

international facilities, even where the interest acquired is less than controlling.

The Commission has requested comment on the scope of its jurisdiction in this area. NPRM ¶ 39. Contrary to the views of a few commenters in this proceeding,^{27/} the Department, in common with other concerned Executive Branch agencies represented in the comments filed by NTIA, has agreed that the Commission does have jurisdiction to act in this area, in furtherance of its general mandate to promote the availability to U.S. consumers of a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" 47 U.S.C. § 151 (1988 & Supp. V 1993), and in the exercise of the specific statutory authority it now holds under Sections 214 and 310 of the Communications Act, which encompasses the ability to address competitive issues in telecommunications.^{28/} In exercising this jurisdiction, the Commission should defer to the expressed views of the Executive Branch in areas of overlapping responsibility, in the manner described in the comments previously filed by NTIA on behalf of the Executive Branch agencies.

The Commission proposes to base its market access analysis on the "primary markets" in which the foreign carrier operates, meaning those markets in which the carrier has a "significant facilities-based presence," or "a significant

²⁷ See, e.g., Comments of Telefonica Larga Distancia de Puerto Rico, Inc., at 5-19; Comments of Deutsche Telekom AG at 12-14, 19-22.

²⁸ Comments of the National Telecommunications and Information Administration on the Notice of Proposed Rulemaking, at 10, 15 (filed April 11, 1995).

ownership interest in a facilities-based telecommunications entity that has a substantial or dominant share of either the international or local termination telecommunications market of the country, and traffic flows between the United States and that country are significant." NPRM ¶¶ 40, 43. The Department agrees that there is no competitive reason to link market access issues that are unrelated to competition in telecommunications facilities and services to the approval of permits under Section 214. The Commission's analysis of market access issues should be focused on circumstances when the foreign entity acquiring an ownership interest in a U.S. carrier is a dominant telecommunications provider in a foreign country, or the subsidiary or affiliate of such a dominant provider. It is not necessary to protect competition to impose a market access analysis on entry by foreign entities that have no legal monopolies or other forms of economic market power in a foreign market. Indeed, doing so could serve to deter procompetitive entry. A full market access analysis is most important for those larger countries that individually handle significant volumes of bilateral traffic with the U.S. and are likely to play an important role in the evolution of global networks and strategic alliances, though the Commission should retain the ability to impose safeguards for even relatively small countries' dominant carriers that have U.S. affiliates, since much international traffic will continue to be delivered for the foreseeable future through route-specific arrangements that can constitute distinct markets. It would be appropriate on competitive grounds to similarly limit the focus of the analysis of market access issues under Section 310, even

though that section does permit the Commission to take into account all foreign ownership of a radio licensee.

The Commission's "primary market" analysis appears overbroad, however, in proposing to restrict the ability of a foreign carrier to enter the U.S. when it is not a dominant foreign telecommunications provider or the subsidiary or affiliate of such a dominant carrier, but merely has a noncontrolling interest in a dominant foreign provider in a third country.^{29/} Under these circumstances, it is doubtful that the foreign carrier has either the leverage to cause the third country to open its market, or the ability as a minority investor to induce the third country's dominant carrier to implement a discriminatory or other anticompetitive strategy that disadvantages other U.S. carriers. In contrast, where the foreign dominant carrier itself is entering the U.S., directly or through a subsidiary or affiliate, its power in its home market gives it the opportunity to act in ways that favor itself or its U.S. affiliate and disadvantage U.S. competitors and consumers, and it may acquire the incentive to act on those opportunities from even a substantial minority investment, as in the BT-MCI transaction.

A shift in the emphasis of the Commission's proposed market access analysis also is in order. The Commission stresses the ability of U.S. carriers to

²⁹ See, e.g., Comments of Cable & Wireless, Inc. at 3-4 ("a foreign government would have no incentive to liberalize if its nationals still were denied access to the U.S. market because of investments in third countries."). Cable & Wireless considers it appropriate, however, to aggregate interests of multiple foreign carriers that acquire equity in a U.S. carrier, so as to take into account all of the home markets in which the foreign owners are dominant.

enter a foreign market to provide basic, international facilities-based telecommunications services. NPRM ¶ 40. However, the Department believes that the Commission should not limit itself to that inquiry, but should also consider the overall competitiveness of the foreign market, including the extent to which competition from non-U.S. facilities-based carriers in that market reduces the market power of the dominant telecommunications carrier. Limitations on the number of providers that can enter a market are generally undesirable as a competitive matter, where not compelled by technical considerations such as spectrum scarcity. But the example of the United Kingdom demonstrates that even imperfect duopoly competition can have substantial benefits to consumers compared with legally enforced monopolies, and that it can be appropriate to distinguish these situations in deciding whether to prohibit a foreign carrier's entry or impose safeguards, even though in neither case could U.S. carriers become facilities-based international competitors. General prohibitions on competitive entry in any area of services or facilities in a country that could affect international telecommunications should always be relevant to the market access analysis. Moreover, exclusion or restriction on entry directed specifically at United States, or all non-national, carriers should remain a significant factor in the Commission's competitive analysis where a foreign carrier seeks to enter the U.S. at a time when full competition in the foreign market has not matured, even though legal monopoly rights have been removed.

Because the existence of facilities-based competition is the best means of ensuring that U.S. consumers of international services are adequately protected, the Commission should keep competitiveness of a market at the heart of its analysis. Regulation generally is an imperfect substitute for competition, and that is particularly true when foreign authorities are regulating government-owned monopoly carriers. Foreign regulation normally should not be considered a sufficient alternative to protect U.S. consumers in the absence of any meaningful facilities-based competition, however effective that regulation may be represented to be. The Commission's proposed consideration of regulatory factors and privatization in its market access analysis, NPRM ¶¶ 40, 45, may still be relevant to the extent these factors indicate whether a market nominally open to some facilities competition is actually able to operate in a competitive fashion or will be subject to the continuing exercise of market power by a dominant carrier.

Conclusion

By adopting rules that explicitly take into account whether foreign telecommunications markets are open to competition as part of the process of reviewing grants of Section 214 authority and waivers of Section 310's ownership restrictions, the Commission can help to redress the harms that are now inflicted on United States consumers of international telecommunications services by foreign telecommunications monopolies.

Respectfully submitted,

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