

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

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )

Market Entry and Regulation of )  
Foreign-affiliated Entities )  
\_\_\_\_\_)

) IB Docket No. 95-22  
) RM-8355  
) RM-8392  
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**REPLY COMMENTS OF DOMTEL COMMUNICATIONS, INC. TO  
NOTICE OF PROPOSED RULEMAKING**

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## SUMMARY

Competition is the Commission's primary goal. DOMTEL, and its foreign nondominant parent, TRICOM, are firmly in support of such a goal. In fact, TRICOM's history demonstrates an uphill, but highly successful, battle to promote this goal in the Dominican Republic. Prior to 1990, the telecommunications marketplace consisted of one monopoly provider in the Dominican Republic. Today, the telecommunications marketplace in the Dominican Republic supports four local exchange and international long distance licensed carriers, all of which have levels of U.S. ownership which exceed foreign-ownership limits imposed in the United States. The driving force for such rapid and impressive change are the small nondominant carriers that have prompted competition in the market.

As noted in several comments, the Commission should differentiate between small and large carriers in imposing its expanded public interest analysis. If the Commission adopts its proposed test, it should recognize and reward the efforts of these nondominant foreign carriers by exempting U.S. carriers affiliated with them from a cumbersome and costly process. As DOMTEL proposed in its initial Comments, U.S. carriers affiliated with nondominant foreign carriers should not only be exempt from the expanded public interest analysis, but should be subject to streamlining requiring approval within 6 months. Moreover, such Section 214 applications should not be subject to full Commission approval. A nondominant foreign carrier would be defined as a carrier having less than a 45% average market share of the total combined national local exchange, and domestic and international long distance market.

In addition, the Commission should grant nondominant foreign carriers of developing countries a presumptive waiver under Section 310(b)(4) which allows up to a 60% equity interest in the holding company of a licensee.

With regard to resale, DOMTEL supports the Commission's policies, but advocates that the Commission allow authorized resellers of international private lines for switched services to be allowed to provide service to countries determined equivalent without additional authorization or notification.

Finally, DOMTEL urges the Commission to reconsider its decision to exclude U.S. carriers that acquire an ownership interest in, or enter into an arrangement with, dominant foreign carriers from the proposed expanded public interest analysis. U.S. carriers that acquire an ownership interest in, or enter into an arrangement with, dominant foreign carriers possess ample opportunity and incentive to discriminate against other U.S. carriers and foreign carriers alike. As such, these U.S. carriers should be subject to the Commission's proposed test.

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**REPLY COMMENTS OF DOMTEL COMMUNICATIONS, INC. TO  
NOTICE OF PROPOSED RULEMAKING**

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DOMTEL Communications, Inc. ("DOMTEL"), through its counsel, hereby respectfully submits its Reply to the comments filed in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("Commission"). The NPRM proposes modifications to the Commission's Rules regarding the entry of foreign-affiliated entities into the U.S. international telecommunications market.<sup>1/</sup>

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<sup>1/</sup> *Market Entry and Regulation of Foreign-affiliated Entities*, FCC 95-53, Notice of Proposed Rulemaking (released February 17, 1995) [hereinafter NPRM].

DOMTEL, a U.S. corporation, is the wholly-owned subsidiary of Telepuerto San Isidro, S.A. ("TRICOM") of the Dominican Republic. TRICOM, in turn, is 40 percent owned by Motorola and 60 percent of the company is under Dominican ownership.

