

SUMMARY

The comments filed in this proceeding demonstrate that the proposal to adopt a reciprocal market access standard for reviewing foreign carrier applications to enter the U.S. market would undermine rather than promote the Commission's goals. The comments of foreign carriers and governments make it clear that the proposed effective market access test, if adopted, would be viewed as a "closing" of the U.S. market. Thus, it would discourage foreign governments from opening their markets to U.S. carriers and slow progress toward effective competition in the global telecommunications market.

The comments also reinforce Teleglobe's view that the approach proposed in the Notice is inconsistent with the Commission's objective of streamlining its market entry review process and providing greater certainty for investment decisions of potential entrants. The National Telecommunications and Information Administration's comments confirm that adoption of the proposed market access test would result in protracted, multi-agency review of international Section 214 applications, further extending the already lengthy application process.

The comments also demonstrate that the proposed effective market access test is not needed to prevent anti-competitive conduct in the provision of international services or facilities. None of the parties supporting the proposed test has provided any evidence challenging the success of the pro-competitive safeguards the Commission has implemented in applying its current public interest standard. Teleglobe believes that the largest U.S. carriers' support for the proposals in the Notice is based

on their desire for additional regulatory tools to delay or stifle competition in the lucrative U.S. international services market, which they dominate.

If, despite these concerns, the Commission nonetheless decides to adopt a new market entry policy based on the reciprocal principle, it should do so in a consistent manner. As proposed in the Notice, the effective market access test would give an unfair advantage to U.S. carriers. Adoption of such a one-sided policy could only increase the likelihood that the policy will be viewed abroad as a new barrier to entry into the U.S. market. To reduce this risk, the Commission should:

- Adopt a standard that is consistent with existing U.S. law affecting trade in telecommunications -- that is, a standard based on the existence of "mutually advantageous market opportunities" rather than effective market access;
- Extend the reciprocity principle to the foreign investment standard it adopts for purposes of applying the reciprocal market access test;
- Apply any market access test it adopts equally to U.S. carriers with interests in foreign carriers with market power in their primary market(s); and
- Apply the market access test to all affiliations and alliances among carriers that would give the partners the ability and incentive to discriminate against non-ally carriers, including co-marketing arrangements such as AT&T's WorldPartners alliance.

Regardless of any other action it takes in this proceeding, the single most constructive step the Commission could take to improve the international section 214 application process would be to establish a requirement that a final decision be issued on all such applications within a reasonable fixed time frame.

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

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

REPLY COMMENTS OF TELEGLOBE INC.

Teleglobe Inc. ("Teleglobe"), by its attorneys, hereby submits its Reply Comments in the above-referenced proceeding.^{1/} The initial comments filed in this proceeding confirm Teleglobe's view that the addition of the proposed effective market access test to the Commission's public interest standard for reviewing foreign carrier applications to enter the U.S. market would hinder rather than further achievement of the Commission's goals. While virtually every party supports those goals, numerous commenters agree with Teleglobe that the reciprocal market access approach proposed in the Notice would slow rather than promote effective competition in the global telecommunications market and discourage foreign governments from opening their communications markets. The comments also demonstrate that the proposed effective market access test is not needed to prevent anticompetitive conduct in the provision of international

^{1/} Market Entry and Regulation of Foreign-affiliated Entities, Notice of Proposed Rulemaking ("NPRM" or "Notice"), released Feb. 17, 1995.

services or facilities. Indeed, the proposals in the Notice could instead allow and encourage discrimination by carriers involved in non-equity alliances against non-ally carriers. These views are shared by a wide range of parties, including U.S. domestic and international carriers, and telecommunications services users, and are by no means limited to foreign parties.^{2/}

The comments also confirm Teleglobe's belief that the approach proposed in the Notice is clearly inconsistent with the Commission's stated objective of streamlining its market entry review process and providing greater certainty for investment decisions of potential entrants, as well as with its goal of promoting greater competition in the provision of international telecommunications. The comments filed by the National Telecommunications and Information Administration (NTIA), on behalf of the Executive Branch, make it clear that adoption of the effective market access test would lead to increased administrative delay and uncertainty.^{3/}

In its comments, Teleglobe predicted that the proposed changes to the Commission's market entry policies "inevitably would be interpreted by foreign carriers and governments as a 'closing' of the U.S. market."^{4/} The comments of the foreign

^{2/} See, e.g., Comments of Sprint Communications Co. L.P. ("Sprint"), filed April 11, 1995; Comments of NYNEX Corp. ("NYNEX"), filed April 11, 1995; and Comments of LDDS Communications, Inc. ("LDDS") filed April 11, 1995.

