In sum, the majority of the commenters support adoption of an effective market access test to maintain and promote competition in the U.S. international services market.

B. Adoption of the Effective Market Access Standard Will Further the Commission's Public Interest Goal in Protecting U.S. Competition and U.S. Customers Against the Leveraging of Foreign Monopoly Power

Despite the prevailing support for adoption of an effective market access standard, some carriers argue that the Commission should not implement the standard proposed in the NPRM because it is doomed to failure. DT, for example, argues that the effective market access test will be successful only if it results in the opening of foreign markets that would otherwise have remained closed.[44] Sprint contends that adoption of an effective market access standard will give the Commission little leverage in opening foreign markets.[45] TLD similarly argues that the Commission will not achieve its goal of opening foreign telecommunications markets through adoption of an effective market access standard.[46] Each of these carriers has misconstrued the primary purpose of the proposed test. The effective market access standard will succeed if it prevents a foreign carrier with monopoly power from leveraging that power into the U.S. international services market to the detriment of U.S. carriers and their customers. By requiring effective access to foreign markets as a condition of entry to the U.S. international services market, the effective market access test will accomplish exactly that result. Further, the effective market access

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44 DT Comments at 28.

45 Sprint Comments at 20.

46 TLD Comments at 23-24.

rule is not to be universally applied on a proactive basis, but will be triggered only by a foreign carrier application to enter the U.S. market. Countries whose carriers do not desire such access will not be subject to the test.

Whether foreign governments choose to liberalize their markets is entirely their decision. But, if foreign monopoly carriers are allowed to enter the U.S. international services market while they maintain their protected positions at home, their advantage in the U.S. market will not be earned solely through skill, industry or foresight, but rather will be derived in large measure from the regulatory and legal obstacles to competition in their markets. Elimination of foreign carrier market power through demonstrated, fully effective competition is the only marketplace condition that will eventually eliminate foreign carriers' ability to leverage their power to the detriment of U.S. customers. Regulatory conditions are a pale substitute for a competitive market. The effective market access standard is absolutely required to provide minimum protection for U.S. carriers, their customers and the competitiveness of the U.S. market.

Even the more rigorous <u>post-entry</u> conditions proposed in the NPRM would not be sufficient to identify or preclude the myriad ways in which foreign monopoly carriers may discriminate against unaffiliated U.S. carriers in the provision of essential facilities and the allocation of return traffic.[47] The ability of foreign monopoly carriers to engage in such behavior will be removed only when they are subject to full and effective competition in their markets, and when U.S. carriers have the ability to compete in those markets on

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[47] *See* AT&T Comments at 10-16, 46-48.

fair and equal terms.[48] Neither the Commission's existing safeguards, nor the safeguards imposed by the Commission in *BT/MCI*, can therefore substitute for the proposed test, contrary to several parties' claims.[49] Further, the Commission's acceptance of safeguards in the *AmericaTel* and *BT/MCI* transactions was predicated on the state of liberalization in Chile and the U.K. For example, in *AmericaTel*, the Commission found that discrimination against unaffiliated U.S. carriers would be prevented by the "ongoing

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[48] DT's claim that "the loss of goodwill and the cost of defending administrative or legal actions," (DT Comments at 55) in addition to any sanctions imposed, would be sufficient to deter anticompetitive conduct is contradicted by its own actions. In 1990, DT exercised its control over return traffic from Germany to take action against AT&T by counting AT&T USADirect® minutes as DT return minutes for the purposes of DT's proportionate return obligations. In the two year period before DT agreed to eliminate this unfair practice, AT&T suffered damages of $70 million. The lack of an impartial regulator in Germany gave AT&T no practical recourse in that country, and the ability of DT to engage in further retaliatory action through its monopoly over call delivery in Germany made litigation in the United States infeasible. DT claims that a foreign carrier will have minimal incentive to favor its U.S. affiliate. However, DT's own example shows that a five percent shift in return traffic from AT&T would result in a <u>30 percent increase</u> in return traffic to Sprint. *Id.* The corresponding increase in AT&T's costs and corresponding decrease in Sprint's costs would give Sprint a powerful advantage in the marketplace, which it could use to increase its share of U.S.-Germany traffic to DT's benefit. Moreover, the consequences that would be caused by such a shift in return traffic arise because of DT's maintenance of above-cost accounting rates.

