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

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

REPLY COMMENTS OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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Summary

The Department of Justice supports the Commission's proposal to consider whether foreign countries are open to facilities-based competition in telecommunications services and infrastructure in determining whether to authorize foreign dominant carriers to acquire substantial ownership interests in United States international telecommunications carriers. The continued existence of telecommunications monopolies in foreign countries results in higher prices, lower output, inefficient quality of service and slower innovation for U.S. consumers of international telecommunications services. Facilities-based competition in foreign countries is the best solution to these problems, and neither resale nor regulation is an equally effective substitute. Thus, it is in the public interest for the Commission to take actions, within the scope of its statutory authority and with deference to the overlapping responsibilities of the Executive Branch, that will protect competition and U.S. consumers through encouraging greater opening of foreign markets to full telecommunications competition. The Department's recent experience with the BT-MCI transaction indicates that the Commission is correct to revise its definition of affiliation to include non-controlling substantial investments in United States carriers by foreign carriers.

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Introduction

In its Notice of Proposed Rulemaking ("NPRM") in this proceeding,[1] the Commission proposes to adopt policies governing the participation of foreign carriers in United States international telecommunications markets, and stating how the requirements of Sections 214 and 310 of the Communications Act will apply to the activities of such foreign carriers and their United States affiliates. The Commission tentatively concludes that unrestricted facilities-based entry by foreign carriers is not in the public interest when U.S. carriers do not have effective opportunities to compete in the provision of services and facilities in the foreign carrier's "primary" markets. NPRM ¶ 1.

The Commission's rulemaking is timely and appropriate, given the increasing trend toward international strategic alliances in telecommunications markets. This trend presages a gradual shift from strictly bilateral correspondent

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[1] Market Entry and Regulation of Foreign-affiliated Entities, IB Docket No. 95-22, FCC 95-53, Notice of Proposed Rulemaking (released February 17, 1995) (hereinafter cited as "NPRM").

relations in international telecommunications to a mixture of bilateral and end-to-end "seamless" services, some of which may be offered on an exclusive or more favorable basis through alliance partners. Some other countries have partly or entirely opened their telecommunications markets to competition, but most retain forms of exclusive monopoly rights for national telecommunications carriers, particularly in the key areas of voice services and transmission infrastructure. The existence of these restrictions on competition poses important issues for United States telecommunications and competition policy, because access to the facilities and services subject to monopoly rights is needed for all competitive U.S. carriers to complete international traffic to foreign counties. Thus, the effects of foreign telecommunications monopolies are felt not only in foreign markets, but by U.S. consumers of international telecommunications services as well.

The United States Department of Justice ("Department"), as one of the Federal agencies responsible for enforcing the antitrust laws and promoting competition, is interested in the policies that may be adopted by the Commission in this area, and has considerable experience with questions of competition in international telecommunications. There is a substantial overlap between the responsibilities of the Commission and the Department for protection of competition in the telecommunications industry. The Department commented on the Commission's 1992 rulemaking on Regulation of International Common Carrier Services,[2/] in which the Commission, with the Department's support,

[2] CC Docket No. 91-360 (comments filed March 24, 1992).

limited regulation of U.S. carriers considered dominant because of their foreign affiliation to those routes where the foreign carrier could exercise market power. More recently, the Department investigated the first of the major international strategic alliances in telecommunications, British Telecommunications plc's ("BT") formation of a joint venture with MCI Communications Corp. and acquisition of 20% of the stock of MCI. The Department brought a complaint challenging this transaction as violating the antitrust laws, and obtained a consent decree addressing BT's ability to exercise market power over international telecommunications with the U.S., in the circumstances of the United Kingdom market and regulatory system.[3] The Commission also imposed special safeguards on this transaction to protect competition, making use of its authority under the Communications Act.[4]

The Department participated in the initial comment round of this proceeding through comments submitted by the National Telecommunications and Information Administration ("NTIA") on behalf of the Executive Branch, which addressed the proper role of the Commission in this area of overlapping jurisdictions and strong Executive interest. The Department is also participating in the reply comments submitted by NTIA on behalf of the Executive

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3 United States v. MCI Communications Corp., No. 94-CV-1317, Final Judgment (D.D.C. filed Sept. 29, 1994).