^{3/} Comments of the National Telecommunications and Information Administration ("NTIA"), filed April 11, 1995.

^{4/} Comments of Teleglobe Inc., filed April 11, 1995, at 5.

governments and carriers bear out this prediction,^{5/} raising a real risk that other countries could adopt similar entry restrictions. The more this reciprocal market access approach is followed by other countries, particularly those with relatively liberalized regulatory structures, the harder it will be to progress towards effective competition in global telecommunications markets.

Predictably, the very largest U.S. international carriers, AT&T and MCI, generally support the Commission's proposals.^{6/} Their endorsement should alert the Commission to the likely consequences of adopting the effective market access test. These entrenched carriers' self-interest clearly favors restricting -- to the fullest possible extent -- entry by any new competitors into the U.S. international telecommunications services market, a market which they presently dominate. Between them, AT&T and MCI controlled almost 90% of the U.S. international facilities-based services market in 1993.^{2/} In light of their dominance and the historically high-margin nature of this market segment, it is not surprising that AT&T and MCI would seek to stifle competition.

Teleglobe believes that AT&T and MCI favor the approach

^{5/} See, e.g., Comments of the Direction générale des postes et télécommunications, Government of France, filed April 11, 1995; Comments of the Secretary of Communications and Transportation of Mexico, filed April 11, 1995; Comments of Deutsche Telekom AG, filed April 11, 1995; and Comments of France Télécom, filed April 11, 1995.

^{6/} See Comments of AT&T, filed April 11, 1995; and Comments of MCI Telecommunications Corp. ("MCI"), filed April 11, 1995.

^{2/} See Comments of Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD"), filed April 11, 1995, at 44 (citing FCC, 1993-94 Common Carrier Statistics, Table 4.9, at 204).

proposed in the Notice because they anticipate that it will give them additional regulatory tools to block or at least delay the entry of new competitors into the U.S. international services market.^{8/} As the Commission recognizes, however, foreign carrier participation in the U.S. market benefits U.S. consumers.^{9/} Specifically, such entry would strengthen competition in the U.S. international services market, the market segment in which there remains the largest potential consumer welfare gain from additional competition. In this instance, AT&T's and MCI's private interest is contrary to the public interest.

Teleglobe respectfully urges the Commission to heed the reservations of the many commenters who support increasing effective global competition and decline to adopt the proposed effective market access test.^{10/} As Teleglobe and other

^{8/} AT&T's comments make it clear that AT&T would use the effective market access test to raise myriad spurious objections to any and every foreign carrier application to enter the U.S. market. In AT&T's self-serving view, a foreign market should not be considered to afford effective market access unless market and regulatory conditions in the foreign market are identical to those in the U.S., including such highly specific conditions as the availability of "800"-number portability, which AT&T long resisted in the United States. See Comments of AT&T at 32. Ironically, AT&T long resisted 800-number portability in the United States.

^{9/} NPRM at para. 32.

^{10/} MFS International, Inc., asks the Commission to adopt a country-specific policy limiting "Canadian ownership of fiber optic and other wireline facilities in the U.S. to the same minority level permitted U.S.-owned firms in Canada." Comments of MFS International, Inc. ("MFSI"), filed April 11, 1995, at 13-14. MFS' proposal concerns transborder services, which are clearly beyond the scope of this proceeding on policies governing entry into the U.S. international facilities-based services
(continued...)

commenters have demonstrated, the Commission's current market entry standard, which focuses on a prospective entrant's market power abroad, protects against the risk of discrimination by a foreign carrier against unaffiliated U.S. carriers in its home market. The Commission already has devised and, where appropriate, imposed effective safeguards to prevent such anticompetitive conduct.^{11/}

Should the Commission nonetheless decide to adopt a new market entry policy based on the principle of equivalent or reciprocal market access, Teleglobe reiterates its recommendation that the policy be applied in a consistent manner.^{12/} As several commenters point out, the likelihood that adoption of the proposed effective market access test will be viewed abroad as the imposition of an additional barrier to entry into the U.S. market will be greater still if the policy is applied in an inconsistent manner that gives unfair advantage to U.S. carriers.