[49] France Telecom Comments at 22; LDDS Comments at 43; Teleglobe Comments at 26-27; TLD Comments at 39. TLD argues that experience in Puerto Rico demonstrates that foreign carriers cannot effectively leverage their monopoly power into the U.S. market. However, the information provided by TLD does not prove this point. For example, on the Puerto Rico to Spain route, TLD and its parent, Telefonica, in fact have 100% of the traffic -- Telefonica has 100% of the outbound traffic from Spain and receives revenue on 100% of the traffic from Puerto Rico, either through TLD's collection rates or through settlements payments from other carriers. Telefonica can choose whether to use the profits obtained from its monopoly in Spain (*i.e.*, through collection rates and above-cost accounting rates) to obtain market share on the Puerto Rico-Spain route or on other unaffiliated routes.

liberalization of Chile's regulatory regime," coupled with the safeguards adopted by the Commission.[50]

Finally, no safeguard can compensate for the competitive advantage that a foreign carrier has over U.S. carriers in the provision of end-to-end seamless services when the foreign carrier can originate traffic at both ends of an international route and the U.S. carrier can originate traffic only at the U.S. end. The lower costs, faster provisioning of services and general marketing advantages that benefit the foreign carrier under such circumstances are beyond the reach of even the most stringent regulatory conditions.[51] As the Commission recognized in *AmericaTel*, only the existence of effective opportunities for U.S. carriers to compete in the foreign carrier's market can address this concern.[52]

To the extent that foreign countries do not open their markets and foreign carriers do not enter the U.S. because of the proposed rule, the claims by Sprint and its economists that U.S. consumers will be "worse off" ignore one important consideration.[53] If such entry does not take place, consumers will forego the adverse impact on competition that would result from such entry absent effective market access in the foreign carrier's home market. As the Commission observed in the NPRM, the ability of a foreign competitor to

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[50] *AmericaTel*, 9 FCC Rcd. at 4004. *See also BT/MCI*, 9 FCC Rcd. at 3969.

[51] *See* NPRM at ¶ 28. DT provides no support for its contention that such disadvantages can be remedied by regulatory safeguards. *See* DT Comments at 43.

[52] *AmericaTel*, 9 FCC Rcd. at 3996, 4000.

[53] *See* Sprint Comments at 15-18. *See also* A Game-Theoretic Analysis of the FCC's Proposed Reciprocity Rule, Charles River Associates, Inc.

win customers because of its protected status in its primary market(s) "is a disservice to consumers in all these markets because, in the absence of full competition on the merits by all competitors, customers do not receive reduced rates, increased quality, and innovation."[54] The benefit of preventing such anticompetitive results far outweighs any minimal competitive benefit that might result from foreign carrier entry. As the Commission notes:

> Today, there are several hundred carriers, both facilities- and resale-based, competing in the U.S. interexchange market. Indeed, the number of existing interexchange carriers, and other potential entrants, suggests that the loss of the incremental competition that might be provided by [a foreign carrier's] independent entry into the U.S. telecommunications market would appear to be of little competitive significance.[55]

In short, permitting a foreign carrier to enter the U.S. international services market while controlling essential facilities in closed foreign markets would create a significant risk of anticompetitive leveraging of foreign monopoly power and would offer minimal competitive benefits. The U.S. public interest therefore requires implementation of the proposed effective market access standard.

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[54] NPRM at ¶ 29.

[55] *BT/MCI*, 9 FCC Rcd. at 3970. The Commission was referring to independent entry into the U.S. market by BT, one of the world's largest telecommunications carriers. The potential competitive benefits that would be created by the entry of smaller foreign carriers or by the mere investment of funds in existing U.S. carriers would be even less significant.

C. The Effective Market Access Test Will Open Foreign Markets

An ancillary result of Commission efforts to protect U.S. customers from leveraging of foreign market power through an effective market access standard will be increased incentive for governments to liberalize their markets. Although liberalization in foreign countries, or the lack thereof, is driven by many factors, [56] many countries desire access to the U.S. market. Teleglobe acknowledges that U.S. market access is "becoming an essential prerequisite for foreign carriers' successful participation in the global market."[57] A significant portion of the world's telecommunications business, and an even larger share of its major telecommunications users, are in the United States.[58] A number of the world's leading carriers have therefore entered the U.S. market in the recent years, or are now seeking to do so. As Dr. C. Fred Bergsten, Director of the Institute for International Economics in Washington, urges:

> Open and competitive global telecommunications will be most quickly achieved where [foreign governments and monopoly carriers] have an incentive to open their markets. Access to the U.S. market is such an incentive.[59]

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[56] Teleglobe, for example, notes that many countries wish to ensure the survival of their national carrier. Teleglobe Comments at 24-25.

[57] Teleglobe Comments at 6-7.

[58] NPRM at ¶ 20.

[59] Letter to Chairman Hundt, Jan. 18, 1995 (Attachment A to Comments of AT&T).

In this regard, AT&T believes that many of the positive steps taken in the U.K. within the last year to promote competition were directly related to the U.K. government's desire to obtain Department of Justice and Commission approval of the BT/MCI transaction.