4 MCI Communications Corporation [and] British Telecommunications plc Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934 , 9 FCC Rcd 3960 (released July 25, 1994).

Branch, which address primarily the procedures for interaction between the Executive Branch and the Commission on questions of market access, and some additional matters of general interest to the Executive Branch. These comments, in contrast, focus more specifically on matters of competition policy that are of particular interest to the Department,[5] and where the Department, by virtue of its special experience in this area, can make distinct contributions to the Commission's rulemaking.[6]

The Department does not discriminate in the enforcement of the antitrust laws based on the nationality of the parties, but it recognizes that anticompetitive conduct that affects U.S. domestic or foreign commerce may be actionable under the U.S. antitrust laws regardless of where such conduct occurs, or the nationality of the parties involved.[7] The Department likewise supports the Commission's efforts, within the scope of its lawful powers and with due deference to the responsibilities of the Executive Branch, to protect U.S. consumers of international telecommunications services from the substantial harms that can result from

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[5] The submission of these comments does not affect the independent enforcement responsibilities of the Department. See, e.g., United States v. R.C.A., 358 U.S. 334, 350 n. 18 (1959).

[6] Throughout these comments, the Department cites to various publicly available documents as support. Owing to the voluminous nature of some of these documents, they have not been attached to these comments, but copies will be provided to the Commission on request.

[7] U.S. Department of Justice, Antitrust Division, Antitrust Enforcement Guidelines for International Operations, at 2, 12 (April 1995).

actions of foreign telecommunications monopolies, by encouraging the opening of foreign telecommunications markets to full competition.

I. Telecommunications Carriers with Market Power in Foreign Markets Can and Do Inflict Substantial Harm on U.S. Consumers of International Telecommunications Services

Where telecommunications carriers continue to exercise market power in foreign markets, and especially when they hold monopoly rights over important areas of services or infrastructure, those carriers can affect adversely not only the markets in which they have been granted such rights, but also United States international telecommunications markets and United States consumers. All U.S. international telecommunications carriers are necessarily dependent upon interconnection with the services and facilities of foreign carriers holding monopolies, and practically dependent to some extent upon carriers with economic market power, to complete traffic in foreign countries. As AT&T has observed in this proceeding, "in almost all countries, U.S. carriers are absolutely dependent upon foreign monopoly carriers for the termination of their international calls."[8] The prices U.S. carriers have to pay to the foreign carriers for services and facilities, and the amount and quality of what they are able to obtain as inputs to their own services, will be reflected in the international telecommunications services that U.S. consumers receive.

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[8] Comments of AT&T Corp. at 10.

There is considerable reason to believe that foreign carriers with market power, and especially those that continue to hold monopolies over services or infrastructure, tend to charge prices well above the levels that would obtain in a competitive market for international telecommunications services, and provide both a lower output of services and less efficient levels of quality in services than do carriers in competitive telecommunications markets. These problems are manifested today in several key areas.

Leased lines, at both the international and national levels, are the foundation of private corporate networks, public data networks, and emerging seamless global telecommunications services. The prices charged for these lines, and the extent and timeliness with which high-capacity lines are made available, crucially affect the development of competitive services that make use of these facilities. It is well known that prices for leased lines in the countries in the European Union that have not yet been opened to infrastructure competition are several times higher than prices for comparable facilities in the United States, where there is no limit on the number of carriers that can offer long distance services -- and are even substantially higher than prices in the United Kingdom under the infrastructure duopoly of BT and Mercury.[9] These price disparities are

[9] The United Kingdom no longer restricts the provision of domestic infrastructure to the BT-Mercury duopoly, and has licensed other providers, although virtually all traffic still goes over the facilities of one or the other of these carriers at present. At the international level, no other carriers have been licensed to compete with BT and Mercury in the U.K. in the provision of infrastructure.

particularly great for lines of 2 Mbps capacity and higher, and there are shortages in the supply of these high-capacity lines. The European Commission has found from studies that "prices for 2 Mbit lines in the European Union are on average ten times more expensive than in North America," and that "the problems of high pricing levels and lack of suitable capacity . . . result at least in part from current exclusive provision of infrastructure in most Member States."[10] Price differences of such orders of magnitude cannot reasonably be ascribed to any real differences among countries in the efficient cost of providing services. Moreover, the average time to obtain leased lines in a monopoly environment is typically on the order of months, in sharp contrast with the matter of days or at most a few weeks needed to obtain leased lines from carriers in markets where infrastructure has been opened to competition.