^{10/} (...continued)

market. Moreover, the proposal for a reciprocal standard to govern ownership of U.S. domestic non-radio facilities suffers the same infirmities as the Commission's proposed reciprocal entry standard for international facilities-based services. Teleglobe reserves the right to address in detail the policy grounds for rejecting MFSI's request if it is raised in a relevant proceeding.

^{11/} See Comments of Teleglobe at 26-27; Comments of LDDS at 7; Comments of TLD at iii; and Comments of Telex-Chile, filed April 11, 1995.

^{12/} Teleglobe notes that several parties question the Commission's authority under the Communications Act to adopt the proposals in the Notice, although Teleglobe does not express a view on the matter. See, e.g., Comments of Deutsche Telekom at 4-22; and Comments of Sprint at 7-11.

Unfortunately, the Commission's proposals contain a number of inconsistencies, which should be remedied.

First, the Commission should adopt a standard based on the existence of "mutually advantageous market opportunities" for U.S. companies in the overall telecommunications sector of an applicant's primary market. Such an approach would be less rigid than the Commission's proposed "effective market access" standard and would give consideration to market conditions in the foreign country's telecom sector as a whole, rather than narrow indicators of access in individual foreign telecom market segments. Moreover, such an approach would be consistent with the purpose of existing U.S. law governing international trade in telecommunications, which sets as a goal achieving "mutually advantageous market opportunities" for U.S. telecommunications businesses.^{13/}

Second, the Commission should extend the reciprocity principle to the affiliation standard it adopts for purposes of applying the effective market access test. Rather than establish a fixed level of foreign ownership above which any foreign carrier seeking entry would be subject both to the Commission's public interest analysis and the proposed effective market access test, the Commission should subject a foreign entity seeking to invest in a U.S. carrier to review only at the point at which, and to the extent that, the government(s) of the foreign carrier's primary market(s) reviews such investments by U.S. entities.

^{13/} 19 U.S.C. § 3101(b)(5).

Third, the Commission's proposed market access test, if adopted, should apply equally to U.S. carriers with interests in foreign monopoly operators. The Commission bases its proposal to apply the market access test on the premise that unless a foreign carrier's "primary markets" provide effective market access for U.S. carriers, allowing the foreign carrier to enter the U.S. market would harm the public interest by undermining fair competition. Given this premise (with which Teleglobe disagrees), the exact same concern exists where the carrier that holds a monopoly (or other position of market power aided by the lack of effective market access) is affiliated with a U.S. carrier.

Yet the Commission proposes to exempt from its effective market access test those situations in which a U.S. carrier acquires an ownership interest in a foreign carrier. The Commission states that its dominant carrier regulation and related safeguards are sufficient in such situations to prevent discrimination and anticompetitive conduct. There is no justification for this difference in treatment, and this exemption appears to be a straightforward attempt to favor U.S. carriers over foreign carriers with whom they compete. Either the Commission's existing safeguards are sufficient to protect the U.S. public interest and ensure fair competition in the provision of international telecommunications or they are not. The country of incorporation of the carrier in question ought to be without relevance.

Fourth, if the Commission decides to adopt the proposed effective market access test or another form of reciprocal entry standard, it must extend the scope of application of the test to include any co-marketing arrangements, international joint ventures, and other global alliances, such as AT&T's WorldPartners and Unisource arrangements. As numerous commenters demonstrate, such arrangements, regardless of whether they include interconnection exclusivity, provide both the incentive and the ability to the partners to discriminate against non-allied carriers.

Fifth, the existing Section 214 international facilities and services application process must be streamlined, regardless of whether the Commission acts on the proposals in the Notice. The Commission acknowledges the need to reduce the uncertainty currently surrounding investment decisions by foreign carriers in U.S. international carriers -- including investments that are fully consistent with existing laws and regulations. One of the most significant sources of uncertainty facing foreign carriers contemplating an investment in the United States is the delay that characterizes the international Section 214 process. The Commission, however, fails to propose modifications that would address this need, such as requiring that decisions be rendered within a fixed time frame. Teleglobe thus reiterates its call for the adoption of a timetable by which all international Section 214 applications will be processed.