In addition, the Commission's equivalency standard for the resale of international private lines interconnected to the public switched network has not only protected the U.S. public interest against the harm of one-way resale, but it also has succeeded in motivating foreign governments to introduce market reforms. For example, in part to meet the Commission's requirement that such services may be authorized only to countries providing equivalent resale opportunities equivalent to those available under U.S. law, the U.K. replaced its former procedures, under which new entrants negotiated with BT for interconnection arrangements, with standard, published, interconnection terms and conditions.[60]

Strong support for the Commission's use of its proposed test as a market-opening device is expressed by AirTouch, which provides wireless services in markets including Japan, Germany, Sweden, France, Spain, Portugal, Belgium, Italy, South Korea and Thailand, and whose "continued success as a global competitor . . . is dependent upon the continued openness of foreign markets to U.S. participation."[61] AirTouch endorses the Commission's proposal to apply the effective market access test to Section 310(b)(4)

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[60] *Compare BT North America*, File No. ITC-93-126, BT Opposition (April 29, 1993) at 42-44, *with ACC Global Corp.*, 9 FCC Rcd. at 6252 n.34, 6253-54.

[61] AirTouch Comments at 2-3.

waiver applications, which would "provide the Commission and the U.S. with a maximum ability to leverage the desire of foreign companies to enter the U.S. market as a means to liberalize the foreign ownership policies of other countries."[62]

Even those countries that provide effective market access only in limited sectors may obtain additional U.S. market opportunities under the Commission's proposed approach to Section 310(b)(4). Consequently, contrary to the suggestion by NYNEX, it would make little sense for such countries to forego these opportunities by raising market barriers in a liberalized sector in order to "retaliate" for any inability of a foreign carrier to obtain entry to the U.S. international services market.[63]

The wider U.S. experience with unilateral market-opening initiatives also demonstrates the potential success of the Commission's approach here. In the late 1980's and early 1990's, the U.S. took actions under Section 310 of the Trade Act of 1974 against unfair practices limiting U.S. exports of goods and services in a wide range of countries, including Japan, the European Community, Korea, India and Canada.[64] These unilateral actions by the U.S. resulted both in more open foreign markets and in the development of more effective multilateral rules:

> Arguably section 301 did more to open markets in the period 1985-92 than any other international governmental activity, including the Uruguay Round

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[62] *Id.* at 2. Similar views are expressed by E. F. Johnson, Loral/Qualcomm Partnership, and Motorola.

[63] NYNEX Comments at 5-9.

[64] 19 U.S.C. § 2411. *See* Bello & Homer, *U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 Int'l Lawyer 1095, 1100-01 (1995).

> negotiations. In addition, the use of Section 301 and 301 clones arguably enable the U.S. to obtain better rules in the Uruguay Round in general, and with regard to dispute settlement and intellectual property in particular.[65]

An additional incentive to open telecommunications markets is provided by the growing world-wide recognition of the economic benefits that flow from such initiatives. As the European Commission's recent *Green Paper on Liberalization of Telecommunication's Infrastructure and Cable Television Networks* notes, "Experience has shown that the best spur to innovation, investment and technological progress in the telecommunications industry is competition."[66] In Germany, the Association of Chambers of Commerce is urging the elimination of the Deutsche Telekom network monopoly before the 1998 date set by the German government and the European Union because of the vital importance of telecommunications to the competitiveness of other economic sectors. Similar procompetitive forces are at work in other countries. The Commission's promulgation of the proposed effective market access test is thus likely to receive a positive response abroad as it provides further encouragement for countries to travel in the direction in which many are already beginning to move.

IV. THE EFFECTIVE MARKET ACCESS TEST SHOULD BE EXPANDED TO COVER RESALE ENTRY BY FOREIGN CARRIERS

In its Comments, AT&T demonstrated that fulfillment of the Commission's goals requires that the effective market access standard also be applied to entry into the U.S.

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65 *Id.* at 1102 n.17.

66 European Commission, *Green Paper on the Liberalization of Telecommunication's Infrastructure and Cable Television Networks*, Part II, Jan. 25, 1995, at 48-49.

international telecommunications market via resale. Unlike the situation in most countries, the provision of services to international resellers in the U.S. is fiercely competitive and wholesale prices reflect that fact. U.S. facilities-based carriers offer international resellers advanced, feature-rich services, like SDN, that were developed to respond to sophisticated business customer demand. These and similar services offer switching and billing capabilities that make entry by resale an attractive and transparent means for foreign carriers to enter the U.S. international services market with minimal capital investment in facilities, switches or billing systems. Indeed, entry into the U.S. international services market on a resale basis would provide a foreign carrier with capabilities in the U.S. that generally are available only to the monopoly facilities-based carrier in most other countries. Resale entry also would permit a foreign carrier with a closed home market to provide services to customers on both ends of an international route, which the Commission has recognized confers an unfair advantage on the foreign carrier.