## I. INTRODUCTION

As set forth in its initial Comments, DOMTEL does not believe that the Commission should expand its public interest analysis.<sup>2/</sup> In DOMTEL's view, the proposed test would result in greater delay, more ambiguity, and would not achieve or promote the Commission's goals of promoting competition, preventing anticompetitive conduct and opening closed foreign markets. DOMTEL's Comments proposed that if the Commission, however, decides to adopt its proposed test, U.S. carriers affiliated with nondominant foreign carriers that file Section 214 applications for facilities-based service should be exempt from the Commission's proposed expanded public interest analysis. A nondominant foreign carrier would be defined as a carrier having less than a 45% average market share of the total combined national local exchange, and domestic and international long distance market. Moreover, Section 214 applications filed by U.S. carriers with nondominant foreign affiliates would be treated on a streamlined basis, i.e., six months for approval, and would not be subject to full Commission approval.<sup>3/</sup>

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<sup>2/</sup> Comments of Domtel Communications, Inc. to Notice of Proposed Rulemaking, IB Docket No. 95-22, RM-8355, RM-8392 (filed Apr. 11, 1995).

<sup>3/</sup> The Commission specifically stated in the *Telefonica Larga Distancia de Puerto Rico Order* that "[d]ue to the unique public interest and market factors associated with international facilities-based authorizations, we clarify that facilities authorizations from entities affiliated with foreign carriers will require review and approval by the full Commission." *Telefonica Larga Distancia de Puerto Rico*, 8 FCC Rcd 106, 113 (1992).

In addition, DOMTEL proposed that for purposes of Section 310(b)(4), the Commission should presumptively grant waivers to allow up to a 60% foreign ownership interest in the holding company of a radio licensee, if the equity interest is held by a nondominant foreign carrier in a developing country.

DOMTEL continues to support both of these positions with regard to Sections 214 and 310. Additionally, in this Reply, DOMTEL addresses such issues as resale, affiliation, and U.S. ownership in foreign carriers.

**II. UNDER SECTION 214, U.S. CARRIERS AFFILIATED WITH NON-DOMINANT FOREIGN CARRIERS SHOULD BE EXEMPT FROM THE EXPANDED PUBLIC INTEREST ANALYSIS AND SHOULD BE TREATED EXPEDITIOUSLY.**

**A. U.S. Carriers Affiliated with Nondominant Foreign Carriers Should Not Be Subject To Tests That Result in Greater Uncertainty and Delay.**

As demonstrated by the large number of parties that filed comments in this proceeding, there is great interest, as well as concern, regarding the Commission's proposed test. DOMTEL, like most parties, supports the Commission's goals. However, as repeatedly pointed out in many of the comments, including DOMTEL's, the Commission's proposed test is unlikely to promote any of the Commission's goals.<sup>4/</sup> Instead, it simply would create additional factors and tiers to an already onerous process. Under the proposed test, the Commission initially would consider six different factors to determine "effective

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<sup>4/</sup> See British Government Comments at 1; Deutsche Telekom AG Comments at 22-35; fONOROLA Comments at 16; France Telecom Comments at 10; Directorate General of Posts and Telecommunications ("DGPT") Comments at 2; Secretariat of Communications and Transportation of Mexico ("SCT") Comments at ii; Sprint Comments at 17-18; Teleglobe Comments at 20-25; Telex-Chile Comments at 1-3; and Telefonica Larga Distancia de Puerto Rico ("TLD") Comments at 30-41.

market access," then the Commission would look at another set of "public interest" factors (the Commission listed another six factors), with a final solicitation of views from the Executive Branch.<sup>5/</sup> The NPRM does not indicate the extent of the review or the weight that would be accorded to each factor. It simply says that the test would not be dispositive. Given this, the Commission's belief that the proposed test would result in greater certainty is a chimera. This proposed test would erect barriers through more delays and larger costs, particularly for small carriers seeking entry into the U.S. market.

In addition, the National Telecommunications and Information Administration ("NTIA"), which filed Comments on behalf of the Executive Branch, has indicated that an Executive Branch process is being developed to address review of Section 214 applications.<sup>6/</sup> DOMTEL recognizes the authority of the Executive Branch in trade issues and policy. Indeed, it agrees with various other parties that trade issues are better dealt with through bilateral and multilateral negotiations rather than through an "effective market

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<sup>5/</sup> NPRM, *supra* note 1, at ¶ 16, 45.