I. The Effective Market Access Test Would Add Extra Layers of Entry Regulation and Exacerbate the Delays Caused by the Current Section 214 Process

In the Notice, the Commission correctly identified the primary problem that has arisen under the current Section 214 international facilities and services application process: "market uncertainty" caused by lengthy pendency of such applications and concern about the inconsistent application of standards. In its Comments, Teleglobe argued that application of the proposed effective market access test (involving the case-by-case balancing of six new non-dispositive factors) in addition to the existing criteria under the Commission's current Section 214 public interest analysis would exacerbate this problem.^{14/} Numerous other parties share this concern.^{15/} Moreover, the comments of the NTIA, filed on behalf of the Departments of Commerce, Defense, Justice, State, Treasury, and the Office of United States Trade Representative, confirm that implementing the

^{14/} Comments of Teleglobe at 20-23.

^{15/} See Comments of BT North America, Inc. ("BT-NA"), filed April 11, 1995, at 7 ("The Commission's suggestion that U.S. entry may be denied even if the effective market access standard is satisfied will exacerbate the uncertainty the Commission is trying to eliminate"); Comments of the Secretary of Communications and Transportation for Mexico at 11 (Imposition of the effective market access standard "would explicitly include a new criterion among those used to potentially restrict entry to the United States market, but it would not increase the certainty of the Section 214 process"); Comments of Telex-Chile at 2-3 ("These proposals guarantee that the Section 214 process will be longer and more complex than it is today."); Comments of LDDS at 10 ("The addition of an 'effective market access' test will increase uncertainty."); Comments of DOMTEL Communications, Inc., filed April 11, 1995, at 31 (The Commission's proposal "adds new layers of tests and new levels of interagency consulting to an existing system that is already cumbersome and results in substantial delay.").

proposed test might well become an even more protracted, multi-agency affair.

NTIA's comments highlight the complexities and difficulties arising from the Commission's proposal, which NTIA affirms would involve the Commission in matters related essentially to international trade. Such issues are beyond the Commission's traditional scope of activities. NTIA states that "with respect to acquisitions and other transactions between the United States and foreign telecommunications carriers, the Commission's authority overlaps with the more extensive and primary responsibilities of the Executive Branch."^{16/} NTIA also informs the Commission that it "must accord great deference to the Executive Branch"^{17/} and may not usurp it.^{18/} Accordingly, NTIA pledges to "work with the Commission to establish a process" for handling international Section 214 applications.^{19/}

Thus, if the proposals in the Notice are adopted, a prospective Section 214 applicant can expect to be subject, first, to Commission application of the effective market access test, involving the balancing of six specific factors intended to elucidate the degree of openness of each of the carrier's "primary markets." Next, the Commission would apply all of the elements of the existing public interest standard, then balance the results of this analysis with the outcome of the effective

^{16/} Comments of NTIA at 16.

^{17/} Comments of NTIA at ii.

^{18/} Comments of NTIA at note 23 (p. 16).

^{19/} Comments of NTIA at 16.

market access test. In addition, the application would be subject to a multi-agency review process involving consideration of many of the same factors.

Adoption of the Commission's proposals, therefore, would have the undesirable effect of increasing the uncertainty facing potential investors in the U.S. market, imposing additional administrative burdens and expenses on prospective entrants and regulators, and further elongating the already lengthy Section 214 process.

These inevitable delays would further postpone the benefits to consumers of foreign carriers' participation, even as minority interest holders, in the U.S. market. They also would be viewed by foreign carriers and governments as a "closing" of the U.S. market -- precisely the outcome the Commission states that it is seeking to avoid.^{20/} For instance, in its comments, the Government of France states that if the effective market access standard were "added to the current procedures, thus increasing the scope and duration of enquiries," it would be "perceived by France as the implementation of new barriers to entry of foreign entities on the U.S. telecommunications market."^{21/} NYNEX notes that such a perception "could cause foreign governments to take retaliatory actions resulting in the closing of their markets to U.S. carriers."^{22/} The Mexican Government agrees, stating that

^{20/} NPRM at para. 49.

^{21/} Comments of the Direction générale des postes et télécommunications, Government of France, at Section 1.