The comments filed by other parties confirm that the U.S. public interest requires application of the effective market access standard to resale entry. GTE and MCI, for example, support application of the test to resale entry.[67] As MCI stresses:

> Foreign carriers operating from closed markets have a substantial capacity to engage in anticompetitive conduct in conjunction with their U.S. affiliates even if their entry into the U.S. market is only on a resale basis. Foreign carriers could offer ubiquitous services at lower prices than their U.S. competitors which are denied entry into the foreign carriers' home markets and must continue to pay accounting rates.[68]

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67 GTE Comments at 5-6; MCI Comments at 18-19.

68 MCI Comments at 19.

TLD's Comments further demonstrate why the effective market access standard should apply to resale entry. TLD emphasizes that the Commission's public interest goals will not be attained because "[u]nder the proposed rule, a FAC [foreign-affiliated carrier] could enter the U.S. market and provide facilities-based domestic interexchange services and switched international resale services . . . "[69] TLD thus concludes that although a foreign carrier may suffer a cost penalty through resale entry,[70] it would not be precluded from competing in the U.S. international services market. Indeed, TLD has even filed an application for Section 214 authority to provide international services from the U.S. mainland via resale in an attempt to take advantage of this potential loophole.[71] In order to protect the U.S. public interest concerns underlying the proposed effective market access test, the Commission should apply the proposed effective market access test to resale entry, either in this initial phase of the rulemaking or through a Phase II proceeding.

V. THE EFFECTIVE MARKET ACCESS TEST SHOULD INCLUDE THOSE ELEMENTS NECESSARY TO PROTECT U.S. COMPETITION AND U.S. CUSTOMERS AGAINST THE LEVERAGING OF FOREIGN MONOPOLY POWER

In its Comments, AT&T demonstrated that the factors proposed as part of the Commission's effective market access test were necessary to protect U.S. carriers and

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69 TLD Comments at 30 (emphasis added).

70 AT&T questions whether a foreign carrier entering the U.S. market on a resale basis would suffer a cost penalty initially, *i.e.*, when its traffic volumes were relatively small, because it would not incur the costs of establishing its own facilities. The fact that more than 450 carriers provide international services in the U.S. via resale demonstrates the viability of resale entry.

71 *Telefonica Larga Distancia de Puerto Rico*, ITC-95-248, filed March 21, 1995.

their customers against the leveraging of foreign monopoly power. Thus, AT&T's Comments established the need for: (1) the ability of U.S. carriers to be able to offer international facilities-based services; (2) published, non-discriminatory charges, terms and conditions for interconnection; (3) competitive safeguards, including cost-allocation rules; (4) an independent regulatory process; (5) timely and nondiscriminatory disclosure of network interface information; and (6) protection of carrier and customer proprietary information. AT&T also agreed with the Commission that the presence or lack of cost-based accounting rates and the ability to provide service in other market sectors were critical factors. AT&T further demonstrated that the proposed effective market access test should apply when a foreign carrier seeks to acquire ten percent or more of a U.S. international carrier.

The overwhelming majority of commenters support the effective market access factors proposed in the NPRM. The principal areas of debate among the parties were (1) whether foreign carriers permitted entry should be required to set cost-based accounting rates, (2) the timing for effective market access, (3) application of the test to primary vs. home markets, and (4) the appropriate equity threshold to trigger the effective market access standard. In this Section, AT&T rebuts the claims of those who argue against the implementation of cost-based accounting rates as a pre-condition to foreign carrier access to the U.S. international services market and the need for the existence of effective market access at the time the foreign carrier seeks to enter the U.S. market. AT&T further demonstrates that a ten percent threshold should be established, and that the effective market access standard should be applied to a foreign carrier's primary markets.

A. The Effective Market Access Test Should Require Implementation of Cost-Based Accounting Rates

There can be no dispute that the U.S. public interest is served by cost-based accounting rates. Implementation of such rates would eliminate the subsidies now paid by U.S. consumers to foreign carriers which deny U.S. consumers the full benefits of effective competition in the U.S. international services market. The maintenance of above-cost accounting rates by foreign carriers with U.S. affiliates would increase the deleterious effects on both U.S. carriers and U.S. customers. When a foreign carrier operates in the U.S. and maintains above-cost accounting rates, the foreign carrier and its U.S. affiliate place competing U.S. carriers in a price squeeze. U.S. customers suffer in the long run as competition in the U.S. is skewed and diminished as a result. Requiring implementation of cost-based accounting rates as a condition of entry to the U.S. international services market would help prevent this anticompetitive result.[72]

The Economic Strategy Institute ("ESI") establishes convincingly that cost-based accounting rates are in the U.S. public interest. According to ESI's estimates, at the current pace, accounting rate subsidies paid by U.S. citizens will amount to over $27 billion in this decade.[73] Further, stronger measures are needed to convince foreign carriers to reduce their accounting rates. For this reason, ESI concludes that "it is crucial that the

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72 Implementation of a cost-based accounting rate would not, of course, protect against cross-subsidization from other monopoly profits.