The result is a less widespread use of private corporate network services, and less competition in public data services, even where those areas of services have nominally been opened to competition. The European Commission has observed that "high tariffs for and lack of availability of the basic infrastructure over which such liberalized services are operated or provided to third parties have delayed the widespread development of high speed corporate networks in Europe, remote accessing of databases by both business and residential users and the

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[10] Green Paper on the Liberalization of Telecommunications Infrastructure and Cable Television Networks: Part One, COM(94) 440 final, at 15 (Oct. 25, 1994) (hereinafter cited as "1994 Green Paper").

deployment of innovative services."[11] These injuries resulting from continued monopoly provision of infrastructure are felt not only in foreign countries, but by U.S. consumers who use, or would like to use, international services to those countries.

The great majority of international telecommunications traffic, in terms of volume and revenues, still consists of switched voice services offered on a "correspondent" basis and subject to the regime of bilaterally negotiated accounting and settlement rates. Due in large part to price competition in the United States that is not matched abroad, U.S. international carriers have substantial traffic deficits with most foreign carriers, leading to large outpayment obligations.

The Commission's most recent report on international traffic stated the net amount of this deficit as $3.7 billion for 1993, nearly half of the $8.3 billion in international revenues that U.S. carriers retained.[12] The great majority of the foreign carriers with which U.S. carriers have deficits continue to hold legal monopolies over public switched voice services, and the size of U.S. payments to foreign carriers is greatly exacerbated by accounting rates that for many routes remain well above cost, notwithstanding the Commission's efforts to establish reasonable benchmarks for accounting rates and encourage their reduction.

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[11] 1994 Green Paper at 12.

[12] Federal Communications Commission, Common Carrier Bureau, Industry Analysis Division, 1993 Section 43.61 International Telecommunications Data (Nov. 1994).

Various estimates have been made of the share of the outpayment attributable to above-cost accounting rates, ranging from the Commission's own figure of $500 million annually announced in 1991, to more recent calculations from other studies in the range of $1.67-2.3 billion, which is half or more of the total annual outpayment.[13] Ultimately, U.S. consumers pay for these higher costs imposed on U.S. carriers in the form of higher retail prices for international services.

In addition to leased lines, international competitive service providers also need interconnection with the monopoly national public switched networks, not only for delivery of those forms of voice traffic that can legally be provided outside the monopoly but also for customer access to data and ISDN-based services. The terms on which such access is offered, and the timeliness with which it is provided, greatly affect not only the technical operation but the economic feasibility of competing services. Denial of interconnection or delay in providing interconnection to emerging competitors can frustrate the growth of competition, as evidenced by the experience of the United States with the former Bell System, which ultimately led to divestiture of the competitive long distance network of AT&T from its local monopolies. See United States v. AT&T, 552 F. Supp. 131, 161-62 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983). The European Commission has also recognized the crucial link between an open market for services, competition in the provision of

[13] Economic Strategy Institute, Crossed Wires: How Foreign Regulations and U.S. Policies are Holding Back the U.S. Telecommunications Services Industry, at 58 (Dec. 1994) (hereinafter cited as "Crossed Wires").

infrastructure, and open access to networks. "Providing open access to the network is absolutely fundamental to the successful development of the information society."[14] Moreover, "[n]ew actors would find it difficult to offer their own services if their access to the network continues to be restricted and with dominant players able to price them out of the market."[15] Continued network monopolies in foreign countries can be expected to have adverse effects on the development not only of domestic competition but competitive international services.

Carriers with monopoly positions are also less likely to be innovative in developing new areas of telecommunications services and technologies, which typically require both some degree of standardization and interconnection with public networks. While most traffic is still conventional switched voice, higher levels of growth over the next several years are widely anticipated for more advanced services, including intelligent network capabilities, virtual private networks, broadband services, multimedia capabilities and the global "information superhighway." Yet, as the European Commission has found, "high tariff levels in Europe are a barrier to the take off of innovative advanced services."[16] Innovation in telecommunications and the introduction of full infrastructure and services competition are intimately linked.

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[14] 1994 Green Paper at 4.

[15] Id. at 6.