<sup>6/</sup> NTIA Comments at 16.

access" test.<sup>7/</sup> However, DOMTEL is particularly concerned that the establishment of an Executive Branch process, coupled with a Commission review, will inevitably result in a "black hole." And, for carriers who must confront this review process, particularly for small nondominant carriers, the reaction will be similar to Edvard Munch's *The Scream*.

**B. U.S. Carriers Affiliated with Nondominant Foreign Carriers Should Receive an Exemption from the Proposed Test.**

The Commission is much more likely to achieve its goals of greater competition and liberalization in foreign markets, if it promotes, rather than hinders, U.S. carriers affiliated with nondominant foreign carriers. As noted by TLD, there are little assurances that *de facto* monopolies would be willing to give up their exclusivity rights and substantial revenues simply to participate in the U.S. market.<sup>8/</sup> Experience shows the empirical opposite for nondominant foreign carriers, for them, participating in the U.S. market is essentially the only means of competing with *de facto* monopolies and promoting

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<sup>7/</sup> See British Government Comments at 5; Deutsche Telekom AG Comments at 47-48; DGPT Comments at 2; Sprint Comments at 23-25; and TLD Comments at 20-23. In addition, some parties have asserted that the Commission's proposed "effective market access" test may not only endanger ongoing multilateral negotiations, but may have violated the GATS standstill agreement. Certain parties also have asserted that the Commission has no sole authority to address trade matters. See Deutsche Telekom AG Comments at 3-12, 48; TLD Comments at 5-19, 22; and Sprint Comments at 23-25. In fact, a number of governments that filed comments expressed concern that the Commission's action demonstrated a closing of the U.S. market and could result in retaliation. This would be particularly unfortunate since a number of countries have taken steps towards more competitive markets, or are in the process of doing so. It would be a disastrous outcome if these countries retreated from these efforts as a reaction to the Commission's proposed actions. See British Government Comments at 5-6; SCT Comments at 11; and DGPT Comments at 2. See also Deutsche Telekom AG Comments at 30-32; LDDS Communications Comments at 1-9; Sprint Comments at 18; Teleglobe Comments at 20-25; and TLD Comments at 34-38.

<sup>8/</sup> See TLD Comments at 33-34.

the Commission's goals. Imposition of the Commission's proposed test would suppress the only viable means of generating competition abroad.

As such, the Commission should change the existing rules so that U.S. carriers affiliated with nondominant foreign carriers (i.e., carriers that do not have a primary market because they are not dominant in their marketplace) would receive a rebuttable presumption in favor of approval. A dominant market share would be where the foreign carrier controls 45% or more of the combined basic services of the foreign market. Moreover, U.S. carriers affiliated with nondominant foreign carriers would be treated on a streamlined basis, a 6 months approval timetable, and would not require full Commission approval. This streamlined timetable would be consistent with the Commission's efforts to decrease regulation where it is unnecessary and burdensome on carriers, particularly given the Commission's efforts to improve the Section 214 application process.<sup>9/</sup> As noted by several parties,<sup>10/</sup> the implementation of timetables for Section 214 applications is critical. Without such deadlines, Section 214 applications can, and do, languish in an eternal and internal (and now possibly interagency) review process for years.

Like DOMTEL, Transworld, Communications Telesystems International and FONOROLA, support exemptions for smaller carriers and urge the Commission to differentiate between small and large carriers for purposes of imposing the proposed test for

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<sup>9/</sup> International Bureau to Improve International Section 214 Process, Public Notice, Report No. I-8046 (released Apr. 27, 1995). The Commission announced that it is initiating a rulemaking to ways to improve its international Section 214 application processing procedures.

<sup>10/</sup> A number of other parties also supported the adoption of timetables including the British Government, Teleglobe, and NYNEX. British Government Comments at 2; Teleglobe Comments at 34; NYNEX Comments at 8.