73 ESI Comments at 3.

Commission demand cost-based accounting rates when considering foreign license applications.[74]

No commenter provided any valid argument against imposition of such a requirement. BTNA, for example, argues that the Commission should not require any lowering of accounting rates unless U.S. carriers guarantee that BT will receive the same amount of subsidy, through increased U.S. outbound traffic volumes, as BT was receiving before such a reduction.[75] Thus, BTNA not only insists that U.S. customers must continue to subsidize its parent, BT, but it also insists that the absolute dollar amount of above-cost subsidy received by BT should be maintained. Despite BT's reluctance to lower its accounting rates in an arguably competitive market, BTNA contends that effective market access itself will drive accounting rates to cost. *See also* GTE Comments at 4.

Experience in Chile teaches otherwise. In Chile, where fierce competition is raging between the facilities-based international carriers, these carriers have become dependent upon settlements payments for their profitability.[76] This dependency, coupled with the

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[74] *Id.* at 4.

[75] BTNA Comments at 6-7.

[76] On an outbound basis from Chile, collection rates by Chilean carriers are approximately $0.45 per minute -- below the nominal settlement rate of at least $0.55 per minute. Because U.S.-outbound traffic volumes exceed Chile-outbound volumes to the U.S. by a two-to-one margin (which ratio, despite competition in Chile, has remained relatively static over the last year), Chilean carriers receive settlement in-payments from U.S. carriers. These in-payments resulting from U.S. carrier traffic now drive the profitability of Chilean carriers -- making it all the more difficult (if not impossible) for AT&T to bargain for lower accounting rates with Chilean carriers.

fact that the dominant local carrier charges ten times more for interconnection of inbound international calls (*i.e.*, \$0.30 per minute) than it does for outbound international calls (\$0.03 per minute), has prevented AT&T from negotiating an accounting rate of less than \$1.10 per minute with any Chilean carrier.

Experience with the U.K. also demonstrates that Commission reliance on market forces and foreign carrier cooperation is misplaced. When the Commission authorized BTNA to engage in international private line resale between the U.S. and the U.K., it ordered BTNA to file a plan setting forth significant reductions toward cost-based accounting rates with U.S. carriers over the next two years. In response, BTNA not only failed to file a plan, it reported BT's withdrawal of a proposed lower accounting rate and BT's offering of a new proposed accounting rate 20% higher than the withdrawn proposal.[77] In short, experience has shown that the fully effective competition needed to drive accounting rates to cost-based levels does not yet exist outside the U.S. By the same token, after the Commission has granted a foreign carrier access to the U.S. international services market, the carrier loses whatever incentive or willingness it may have had to lower its accounting rate. The Commission should promote the U.S. public

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[77] AT&T Comments at 35 n. 36. Incredibly, despite such a result with its affiliate, MCI recommends that the Commission follow this example and merely require the filing of an accounting rate plan when a foreign carrier's U.S. affiliate seeks to resell interconnected private lines to affiliated countries. MCI Comments at 20.

interest by granting entry to the U.S. international services market only where the carrier seeking entry has set cost-based accounting rates with United States carriers.[78]

B. The Threshold for the Effective Market Access Test Should Be Ten Percent or More

AT&T's Comments established that the effective market access test should apply whenever a foreign carrier seeks to acquire an equity interest of ten percent or more in a U.S. carrier involved in the provision of international services. BTNA, GTE and MCI also agree that a ten percent threshold is necessary to ensure that the effective market access test applies to those instances that create an incentive in foreign carriers controlling bottleneck facilities to discriminate in favor of their U.S. affiliates.[79] Certain carriers argue that the Commission should create a "small carrier" exception so that a foreign monopolist could acquire 100% of a small carrier without application of an effective market access standard.[80] This argument misses the mark. It is the potential leveraging of foreign market power that creates the threat to U.S. competition and U.S. customers. A foreign

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[78] Several foreign-affiliated carriers also object to even filing their accounting rates with the Commission so that the Commission can determine whether the foreign carrier is discriminating against U.S. carriers. Indeed, AmericaTel argues that it would be too burdensome for its ultimate parent, ENTEL-Chile, to compile a list of its accounting rates with other countries, (AmericaTel Comments at 10) despite the fact that ENTEL-Chile must have this information in order to settle its international accounts. This foreign carrier opposition to a mere reporting requirement graphically illustrates why effective market access is needed and why a pre-condition requiring implementation of cost-based accounting rates is critical.