^{22/} Comments of NYNEX at 2.

the Commission's proposed "market restrictions would have a tendency to provide a basis for other countries to exclude United States carriers from their markets."^{23/}

Many other commenters, including U.S. carriers, share Teleglobe's doubts that the effective market access standard will be effective in encouraging foreign governments to open their telecommunications markets to U.S. carriers. According to Sprint, "[i]t is far from certain, as a matter of economic game theory, whether a reciprocity rule will in fact succeed in opening any foreign markets."^{24/} The Organization for International Investment states that "[w]hether restricting investment will give other countries an incentive to open their markets for telecommunications services is an untested and questionable theory."^{25/} Sprint, Telefónica Larga Distancia de Puerto Rico, and others warn that the proposed reciprocal access standard could "backfire," resulting in what France Télécom refers to as a "downward spiral of reciprocity and protectionism."^{26/} Such a sequence of events would clearly

^{23/} Comments of the Secretary of Communications and Transportation of Mexico at 13.

^{24/} Comments of Sprint at iv.

^{25/} Comments of the Organization for International Investment at 3.

^{26/} Comments of Sprint at 20; Comments of TLD at 34; Comments of France Télécom at 3.

undermine the Commission's goal of fostering global competition and the opening of foreign markets.^{27/}

U.S. carriers' ability to enter foreign markets could be severely restricted if other countries accepted the Commission's logic and decided to follow the Commission's example and adopt a similar effective market access standard. As Motorola and others note, several U.S. carriers currently hold ownership interests in telecommunications operators in "protected foreign markets."^{28/} Thus, even if the U.S. market were found by a foreign government to provide effective market access, a U.S. carrier's other "primary markets" could fail the test.

In summary, the Commission's proposals fail to meet the objective of reducing uncertainty and administrative burdens. Moreover, they are "unlikely to motivate foreign countries to open up their markets."^{29/}

II. The Commission Should Continue to Apply Its Current Section 214 Public Interest Standard

The comments confirm that the proposed effective market access standard is not needed to prevent anticompetitive conduct

^{27/} Teleglobe agrees with the parties that object strenuously to the Commission's proposal to require the U.S. international facilities-based carrier affiliated with a foreign carrier to file with the Commission a regularly updated list of all of the foreign carrier's accounting rates. See , e.g., Comments of AmericaTel Corp., filed April 11, 1995, at 9-11. Such a demand for information that is frequently proprietary would be burdensome, intrusive, and inappropriate.

^{28/} Comments of Motorola Inc., at 4.

^{29/} Comments of Deutsche Telekom at 32.

in the provision of international services or facilities. Numerous parties agree with Teleglobe that the Commission's current market entry standard, which focuses on preventing undue discrimination by the foreign carrier against unaffiliated U.S. carriers in the foreign carrier's home market, fully satisfies this objective. In reviewing past applications by foreign carriers seeking to enter the U.S. market, the Commission has imposed safeguards and conditions designed expressly to prevent discrimination against unaffiliated U.S. carriers. None of the parties that support the proposals in the Notice could cite a single instance in which these safeguards have proven inadequate.

In its comments, AT&T recites a litany of ways in which a foreign carrier that controls essential facilities in its primary foreign markets "could" discriminate in favor of its U.S. affiliate and against other U.S. carriers.^{30/} But AT&T provides no evidence that any foreign carrier that has a U.S. affiliate has engaged in such conduct. AT&T argues that "by reducing the market power of foreign carriers, the proposed effective market access test will help to protect U.S. competitors and their customers from discrimination by foreign carriers."^{31/} But if the Commission's existing safeguards have proven effective in preventing such discrimination, there is no justification for the Commission to base the proposed additional of a new requirement - - effective market access -- on the need to prevent discrimination.

^{30/} Comments of AT&T at 10-13.

^{31/} Comments of AT&T at 8.

AT&T contends that the proposed effective market access test "will prevent foreign carriers from gaining an unfair competitive advantage in the United States telecommunications market from their ability to provide end-to-end service on an international route, while U.S. carriers cannot."^{32/} This statement misrepresents the nature and evolution of the global telecommunications market. As the Commission accurately points out in the Notice, the world's carriers, with few exceptions, are seeking to enter the global telecommunications services market through alliances and other relationships with established operators in foreign countries.^{33/} If the scenario described by AT&T were a realistic concern, one might expect AT&T's many partners in the WorldPartners and Unisource ventures to have sought authority to establish their own U.S. affiliates in order to provide end-to-end services, instead of aligning themselves with AT&T.