Section 214 applications seeking to provide international service.<sup>11/</sup> We agree with these companies that the Commission should distinguish between the entry of smaller, non-dominant foreign affiliated carriers and large dominant carriers in the application of the test.<sup>12/</sup> In addition, we agree with NYNEX that the Commission "should grant U.S. international carriers and foreign carrier "blanket" 214 authority to provide service on all international routes on which they would be required to seek Section 214 authority and where they are not affiliated with dominant carriers on the foreign end."<sup>13/</sup>

In its Comments, AT&T stated that it agrees with the Commission's approach to limit "the effective market access test to those situations in which the foreign market power of a carrier can be used to undermine fair competition in the United States telecommunications market."<sup>14/</sup> DOMTEL agrees with AT&T but notes that the definition of this market power is lacking. It should be dominance as defined here. AT&T's anticompetitive concerns are inapplicable to U.S. carriers affiliated with nondominant foreign

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<sup>11/</sup> See Transworld Comments at 2 and Communications Telesystems International Comments at 2 (exemption from proposed test should be made for small carriers with gross annual revenues from international services less than \$125 million and no control of U.S. bottleneck facilities); fONOROLA Comments at 5 (Commission should distinguish between the entry of smaller, non-dominant foreign affiliated carriers and large dominant carriers in application of test); and NYNEX Comments at 9 (nondominant U.S. international carriers should be given blanket Section 214 authority). See also Teleglobe Comments at 30 (proposed test favors large U.S. international carriers to the detriment of smaller U.S. and foreign carriers); Telex-Chile Comments at 3 and TLD Comments at 51-52 (proposed test favors established carriers like AT&T).

<sup>12/</sup> fONOROLA Comments at 5.

<sup>13/</sup> NYNEX Comments at 9.

<sup>14/</sup> AT&T Comments at 19.

carriers. A nondominant foreign carrier's primary objective is to promote competition. As noted in *Latin American Telecom Report*,

[a]s telecom liberalization gains momentum in Latin America, new competitors are beginning to emerge. Some of these people are proving to be innovative, dedicated and aggressive rivals to the established operators. In most cases, this heightened competitive environment is fueling the liberalization debate at the center of which the established monopolies now find themselves.<sup>15/</sup>

Across-the-board regulations for all U.S. carriers with foreign affiliations are untenable. Within this group there are a wide range of carriers with varying market power. Therefore, it is unjustifiable, and absolutely counterproductive, to lump all foreign-owned carriers into one category and impose the same entry standard. It just does not fit. What sense does it make to erect barriers against the small foreign carriers that are struggling to promote greater competition?<sup>16/</sup> For example, as noted in a recent article, "[o]ver the last two years, TRICOM and All America have emerged to challenge the dominant market position of CODETEL. The key force for change in the market has been TRICOM, which is pushing into the long distance, cellular and local service markets."<sup>17/</sup>

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<sup>15/</sup> *Tricom: Dominican's David*, 1 LATIN AMERICAN TELECOM REPORT 1 (Nov. 15, 1992).

<sup>16/</sup> In the *Regulation of International Common Carrier Services*, the Commission acknowledged that this approach was unjustifiable and decided to regulate on the basis of a carrier's control of bottleneck facilities and ability to discriminate, rather than classifying all U.S. carriers affiliated with foreigners as dominant merely because of their ownership. *Regulation of International Common Carrier Services*, 7 FCC 7331 (1992) [hereinafter *International Common Carrier Services*].

<sup>17/</sup> *The Dominican Republic - Competition in the Caribbean*, 3 LATIN AMERICAN TELECOM REPORT 8 (July 15, 1994).