[79] BTNA Comments at 8-9; GTE Comments at 8; MCI Comments at 11.

[80] CTS and Transworld Communications both propose that the Commission exempt acquisition of all or part of a carrier with less than $125 million in gross annual revenues from the effective market access standard.

monopoly carrier will have the power and incentive to favor its U.S. affiliate, and disadvantage all other U.S. carriers and their customers, regardless of the market share that the affiliate controls.[81]

AmericaTel and LDDS both argue that if an effective market access standard is adopted, the threshold should be 25 percent.[82] Yet, such a threshold would permit foreign carriers to obtain entry to the U.S. market without Commission review through equity investments that would create the incentive for the foreign carrier to leverage its monopoly power in favor of its affiliate and against the customers of all other U.S. carriers. Even LDDS acknowledge this potential because it would require the automatic imposition of safeguards for any investment of 10% or more.[83] The Commission should adopt a threshold of ten percent or more in order to prevent such anticompetitive monopoly leveraging.[84]

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81 Domtel contends that the Commission should exclude from application of the effective market access test any foreign carrier controlling less than 45% of the overall market in its home country. Domtel Comments at 8. Such a blanket exclusion would permit a carrier with monopoly control over 44.9% of the bottleneck facilities in a foreign country to leverage its monopoly power in favor of its U.S. affiliate and distort competition in the U.S. international services market, precisely the result the proposed effective market access standard is designed to prevent. Domtel's proposed exception would swallow the rule, and thus should not be adopted by the Commission.

82 AmericaTel Comments at 13; LDDS Comments at 2.

83 LDDS Comments at 2, 11.

84 TLD argues that the one of the primary factors the Commission should consider in determining who should be subject to the effective market access standard is the level of U.S. international traffic handled by that carrier. TLD thus argues that AT&T's overseas activities deserve greater scrutiny than TLD's because of the large volume of U.S. international traffic handled by AT&T. TLD Comments at 56-60. However,

(footnote continued on following page)

BTNA, GTE, MCI and AT&T have presented compelling reasons why application of the effective market access test should be triggered when a foreign carrier seeks to obtain a ten percent or more equity interest in a U.S. international carrier. The Commission should adopt such a threshold as part of its effective market access standard.

C. The Commission's Test Should Require Effective Access Now

The Commission should require the presence of legal and regulatory conditions that provide real competitive opportunities for U.S. carriers, *i.e.*, conditions that permit facilities-based international competition and commercially feasible resale, as evidenced by actual competition. As Chairman Hundt has stressed:

> Competition on paper does not count. Only competition in the market counts. A market can proclaim itself open or competitive, but whether it is in practice depends upon access charges, interconnection, numbering schemes and the like.[85]

Motorola also warns against relying upon promises of future action:

> [P]ast experience shows that many EU deadlines for market liberalization have gone unmet. Member States have failed to meet the domestic implementation guidelines in nearly all of the EU-wide telecommunications

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(footnote continued from previous page)

> despite the absolute volume of international traffic that AT&T handles, AT&T does not control bottleneck facilities -- TLD's parent, Telefonica de España, does. It is Telefonica's unrestrained ability to injure U.S. carriers and their customers through leveraging of its foreign monopoly which properly is the focus of the Commission's NPRM. The fact that one U.S. carrier may have a larger traffic stream than another merely means that it has more customers who may be injured through the exercise of foreign market power.

85 Statement before the House Commerce Subcommittee on Commerce, Trade and Hazardous Materials, March 3, 1995 at 9.

> integration directives, including those on services, terminal equipment, open network provision, and leased lines.[86]

Motorola's warning is confirmed by the European Commission's recent report concluding that the 1990 European Union directive requiring competition in non-voice telecommunications services had not been implemented fully in some Member States more than two years after the implementation deadline.[87]

The true test of the presence of effective market access is whether effective competition presently exists in the foreign market. If such competition is lacking, one must question whether the legal and regulatory regime promotes and protects competition. For the Commission to require anything less than the existence of true competitive opportunities, such as allowing an additional period of time for countries to develop the necessary conditions, would be to accept less for U.S. customers and a major competitive disadvantage for U.S. carriers, with no assurance that the necessary opportunities would actually become available in the stated time period. The Commission should require effective market access to exist at the time the foreign carrier is granted access to the U.S. international services market.[88]

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86 Motorola Comments at 8.