The only significant shortcoming of the existing public interest standard under which the Commission currently reviews international Section 214 applications is the length of time it takes the Commission to process them. In its comments, DOMTEL, for one, notes that its application has been pending almost two years.^{34/} FONOROLA notes that the process for obtaining authority to resell international private lines between the U.S. and Canada is far more burdensome and lengthy in the United

^{32/} Comments of AT&T at 8.

^{33/} NPRM at para. 20.

^{34/} Comments of DOMTEL at 4.

States than in Canada.^{35/} This problem can and should be remedied by Commission adoption of a mandatory schedule for acting on Section 214 applications.

III. If the Commission Chooses to Adopt a Market Entry Policy Based on the Reciprocal Principle, the Policy Should be Applied With Consistency.

In its initial comments and in these reply comments, Teleglobe has endeavored to demonstrate that the Commission's proposal to add an effective market access test to its public interest standard governing foreign carrier entry into the U.S. market would be counterproductive. Should it decide nonetheless to adopt a new market entry policy based on the principle of reciprocal market access, Teleglobe urges the Commission to ensure that the policy be applied in a consistent manner. The likelihood that adoption of the effective market access test will be viewed abroad as the imposition of an additional barrier to entry into the U.S. market will be increased by any perception that it is applied in an inconsistent manner that favors U.S. carriers over foreign carriers. As Sprint notes, "resentment" of the effective market access by foreign administrations "might follow if the Commission's reciprocity rule were viewed as one-sided or hypocritical."^{36/}

Unfortunately, the Commission's proposals contain several inconsistencies which reasonably would be viewed as favoring the

^{35/} Comments of FONOROLA Corp., filed April 11, 1995, at 4.

^{36/} Comments of Sprint at 20.

largest U.S. carriers when their interests conflict with the core principles and goals enunciated by the Commission in the Notice.

A. The Commission's Standard Should Be Consistent With Existing U.S. Trade Law

Teleglobe reiterates and elaborates here on its recommendation that the Commission, if it decides to adopt a reciprocal access policy, should adopt a standard based on the existence of "mutually advantageous market opportunities" for U.S. companies in the applicant's primary market. Such a standard would not require as a condition of entry into the U.S. market that a foreign international facilities market must be opened fully to U.S. entry on a near-flash-cut basis. Rather, this approach would hinge on overall market conditions and would allow entry to the U.S. market so long as the foreign telecom market as a whole is considered sufficiently open to create a climate of mutually advantageous market opportunities for U.S. carriers. A significant existing U.S. presence in the foreign country's telecom markets would be one indicator that such opportunities exist.^{37/}

Moreover, such an approach would be consistent with existing U.S. law. The Telecommunications Trade Act of 1988 specifies as a goal "to achieve a more open world trading system for telecommunications products and services through negotiation and

^{37/} In its Comments, France Télécom urges the Commission to "accord considerable weight to the fact that U.S. service providers are present, and are able to compete with a non-U.S. carrier, in that carrier's home market." Comments of France Télécom at 17.

provision of mutually advantageous market opportunities" for U.S. businesses.^{38/} The Act requires the U.S. Trade Representative to investigate foreign telecommunications trade barriers and establish a list of "priority foreign countries" that deny U.S. firms "mutually advantageous market opportunities."^{39/} Given the international trade implications of the Commission's proposed market entry policies, they must be harmonized with existing standards and procedures governing trade in telecommunications services.

Echoing Teleglobe's comments, several parties stress the importance of recognizing that there is not a single path to telecommunications liberalization and that different approaches employed in different countries are equally valid.

B. The Commission Should Adopt a Reciprocal Affiliation Standard

If the Commission concludes that a new market entry policy based on reciprocal access is appropriate, it should extend the reciprocity principle to the affiliation standard adopted for purposes of applying its market access test. The Commission has received sharply conflicting views on the appropriate level of foreign ownership that should trigger application of the effective market access test. Rather than set a fixed level of foreign ownership, Teleglobe believes it would be more consistent

^{38/} 19 U.S.C. s. 3101(b)(5) (emphasis added). See Comments of Deutsche Telekom at 19.