[16] 1994 Green Paper at 15.

II. The Department's Experience with the BT-MCI Transaction Indicates that Substantial Equity Investments By Foreign Carriers with Market Power in United States International Telecommunications Carriers Can Give Rise to Competitive Concerns

The Commission proposes to apply its market access analysis for international Section 214 applications only to potential entrants that are "affiliated" with a foreign carrier. NPRM ¶ 52. At the same time, the Commission recognizes that it would be inappropriate to define affiliation only in terms of control, expressing concern that "if a foreign carrier acquires even a less-than-controlling ownership interest in a U.S. carrier, this may also confer on the foreign carrier the incentive to discriminate in favor of the U.S. carrier." NPRM ¶ 56. The Commission also proposes to bring the definition of affiliation now used in its dominant carrier regulations, which is now based on control, into conformity with the broader definition of affiliation proposed here, so that U.S. carriers with substantial ownership by a foreign carrier would be subject to closer regulatory oversight following entry on the international routes where the foreign owner is dominant. NPRM ¶ 50. The Department agrees with the Commission's proposed approach on all these scores.[17]

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[17] In its comments to the Commission in 1992 in the Regulation of International Common Carrier Services proceeding, the Department pointed out that when a foreign carrier owns a share of a United States carrier, a relationship of control is not necessary to give rise to possible competitive concerns. "A sufficiently large ownership interest falling short of control could give a foreign carrier a financial incentive to discriminate in favor of its United States affiliate in some circumstances." A control standard for affiliation, the Department said, was only appropriate where it was the United States carrier that owned an

(continued...)

As a result of its investigation of British Telecommunications plc's alliance with MCI Communications Corp., the Department concluded that a substantial investment by a foreign telecommunications carrier with market power in its home market could increase the extent to which the foreign monopolist engages in various types of behavior harmful to U.S. consumers. The principal U.S. carriers that have filed comments in this proceeding, including AT&T, MCI, and Sprint, all agree that a potential for discriminatory conduct favoring the U.S. affiliate at the expense of competitors exists when a foreign carrier has an equity relationship with a U.S. international carrier, though they are not in complete accord as to the threshold ownership level giving rise to concern.[18]

The BT-MCI transaction was the first instance in which the Department and the Commission confronted the consequences of the transition now beginning in international telecommunications services, which are moving from bilateral

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[17] (...continued) interest in the foreign carrier. Regulation of International Common Carrier Services, CC Docket No. 91-360, Reply Comments of the United States Department of Justice at 14 n.19 (Mar. 24, 1992).

[18] Compare Comments of Sprint at 27-29 (Sprint agrees that the potential for discrimination in such areas as accounting rates, disproportionate return traffic and circuit provisioning exists, but believes 10% is too low); Comments of MCI Telecommunications Corporation at 3-4, 11-12 (foreign carriers should be prevented from engaging in anticompetitive conduct by entering U.S. market by keeping own markets closed, and favors 10% threshold with aggregation of interests of foreign carriers having 5% or more each); Comments of AT&T Corp. at 8-16, 27 (market access analysis with threshold of 10%, combining all foreign carrier interests, will prevent foreign carriers from gaining anticompetitive advantage by being able to provide end-to-end service while competitors cannot, and protect U.S. carriers against discrimination and other conduct undermining competition).

correspondent relations to a more mixed model with a substantial share of services being provided over so-called "seamless" networks. This fundamental shift in relationships between international carriers has the potential to effect great changes in how international services are priced and provided, and how international carriers deal with one another to obtain needed inputs. It has become apparent to the Department that this transition in market structure is likely to be beneficial to both U.S. and foreign consumers, provided that all of the major countries in which these services are to be provided and whose carriers will form the key strategic partnerships are open to competition in both services and infrastructure.[19] This transition could, however, be harmful to consumers in countries that are open to competition if other key countries forming alliances retain policies restricting competition in substantial areas or their carriers retain effective market power.