87 European Commission, *Communication by the Commission to the European Parliament and the Council on the Status and Implementation of Directive 90/88/EEC on Competition in the Markets for Telecommunications Services*, April 4, 1995 at 10-11. The deadline for implementation of the directive was December 31, 1992.

88 BTNA point out the problems created by the Commission's proposal to review equity investments after the fact. BTNA Comments at 11-12. BTNA therefore suggests, as did AT&T, that the Commission should require prior approval of such acquisitions. *Id.*

D. The Effective Market Access Test Should Be Applied to Primary Markets

C&W and TLD, U.S. carriers whose foreign parents operate in multiple non-U.S. countries, argue that the effective market access test should be applied only to a foreign carrier's home country, and not to the primary markets proposed in the NPRM. Adopting their approach, however, would eviscerate the primary goal of the Commission's effective market access standard, the protection of U.S. carriers and their customers from the anticompetitive leveraging of foreign market power. As proposed by these carriers, a foreign carrier with monopolies in thirty countries could enter the U.S. so long as its home market afforded U.S. carriers effective access to its telecommunications market. Such application of the test would do little to prevent the foreign carrier from leveraging its monopoly power in the thirty other countries to the detriment of U.S. carriers and customers.

The NPRM's definition of primary market struck a reasoned balance by focusing the Commission's effective market access inquiry on those foreign markets in which a foreign carrier has the ability to leverage its market power over the international or local termination market. Adoption of the home country test propounded by C&W and TLD would destroy this careful balance. The Commission should retain its proposed focus on the primary markets of foreign carriers.

E. The Effective Market Access Standard Should Be Applied with Certainty

One of the overriding concerns expressed in the comments is the need for certainty in the Commission's application of the effective market access test. BTNA, for example, calls for an entry standard that is "clear, specific and pragmatic."[89] TLD contends that the uncertainty of gaining access to the U.S. international services market, even if a country meets the effective market access test, will remove any incentive a country might have to liberalize in order to enter the U.S. market.[90] Teleglobe likewise objects to the flexibility inherent in the effective market access test proposed in the NPRM. In order to deliver the benefits of effective competition to U.S. customers and to provide certainty to foreign carriers and their governments, the Commission should make clear that, subject to procedures to ensure Executive Branch concurrence, any country that provides effective market access to U.S. carriers may enter the U.S. international services market, while carriers from countries that do not provide such access will be unable to do so.

VI. NON-EQUITY, NON-EXCLUSIVE CO-MARKETING ARRANGEMENTS SHOULD NOT BE SUBJECT TO THE EFFECTIVE MARKET ACCESS STANDARD

The NPRM proposes to exempt non-exclusive, non-equity arrangements between U.S. and foreign carriers from the effective market access entry criteria. AT&T demonstrated in its Comments that this decision was correct because non-equity, non-exclusive arrangements, like WorldPartners, do not allow foreign carriers access to the U.S. telecommunications market or give foreign carriers potential control over U.S. carriers' operations or create incentives to use home market monopolies to disadvantage other U.S. carriers. Further, non-exclusive and non-equity arrangements are used to

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[89] BTNA Comments at 2.

[90] TLD Comments at 32-33.

ensure that foreign carriers deliver the type of high quality, seamless capability necessary to support U.S. carrier global services, and thereby provide a legitimate means to extend and promote U.S. carrier global offers. Moreover, until U.S. carriers obtain effective market access in foreign countries, such services can be delivered only through arrangements with foreign carriers.

Other commenters agree that non-equity, non-exclusive arrangements should not be subject to an effective market access standard. Citicorp endorses the Commission's decision to limit its effective market access standard to potential entrants affiliated with a foreign carrier because, by doing so, "the Commission will promote the formation of joint ventures and nonexclusive co-marketing arrangements. Such arrangements bring significant benefits to international telecommunications users through 'one-stop shopping,' seamless interconnection, superior quality service and the like."[91] AmericaTel similarly supports the Commission's decision "not to include within the definition of 'affiliate' non-equity business relationships between carriers, and most co-marketing arrangements."[92]

Some commenters, however, attack AT&T's participation in WorldPartners. These commenters paint a picture of WorldPartners that suits their purposes, but has no basis in reality. As AT&T established in its Comments, the members of WorldPartners do

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91 Citicorp Comments at 3.