In addition, subjecting nondominant foreign carriers to the Commission's proposed test would create a vehicle for larger carriers to oppose approval of a Section 214 application solely to exclude, or at a minimum, delay the entry of new competitors on their international routes. DOMTEL agrees with fONOROLA Comments that "the Commission's proposal could allow U.S. carriers to seek to burden even tiny competitors with increased regulation, solely to gain competitive advantage."<sup>18/</sup> As stated by the British Government, the Commission "needs to consider in defining dominance the real market power in the US of the carrier in question, rather than often hypothetical risks set out in public comments in S. 214 procedures."<sup>19/</sup> Such "hypothetical risk" oppositions have one singular purpose -- to hold up the determination of an application.

Adoption of an exemption for U.S. carriers affiliated with nondominant foreign carriers is consistent with prior Commission policy. In the *Regulation of International Common Carrier Services*, the Commission modified its regulatory classification scheme and in so doing stated that it did not

agree, however, that [its] regulatory objective to promote competition for the benefit of U.S. consumers is well-served by retaining dominant carrier regulation in circumstances where a carrier will not be able to exercise or benefit from market power.<sup>20/</sup>

Similarly, it is inequitable and again counterproductive to inflict the Commission's proposed test on U.S. carriers affiliated with nondominant foreign carriers when those nondominant foreign carriers are unable to exercise or benefit from market power.

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<sup>18/</sup> fONOROLA Comments at 18.

<sup>19/</sup> British Government Comments at 3.

<sup>20/</sup> *International Common Carrier Services*, *supra* note 16, at 7332.

C. Primary Market Definition Should Be Modified and Narrowed  
Not Expanded or Made More Nebulous.

Under DOMTEL's proposed exemption, a nondominant foreign carrier would be a carrier that does not possess a primary market because it is not dominant. Consistent with this approach, the Commission would need to modify its proposed definition of "primary market."<sup>21/</sup> A "primary market" would be defined as: the key markets where a carrier has a significant ownership interest in a facilities-based telecommunications entity that has a dominant (45% or more) combined market share of the local exchange and domestic and international long distance basic services of the foreign market; and traffic flows between the United States and that country are significant. The proposed definition of dominance by market defeats the very competitors in the previously monopolistic market which the Commission wants to support. This is because real market power depends on the long distance carrier's ability to terminate traffic in the local exchange, normally controlled, for decades after a competitive market opens, by the former monopoly. Even though many governments in former monopoly environments now are developing interconnection rules to keep the former monopoly "honest," as we know from the litigation following the AT&T divestiture, and the similar litigation which lasted for four years in Chile (before the Antimonopoly Commission and the Supreme Court in the matter of CTC's petition to provide long distance service, and ENTEL's petition to provide local exchange service), true parity is not realistically achieved in less than 10 years.

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<sup>21/</sup> The Commission proposes to define "primary market" as "those key markets where the carrier has a significant ownership interest in a facilities-based telecommunications entity that has a substantial or dominant market 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, *supra* note 1, at ¶ 43.

Thus, the only meaningful definition of dominance which does not favor the former monopoly, by retarding the economic ability of the new competitor to grow, is one which derives a percentage market control based on the combined local exchange and long distance markets in basic services (as the respective country defines the latter.)

D. A Uniformity Approach Should Not be Established.

DOMTEL also disagrees with AT&T that the Commission should adopt the same "effective market access" standard for Section 214 applications, Section 310(b)(4) waiver requests, submarine cable landing license applications, and private line resale authorizations. Although use of the same standard may promote uniformity, uniformity is not particularly helpful if it results in the uniform application of a cumbersome and multi-factored test. Equally important, statutes and rules are adopted for different reasons and to address different concerns. It is inappropriate to slap one test onto another situation.

E. A Loophole for "Unique Factors" Should Not Be Established.

In the NPRM, the Commission states that it would "reserve[s] the right to review any transaction that involves foreign carrier participation in which unique factors suggest Commission review would be necessary to serve the public interest, even with foreign carrier participation at levels below the investment threshold chosen."<sup>22/</sup> This reservation will lead to unfair uncertainty on the part of U.S. carriers seeking to provide international services. If the Commission establishes certain standards and benchmarks, carriers rely on these standards and benchmarks to enter into transactions. The

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<sup>22/</sup> NPRM, *supra* note 1, at ¶ 64.

