself to in a variety of treaties and other international

¹² If this analysis is mistaken, we of course would expect that NTIA and the other Executive Branch agencies to explain why in their promised reply comments. See NTIA 8-9 ("[T]he Executive Branch has the primary responsibility for meeting the international legal obligations of the United States and for interpreting international agreements."). A failure to address such a serious charge should, under these circumstances, only be regarded as a tacit concession of its merit.

agreements. See No. 86-494 Petition for Reconsideration 7-13 (citing and discussing bilateral treaties of Friendship, Commerce and Navigation ("FCN"), the Code for the Liberalization of Capital Movements of the Organization for Economic Cooperation and Development ("OECD"), and Bilateral Investment Treaty ("BIT") initiatives on the part of the United States government).¹³

In response to these arguments, the Commission significantly curtailed the scope and duration of its reporting requirements. See Order on Reconsideration, International Telecommunications, 4 FCC Rcd 323, 337 (1989) (¶ 72). And while the Commission disagreed with the Executive Branch's claim that its reporting requirements violated the principle of national treatment as embodied in various treaties (*id.* at 336-37), it did so on grounds that have no relevance here. For example, the Commission took comfort from Congress's then-recent enactment of the 1988 Trade Telecommunications Act, which contained a provision that validated the Commission's information-gathering function under the proposed rule. See *id.* at 329-30 & nn.15-17. More importantly, the Commission believed that reporting requirements did not implicate the national treatment principle. The Commission explained:

We recognize, of course, that the purpose of the national treatment principle is to establish a favorable climate for foreign investment and to encourage foreign-controlled enterprises to contribute to economic and social progress. We do not believe that the reporting requirements that we established in the Order can be compared, however, to the investment restrictions that the national treatment principle is designed to address, nor do we believe that our reporting requirements will have any negative affect on the investment climate for foreign investment in the U.S. telecommunications market.

¹³ See No. 86-494 Petition for Reconsideration 9 ("By singling out 'foreign-owned carrier' for special reporting requirements, the FCC is violating the long-established principle of the United States that foreign investors shall be accorded national treatment."); *id.* at 12 ("[A]pplying new discriminatory reporting requirements to firms owned by nationals of certain foreign countries and already investing in the United States might be contrary to our obligations under several FCN treaties."); *ibid.* (stating that the FCC's order "could be viewed as violating" various multilateral and bilateral agreements with other nations).

Id. at 336 (footnote omitted) (emphasis added). The same distinction obviously cannot be made here. In view of the Commission's previous recognition that the national treatment principle is directed at protecting foreign investment, as well as the significant international treaty obligations that the United States has assumed since the International Telecommunications proceeding (see, e.g., DT 14-19), we fully agree with the British Government that the "effective market access" test raises a serious question whether the Commission's approach is inconsistent with treaty obligations of the United States.¹⁴ It cannot be gainsaid that the "effective market access" test would impose on certain foreign investors substantial regulatory burdens (which the investors themselves are powerless to satisfy) that would not be similarly placed on United States investors. In addition, it would place those burdens on foreign carriers that wish to invest in

¹⁴ Relatedly, the Commission's proposed "effective market access" may run afoul of the United States' international commitments, embodied in FCN and BIT treaties, to the Most Favored Nation (MFN) principle. As NTIA and others point out, in the ongoing GATS negotiations the United States "has reserved the right to take a[n] * * * MFN exemption for basic telecommunications services if the NGBT fails to produce high-level commitments to liberalize competition in basic services from a critical mass of countries." NTIA 4-5. See also TLD 21 & n.49. But the United States has already made bilateral MFN commitments in specific treaties, and those obligations may well apply here. See e.g., Friendship, Commerce and Navigation Treaty, October 29, 1954, United States - Federal Republic of Germany, art. VII, 7 U.S.T. 1839, T.I.A.S. No. 3593.

In this connection, it is perhaps significant that the NPRM proposes to define the term "primary market" (which would trigger application of the Commission's test) as consisting of only those markets (1) where a foreign carrier "has a significant ownership interest in a facilities-based telecommunications entity that has a substantial or dominant share of either the international or local termination telecommunications market, and (2) "traffic flows between the United States and that country are significant." NPRM ¶ 43. The latter requirement obviously suggests that the "effective market access" test will have no application to some countries, namely, those with a relatively small flow of telecommunications traffic with the United States. Yet such differential treatment is precisely what the MFN obligation forbids.