92 AmericaTel Comments at 13. AmericaTel believes that any agreement a U.S. carrier/applicant enters into with a foreign carrier should be filed with the Commission, provided there is a correspondent or ownership relationship between the two.

not have equity interests in AT&T, and do not derive revenue from the provision of AT&T's services in the U.S. In the same manner, AT&T does not derive revenue from a WorldPartners member's provision of services in its home country. WorldPartners merely provides a set of services standards by which the individual members can meet the needs of their customers for global seamless services. WorldPartners thus is a non-exclusive, non-equity arrangement of the sort the Commission properly has determined should not be subject to an effective market access standard. The degree of non-exclusivity and independence among WorldPartners members is corroborated by the Comments filed by TLD in this proceeding. One need but read TLD's pleading to realize that AT&T and Telefonica, a proposed member of Unisource, which is a member of WorldPartners, do not share the common goal envisioned by these conspiracy buffs.[93] Additional confirmation that WorldPartners is not the global monolith portrayed by these commenters is provided by the fact that many of the members of WorldPartners are involved in commercial dealings with the very carriers who attack this bilateral, correspondent arrangement. For example, Singapore Telecom, a founding partner of WorldPartners, has made arrangements with BT/MCI's Concert joint venture to deliver Concert services in Singapore.

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[93] Contrary to one of TLD's many assertions (TLD Comments at 53 n.122), AT&T complied fully with Section 63.11 of the Commission's Rules by submitting the required notification to the Commission on June 7, 1993, and supplementing this notification on June 24, 1993.

The lack of any principled basis for application of the effective market access test to WorldPartners is evidenced by the positions of ACC and MFSI, until now two of the leading opponents of what they term "mirror reciprocity." MFSI, for example, proposes that any agreement between a U.S. carrier with a "substantial share" of U.S. international traffic -- apparently anyone with more market share than MFSI -- would be required to obtain Commission approval before implementing any agreement with a foreign carrier. As a condition of such approval, MFSI would require the U.S. carrier to ensure that MFSI obtained an operating agreement and that MFSI obtained foreign carrier half circuits at cost-based rates. If the U.S. carrier could not successfully negotiate such terms for MFSI, the U.S. carrier would be barred from providing end-to-end services on the route.[94]

ACC likewise urges the Commission to prohibit "major" U.S. carriers (*i.e.*, anyone but ACC) from participating in an "alliance", including non-equity, non-exclusive arrangements, unless the U.S. carrier demonstrates that the country is "sufficiently liberalized" for U.S. carriers, that correspondent agreements are freely available to all U.S.

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94 MFSI Comments at 3-4, 9 n.8. MFSI argues that it needs such favored treatment to compete in other countries because many countries lack "liberalized restrictions on competitive entry, nondiscriminatory cost accounting and interconnection regulatory regimes; and/or regulations intended to allow the regulator to discover, prevent, and remedy cross-subsidization and anticompetitive leveraging." *Id.* at 7. However, ACC and MFSI have argued vehemently in their private line resale applications that foreign countries, such as France and Germany, offer boundless opportunities for U.S. carriers to compete. When AT&T points out similar problems in a foreign country, ACC and MFSI accuse AT&T of seeking "mirror reciprocity." Yet, despite its opposition to any form of "mirror reciprocity", MFSI requests the Commission in this proceeding to impose a 20% ownership limitation on non-radio facilities in the U.S. to <u>mirror</u> the foreign ownership restriction in Canada. *Id.* at 13.

carriers, that all negotiated accounting rates will be made available simultaneously to all U.S. carriers, and unless the U.S. carrier agrees to the BT/MCI conditions.

Adoption of these proposals would hurt, not promote, competition. Leaving aside the obvious problem of what constitutes an alliance -- ACC's proposal would appear to prohibit any carrier larger than ACC from implementing or continuing a traditional correspondent arrangement (which is a non-exclusive, non-equity arrangement) with a foreign carrier -- ACC's and MFSI's proposals would remove any incentive for U.S. carriers to improve the services they provide their U.S. customers because every other U.S. carrier would automatically obtain the benefit of such innovation and effort. While these carriers argue that they want the opportunity to compete, what they really want is a guarantee that they will succeed in foreign markets by riding on the efforts of others. They have not established on the record any need to adopt their proposals, and their proposals therefore should be rejected.[95]

The Commission chose not to include non-equity, non-exclusive arrangements within its effective market access test because to do so would constrain the ability of U.S. carriers to introduce innovative services throughout the world in the context of the

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[95] ACC and MFSI also request the Commission to impose dominant treatment on AT&T, including 45-day tariff filing requirements and the requirement to obtain Commission approval for additional international circuits. ACC Comments at ___; MFSI Comments at 10-12. AT&T currently is regulated as dominant for IMTS. As AT&T has recently shown, however, it has no market power in any segment of the interexchange market and therefore should not be subject to dominant carrier regulation. *See* Letter from Gerald Salemme to Kathleen Wallman, Chief Common Carrier Bureau, Federal Communications Commission, in CC Docket No. 79-252, dated April 24, 1995.