One example of these types of competitive concerns that arose in the BT-MCI transaction involved the concept of "international simple resale," the interconnection of an international private line with the switched networks in both the U.S. and the foreign country through the facilities of the allied carriers. This would permit large volumes of traffic from the U.K. to the U.S. that would otherwise pass through the accounting rate and proportionate return system to be

[19] The Department agrees with the Commission that it is not necessary that the foreign market strictly mirror the U.S. telecommunications market. NPRM ¶ 41. A practical competitive analysis is more appropriate, based on the existence of facilities-based competition together with other factors demonstrating that the market is effectively open to competition.

diverted exclusively from BT to MCI. The Department anticipated substantial competitive concerns if BT were able to engage in one-way bypass of the accounting rate and proportionate return system to favor its U.S. affiliate and avoid paying settlements on incoming traffic, while competitors of MCI still had to pay settlements on their outbound traffic to the U.K. Bypass of the accounting rate system had the potential to be beneficial to both U.S. and U.K. consumers, provided that U.S. carriers were licensed to provide international simple resale in the U.K. and interconnected with BT's network before any movement away from the accounting rate system occurred. Thus, the Department's relief was tailored to encourage that licensing and interconnection, permitting both U.S. and U.K. carriers to make decisions on how to provide service and obtain inputs based on commercial considerations, not artificial advantages arising from legal restraints or a dominant market position.[20] One important element in determining that this limited solution was feasible was the existence of another facilities-based international carrier, Mercury, in the U.K. Though facilities-based competition at the international level in the U.K. is restricted to a legal duopoly, this competition nonetheless imposed some constraints on BT's pricing of its leased circuits and so reduced its ability to make attempts by other U.S. carriers to bypass its accounting rates uneconomic.

[20] United States v. MCI Communications Corp., Competitive Impact Statement, 59 Fed. Reg. 33014, 33020-21 (filed June 15, 1994).

There are several ways that a substantial equity investment by a foreign carrier in a U.S. international service provider can affect competition, as the Department recognized in the BT-MCI transaction.[21] It can create a difference for the foreign monopolist in dealing with its U.S. affiliate and non-affiliated U.S. carriers that is inconsistent with the Commission's policies on equal treatment of U.S. international carriers, including uniform settlements and proportionate allocation of return traffic. It can also create incentives for the foreign carrier with market power to engage in behavior that would increase the profits of its U.S. affiliate, and indirectly the foreign carrier as owner, at the expense of U.S. consumers. Finally, it can provide the foreign carrier with influence over the policies of its U.S. affiliate that can be used to get the U.S. affiliate to cooperate in conduct benefiting the foreign parent. In a publicly held corporation, a large equity investment can create such influence over the U.S. affiliate even without achieving formal control. In the BT-MCI transaction, as the Commission notes, the Department found that a 20% equity investment was sufficient to give rise to these concerns about anticompetitive consequences, and the Commission likewise found that the characteristics of that transaction gave BT incentives to favor MCI even though BT and MCI were not then considered "affiliated" in the sense of control. NPRM ¶¶ 54, 55.

[21] United States v. MCI Communications Corp., Competitive Impact Statement, 59 Fed. Reg. 33014, 33017 (filed June 15, 1994).

The Department does not find it appropriate here to offer a conclusion on what minimum threshold should lead to the application of the Commission's market access inquiry, below the level of 20% already identified by both the Department and the Commission as sufficient to create competitive concerns in BT-MCI. The Department's experience in this area does permit, however, some observations about the application of whatever threshold the Commission may select. The Commission has asked whether it should aggregate the interests held by various foreign carriers in a U.S. international services provider to reach the threshold, NPRM ¶ 61, and many parties have commented on this point without reaching any consensus. The Department believes that whether interests are aggregated should depend on whether the foreign carriers that own equity in a U.S. carrier are allied in providing international telecommunications services, or otherwise have sufficiently common interests as to make it likely that they would act in conjunction in influencing the policies of the U.S. carrier.

The Commission also proposes to exclude from its definition of affiliation non-equity business relationships, but to reserve the right to review any transaction involving foreign carrier participation. NPRM ¶¶ 62, 64. This approach appears reasonable. While an equity threshold can provide some certainty for parties that their transactions will be reviewed, the Commission should not create an automatic safe harbor for all non-equity relationships, but should retain the ability to impose reporting requirements as well as safeguards for particular transactions. A large equity stake makes the nature of the incentives of the foreign owner more apparent, but in some circumstances it is possible for a relationship closely related to the core monopoly activities of a foreign carrier to give rise to anticompetitive problems even without an equity stake. Non-equity relationships may also be procompetitive or neutral, however, and it would be impractical to attempt to articulate a rule governing how all non-equity relationships further removed from the core monopoly activities should be treated.