U.S. carriers but not vice versa. See NPRM ¶ 50; see DT 25 n.12. Perhaps the Executive Branch could contribute its views on this important subject. See note 12, supra.¹⁵

In sum, the Commission's attempt in this proceeding to impose an "effective market access" requirement on foreign governments is riddled with serious jurisdictional problems. Adoption of the Commission's proposals will only lead to further legal challenges, which in turn will cause unacceptable delays in the development of the market for global services. On that basis alone, this rulemaking proceeding should be terminated and the "effective market access" test abandoned.

II. THE "EFFECTIVE MARKET ACCESS" TEST WILL NOT ACHIEVE ITS INTENDED PURPOSES AND SHOULD BE REJECTED

In our opening comments (at 22-44), we explained that the "effective market access" test is seriously flawed and should be rejected. The Commission's use of the test is likely to be worse than ineffective: it will be counterproductive. Not only is the test insufficient for a variety of reasons to motivate foreign governments to open their markets, but it will almost certainly trigger a negative response abroad, spurring foreign governments to retrench and even retaliate in the area of telecommunications trade.

While many of the comments profess support for the Commission's stated objectives in this proceeding, virtually all criticize, in one way or another, the proposed "effective market access" test as the chosen means of achieving these goals. Several agree with our fundamental

¹⁵ In rejecting the Executive Branch's claim that the Commission's reporting requirement violated the national-treatment principle, the Commission stated that the claim was "difficult to reconcile * * * with certain provisions set forth in the Communications Act." International Telecommunications, 4 FCC Rcd at 336; see also id. at 336, 341-42 n.66 (citing Sections 308(c) and 310 of the Communications Act). That answer, however, ignores the "last-in-time" rule, according to which treaties and statutes have equal legal force and conflicts between them are resolved in favor of the more recent enactment. See The Cherokee Tobacco, 78 U.S. 616, 621 (1870).

objection (DT 25-28): the "effective market access" test is, at bottom, an anticompetitive means of seeking to achieve greater competition. See Transworld 1 (goal of encouraging open markets should not be pursued "at the price of limiting competition in the U.S. market"); Univisa 9 (test "inhibits competition and resulting consumer benefits"). It throws up barriers to new competitors and new capital infusions in the hope of lowering foreign barriers in the longer run. Because of these characteristics, the "effective market access" test is likely to be counterproductive to the Commission's principal goal of promoting competition.

Not surprisingly, several smaller entities express concern that the Commission's proposal might restrict the ability of small carriers to obtain additional capital needed to strengthen their operations and thereby further catalyze competition. See Transworld 1-3; Communication Telesystems 1-4. For example, Transworld urges the Commission to "exercise care in adopting new policies and rules governing foreign carrier investments in U.S. international carriers lest this important potential source of equity capital for small, emerging U.S. carriers — those with the greatest need — would be blocked and competition within the U.S. would be retarded." Transworld 1.¹⁶ To avoid such adverse effects in the cable area, the Commission has twice rejected calls to impose foreign ownership restrictions analogous to those found in Section 310 on cable television operators. See DT 26-27.

¹⁶ Transworld also correctly points out that although the NPRM proposes to except foreign investors by non-carriers, this exclusion will not preserve small carriers' access to needed foreign capital because non-carrier "are not the logical source of capital for small U.S. investors. Foreign carriers — not foreign cosmetic manufacturers, for example — are more likely to funnel investments into U.S. businesses similar to their own." Transworld 3 n.1. Because of its concern over the possibility that sources of needed capital will be blocked, Transworld recommends that the Commission adopt a "small carrier exception" for carriers with gross annual revenues of less than \$125 million and control over no U.S. bottleneck facilities. Id. at 2.

The Commission has not identified, and no commentor has provided, any support for the Commission's fundamental assumption that the immediate and continuing loss in competition and in technological innovation caused by the new barrier will, in the longer term, be offset by increases in competition resulting from the liberalization of foreign markets. As explained below, there is no reason to believe that this prediction is correct and every reason to believe the opposite.

AT&T's "comparable market access" test meets with universal condemnation in the comments, in keeping with the assessment it received in the NPRM (at ¶ 41). See, e.g., GTE 3; Ameritech 3; Citicorp 1. Not even AT&T seeks to rescusitate that indefensible standard. But AT&T does attempt to convince the Commission to adopt a standard that is even more sweeping (without, of course, acknowledging that fact). Specifically, AT&T maintains that in applying an "effective market access" test, the Commission should "question whether sufficient legal and regulatory safeguards exist in that county to afford true opportunities to U.S. carriers to compete" if "actual and demonstrable competition has not yet developed in the foreign market." AT&T 4-5 (emphasis added); see also *id.* at 11, 37-38. "The true test of whether effective market access exists," AT&T explains, "is whether effective competition presently exists in the foreign market." *Id.* at 37-38.