^{39/} 19 U.S.C. § 3103(a) and (b).

for the Commission to subject a foreign entity seeking to invest in a U.S. carrier to review only if an investment by a U.S. entity in the foreign carrier's primary market or markets would be subject to prior governmental review and approval.

The premise of the Notice -- to which Teleglobe and numerous other parties do not subscribe -- is that adoption of a reciprocal market access standard would be effective in fostering global telecommunications competition and encouraging foreign governments to open their markets to competition. Assuming arguendo the validity of this premise, the same argument applies with equal force to the affiliation standard the Commission adopts for purposes of applying the effective market access test. Under the Commission's theory, allowing a foreign entity to acquire, without prior entry review, an interest in a U.S. international carrier equal to that which U.S. entities are allowed to acquire, without review, in the foreign entity's primary markets, a reciprocal affiliation standard could create incentives for foreign countries to open their markets to U.S. entrants.

Thus, if a foreign country generally restricted or applied an entry test to the acquisition by a U.S. entity of greater than a 10 percent interest in one of its international facilities-based carriers, then a foreign carrier for whom that country is a primary market would be subject to the Commission's proposed effective market access test when seeking to acquire a 10% interest in a U.S. international carrier. If the foreign country's entry test or restrictions were triggered at U.S.

ownership levels above 30 percent, then the Commission's effective market access test also would be triggered, for carriers for whom the foreign country is a primary market, at the 30 percent level.^{40/}

C. The Effective Market Access Test Should Apply Equally to Foreign and U.S. Carriers

The Commission's proposed effective market access test, if adopted, should apply equally to U.S. entities with interests in foreign operators. The Commission bases its proposal to apply the test on the premise that unless a foreign carrier's "primary markets" provide effective market access for U.S. carriers, allowing the foreign carrier to enter the U.S. market would harm the public interest by undermining fair competition. As noted in Section II, Teleglobe disagrees with this premise. If deemed valid by the Commission, however, it must be applied with equal force if the carrier that has market power in a foreign country is owned by a U.S. entity.

Yet, as Sprint and other commenters note, the Commission proposes, without explanation, to exempt from its effective market access test those situations in which a U.S. carrier

^{40/} Such a reciprocal affiliation standard would be relatively simple for the Commission to administer. It could require U.S. international facilities-based carriers to notify the Commission when an interest in the U.S. carrier has been sold to a foreign carrier. If seeking to exempt the transaction from prior approval by the Commission, the U.S. or foreign carrier would be required to demonstrate to the Commission that acquisition by a U.S. carrier of a similar interest in a facilities-based international carrier in the foreign carrier's primary market(s) would not trigger an entry test.

acquires an ownership interest in a foreign carrier.^{41/}
Instead, it baldly asserts that its goal would not be "furthered" by requiring an effective market access showing when a U.S. carrier acquires an ownership interest in a foreign carrier.^{42/}
Instead, the Commission proposes to apply its "dominant carrier and other nondiscrimination safeguards" if "the foreign carrier acquired by the U.S. carrier is a monopoly, or otherwise warrants dominant carrier treatment."^{43/} The Commission does not explain why these safeguards are effective in preventing discrimination against unaffiliated U.S. carriers when a U.S. carrier acquires an interest in a foreign carrier, but not when a foreign carrier acquires an interest in a U.S. carrier.^{44/}

This inconsistency undermines the Commission's stated policy rationale for proposing the effective market access test and creates the unmistakable impression that the real purpose of the proposal is to leverage the size and importance of the U.S.

^{41/} Comments of Sprint at 31.

^{42/} NPRM at para. 50.

^{43/} Id.

^{44/} As Sprint notes, "(i)f the Commission believes that less-than-controlling interests of foreign carriers in U.S. carriers give rise to a realistic possibility of discrimination, it is difficult to see why the same would not hold true where the U.S. carrier has such an investment in a foreign monopoly carrier." Comments of Sprint at 31. Similarly, AmericaTel notes that "if a major U.S. long distance carrier purchases a 5%, 10%, 25% or some other non-controlling equity stake in a foreign carrier . . . that foreign carrier has a powerful incentive to favor its U.S. investor . . . The impact on competition can be profound . . . (I)t is necessary for the Commission to apply to U.S. carrier investment . . . in foreign carriers the same standard that it adopts for application to foreign carrier investment in U.S. carriers. Comments of AmericaTel at 12-13 (parentheses omitted).