III. Facilities-Based Competition in all Services and Infrastructure in Foreign Countries Will Benefit U.S. Consumers and Is in the Public Interest

The Department believes that facilities-based competition is by far the best solution to the problems identified in Part I of these comments that arise today from monopoly provision of key network facilities and services. Introduction of facilities-based competition in countries where it is now lacking would benefit U.S. consumers of international telecommunications services.

Experience has shown that the opening of telecommunications markets to competition in both services and infrastructure leads to positive economic benefits. These have been identified by the European Commission, based on the results to date of complete or partial opening to infrastructure competition in the United States, Sweden, the United Kingdom, Japan, Australia and New Zealand, as "a pressure to lower tariffs, greater choice of services and improved quality of offerings."[22] From available information, the Department believes that more than half of the world's multinational corporations are located in countries with some degree of infrastructure competition, and a large share of all international telecommunications traffic also originates from such countries, although most international telecommunications traffic still originates from countries that restrict competition, and the networks of those countries also terminate most international traffic.[23] Not only foreign consumers, but also U.S. users of international telecommunications, will prosper if global telecommunications progresses to full competition from its present state of half monopoly and half free.

Facilities-based competition will enable accounting rates to be brought into line with cost and eliminate the substantial outpayments U.S. carriers now make to foreign carriers. It will accomplish this more effectively than the Commission

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[22] 1994 Green Paper at 4.

[23] In the BT-MCI transaction, the Department found that about 40% of all potential multinational customers for the global services of that alliance had their headquarters in the U.S., while about 10% had their headquarters in the U.K. Competitive Impact Statement, 59 Fed. Reg. at 33018. Adding the multinationals headquartered in the other countries identified by the European Commission, and the few other countries that now permit some substantial degree of domestic or international facilities-based competition in all services, would raise the total percentage of multinationals headquartered in countries with at least some infrastructure competition to approximately 65-70%.

It has been estimated that 24% of all international telecommunications traffic originates from the United States, 14% originates from the Asia region, and 34% originates from European Union countries. See Crossed Wires at 12. The countries open to some infrastructure competition would account for a large part of the international traffic originating from Asia, and a significant minority of the international traffic originating from the European Union.

can do directly with benchmarks or other regulatory means. Facilities-based competition will have the general effect of lowering retail prices for international services in foreign countries, and so stimulating demand and balancing traffic flows. In addition, the existence of foreign competitors will enable U.S. carriers to bargain more effectively with, or bypass entirely, individual foreign carriers, rather than having to take whatever prices are offered or rely on political and regulatory pressure to induce reductions. Even imperfect facilities-based competition, such as the duopoly on international facilities in the U.K., had demonstrably had this effect. Once U.K. regulatory authorities permitted Mercury to negotiate accounting rates independently with U.S. carriers in 1991, rather than having to follow whatever rates BT negotiated, large reductions in U.S.-U.K. accounting rates rapidly followed. These changes were attributable to a combination of international competition and declining costs of delivery over fiber-optic cable. Between 1990 and 1994, U.S.-U.K. per minute accounting rates for basic switched voice IDDD calls fell from $1.06 to .33 SDR (approximately $0.45) for calls going through BT, or .3 SDR (approximately $0.41) for calls going through Mercury, a decline of over half.[24/] These accounting rates are among the lowest U.S. carriers face on any international route.[25/] That most other foreign

[24] Federal Communications Commission, Common Carrier Bureau, International Policy Division, Accounting Rates for International Message Telephone Service of the United States (Sept. 1, 1994).

[25] According to the FCC's 1994 data, of countries involving substantial traffic volumes, only U.S.-Canada accounting rates were lower. Germany's Deutsche (continued...)

monopoly carriers continue to maintain accounting rates at considerably higher levels, notwithstanding the large cost reductions that all must be experiencing on international routes owing to the huge increase in fiber-optic transmission capacity on submarine cables over the past few years, demonstrates the continuing ability of such carriers to exert monopoly power at the expense of U.S. consumers, as well as the benefits facilities-based competition could produce.