In other words, it is not enough, in AT&T's view, that all legal barriers to competition in a foreign market have been removed, or even that sufficient legal safeguards are on the books. Instead, "actual and demonstrable" competition must exist in the foreign market as well. This is nothing more than the "metrics test" that AT&T has so often pressed in the domestic context. Ameritech 4 n.8. There is no warrant for imposing on foreign government such an exacting test, a step that unquestionably would "operate as a distinct new barrier to entry." *Id.* at 4.

For a variety of reasons set forth in our opening comments, the "effective market access" test proposed in the NPRM is unlikely to be effective in coercing foreign governments to open their markets. Several of those reasons merit special attention in light of the comments received. First, as explained in our opening comments (at 30-32), the Commission's approach provides insufficient assurances to foreign governments that they will be rewarded if they open their markets to competition. Because it is riddled with ambiguities and uncertainties, the Commission two-step, multi-factor test provides insufficient guidance on what reforms will suffice. See NBC 3 n.2 ("Loopholes and special exceptions * * * will destroy the value of U.S. reciprocity as an incentive to open markets."). In addition, the Commission must accord "great deference" to the Executive Branch's judgments in deciding whether "effective market access" exists and whether to permit or deny entry to foreign carriers. NTIA 11.¹⁷ Because the Executive Branch can force the Commission to allow entry even if the effective market access test is not satisfied, and can veto entry the Commission wishes to allow, there is little incentive for foreign governments to attempt to comply with the Commission's directive. A rational foreign government would go straight to the Executive Branch to obtain approval.

Second, the Commission's assumption that its rule will be effective in coercing the opening of foreign markets rests on the further assumption that foreign governments will reshape their domestic telecommunications markets and push through legal reforms solely to obtain for a carrier which serves that country's market the right to make an equity investment in a U.S. carrier. The assumption is open to serious doubt. As GTE explains, the idea "that foreign carriers have significant influence in forcing liberalization of markets in their own countries" is

¹⁷ As NTIA correctly points out, Section 214 itself recognizes a role for the Department of State in decisions involving "service to foreign points." 47 U.S.C. § 214(b). See NTIA 12 n.19.

dubious; "[o]ften, the foreign government's policies are determined without regard to the carrier's input." GTE 3 n.4.

Third, the Commission's rule is likely to trigger resentment and to cause retrenchment and even retaliation. DT 33-36. These points garnered a broad consensus of support among commentators, including among U.S. carriers with significant experience in foreign markets. See, e.g., Citicorp 2; Nynex 5; Secretary of Communications and Transportation of Mexico ("Mexico") 11-14. In fact, Nynex points out that the initiative may already have created such resentment. See Nynex 2 & n.4 (initiative "may be perceived by foreign carriers and governments as a 'closing' of U.S. markets" and "indeed, there are indications that such a perception * * * is developing abroad"); *id.* at 2 (this perception "could cause foreign governments to take retaliatory actions"); Directorate General of Posts and Telecommunications ("France") 2 (stating that French regulator will take into account FCC's rulemaking results "when readjusting the French regulatory regime" and noting that "it is likely that other countries might adopt a similar procedure").¹⁸ It is not surprising that several commentators express or imply concern that if such retaliation occurs, it could harm their operations and investment in other countries. See AirTouch 2-3 (stating that company participates in many foreign markets and that its "success as a global competitor in the provision of wireless services is dependent on the continued openness of foreign markets to U.S. participation").¹⁹

¹⁸ See also Mexico 3 (stating that the "dominant tone" of the NPRM is one of "unilateral imposition" of requirements, including suggestion that other countries must accept U.S. regulatory policies); Airtouch 3 (stating that FCC's "conservative interpretation" of its waiver authority under 310 has "been perceived as highly restrictive by foreign governments with whom AirTouch does business").

¹⁹ Exclusion from foreign markets in retaliation for the Commission's initiative would deprive U.S. carriers not only of profits from operations abroad but also of opportunities to gain valuable new technical and marketing expertise. For example, Nynex points out that its ability to provide both cable television and telephone services to subscribers in the U.K. has allowed