With respect to international facilities and services other than switched voice traffic, the introduction of facilities-based competition in foreign countries for all necessary infrastructure inputs can also be expected to reduce greatly the prices charged, and improve the quality of service, including time for provisioning and maintenance. Greater output of services and greater innovation in international telecommunications services will result. The great disparity of several orders of magnitude that has been identified by the European Commission between leased line prices in the United States and prices for countries served by infrastructure monopolies in Europe, as well as the substantial disparity in prices between even the U.K. duopoly and these monopolies, demonstrates the benefits that will result from full competition. Under the duopoly in the U.K., BT has been able to charge prices for services and facilities that are significantly higher than Mercury's, while retaining a dominant share of the markets for international and domestic long distance services. But even BT's leased line prices are

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[25] (...continued)
Telekom AG also agreed last year to lower its accounting rates with U.S. carriers to levels comparable to the U.S.-U.K. rates.

typically much lower than those of the other carriers in the European Union that continue to enjoy monopoly rights.[26] This example indicates that even with just one facilities-based competitor the ability of a dominant carrier to exercise market power can be significantly lessened, though not to the extent that would occur if full competition were permitted.

Accordingly, the Department believes that the Commission should make the existence of facilities-based competition a crucial criterion for whether a country

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[26] The Department has determined that, based on the most current information as of the time it filed its Complaint and Competitive Impact Statement in 1994, BT still had 75% of the market for international switched services in the U.K., and 84% of the market for domestic switched long distance services in the U.K. Competitive Impact Statement at 33016. BT was able to retain these market shares even though Mercury's retail prices were substantially less than BT's. In a study conducted in 1993, the British regulator, OFTEL, found that Mercury's prices for residential and small business customers in London ranged from 50% to 85% of BT's, and noted that on average Mercury said its prices were 35% below those of BT's. Prices were closer for business customers to which Mercury had direct access. OFTEL, Cost Benefit Analysis of Equal Access: A Consultative Document, at 33 (Nov. 1993). The German Federal Minister of Posts and Telecommunications, who has regulatory responsibility for Deutsche Telekom, published in 1992 a standardized cross-country comparison of prices for 2 Mbps leased lines, which showed Mercury's price as 69 DM/km/month, BT's as 99 DM/km/month, France Telecom's as 194 DM/km/month, and Deutsche Telekom's as 241 DM/km/month. Federal Minister of Posts and Telecommunications, Concept for Approving Tariffs for General Leased Lines Covered by the Federal Government's Network Monopoly, at 24 (April 1992). Comparable results were obtained in a study prepared for the European Commission by Coopers & Lybrand, which showed leased line prices for high capacity international circuits to the nearest EU country as 8,817 Ecus per month for Mercury, 10,041 Ecus for BT, and for AT&T over a comparable distance in the US only 3,809 Ecus, whereas almost all of the countries retaining monopoly infrastructure provision had prices ranging between 17,000-30,000 Ecus, four to eight times U.S. levels and two to three times U.K. levels. Coopers & Lybrand, The Impact of Liberalization of Alternative Terrestrial Infrastructure for Non-reserved Services, Final Report to the European Commission at 24.

provides effective market access. It may also be important to consider other factors such as those the Commission describes in the NPRM, ¶ 40, to ensure that a market is truly open to competition. But resale competition, where no substantial facilities-based alternatives to the dominant carrier exist, should not be considered as effective a solution to the harms that facilities-based monopolies can inflict on U.S. consumers of international telecommunications services. Though resale can have some benefits to consumers, without facilities-based competition, the prices that resellers can charge are controlled by the monopoly supplier of inputs, which in all likelihood is also the principal competitor to the resellers' services.

IV. The Commission Can Reasonably Conclude that It Is in the Public Interest to Take into Account the Continued Existence of Foreign Telecommunications Monopolies in Deciding Whether to Approve Entry by Foreign Telecommunications Carriers into U.S. International Services

In light of the substantial harms that foreign carriers with monopoly rights or market power can cause to United States consumers of international telecommunications services, and the potential for full facilities-based competition in foreign countries to redress these harms, the Commission can reasonably conclude that it is in the public interest to take into account the continued existence of telecommunications monopolies and other significant restrictions on entry in foreign countries in deciding whether to grant approval under Sections 214 and 310 of the Communications Act to acquisitions by foreign dominant carriers of equity interests in United States international carriers or U.S.