Commission's proposed reservation creates a loophole that provides an opportunity for any U.S. carrier seeking to protect its dominant status, particularly large and established carriers, to assert that "unique factors" exist wherever it wants to delay a competitor from entering the U.S. international telecommunications marketplace.

**III. NONDOMINANT FOREIGN CARRIERS OF DEVELOPING COUNTRIES SHOULD BE PRESUMPTIVELY GRANTED WAIVERS UNDER SECTION 310(B)(3) ALLOWING TO HOLD UP A 60% EQUITY INTEREST.**

DOMTEL agrees with commenting parties such as J. Gregory Sidak and Airtouch Communications that urge the Commission to interpret Section 310(b)(4) correctly and appropriately read the statute as providing a presumption in favor of more than a 25% foreign ownership interest.<sup>23/</sup> Under DOMTEL's approach, the Commission would adopt a presumptive waiver for nondominant foreign carriers of developing countries who seek to obtain up to a 60% equity interest in the holding company of licensee.

Moreover, DOMTEL disagrees with AT&T's proposal for Section 310(b)(4) that would require a carrier to be subject to another "effective market access" review if a carrier seeks to provide additional services.<sup>24/</sup> This proposal simply is an attempt by AT&T to impose extraneous regulatory burdens to delay competitors and would not serve any additional purpose. Section 310 applies to foreign ownership in the company. The legislative history of the provision indicates that the restrictions were imposed due to national

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<sup>23/</sup> See J. Gregory Sidak Comments at 2-3; Airtouch Communications Comments at 8; *see also*, British Government Comments at 7 (the British government proposed that the Commission offer waivers on a routine basis, except where it is demonstrated that this would be anticompetitive).

<sup>24/</sup> AT&T Comments at 40.

security concerns. As such, if the Commission determines that the foreign ownership is appropriate under Section 310(b)(4), further review should not be required if the carrier seeks to provide additional services.

**IV. DOMTEL GENERALLY SUPPORTS THE COMMISSION'S RESALE POLICIES.**

**A. Switched Services and Noninterconnected Resale Should be Excluded From the Proposed Test.**

DOMTEL supports exclusion of resellers of switched services and resellers of noninterconnected private lines from entry requirements. It agrees with the Commission's established presumption that U.S. carriers with foreign-carrier affiliations seeking to engage in the resale of switched services should be regulated as nondominant.<sup>25/</sup> DOMTEL agrees with the Commission that there "should be a presumption that there is no competitive harm in permitting unlimited foreign-carrier entry for switched resale, even to affiliated countries."<sup>26/</sup> DOMTEL disagrees with GTE's proposal that all foreign resellers should be considered dominant. This is directly contrary to the Commission's established policy in the *Regulation of International Common Carrier Services*.<sup>27/</sup> In that Order, the Commission specifically stated that the Commission proposed to change its policy that

imposes dominant carrier regulation based only on the existence of an ownership interest in a U.S. carrier by a foreign telecommunications entity, and instead to impose such regulation in those instances where there is a substantial possibility of

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<sup>25/</sup> NPRM at ¶ 74.

<sup>26/</sup> *Id.* at ¶ 74.

<sup>27/</sup> *International Common Carrier Services*, *supra* note 16, at 7331.

anticompetitive effects on the U.S. international service market.<sup>28/</sup>

B. Authorized International Private Line Resellers of Switched Services Should be Allowed to Add Countries Without Further Review.

With regard to international private line resale for switched services, DOMTEL supports adoption of a streamlining process like the British system whereby a reseller that obtains a private line resale license is permitted to add on countries for which equivalency has been determined without further notification or authorization.<sup>29/</sup> Once a country is determined equivalent, there is no rationale for requiring a carrier to undergo additional expense and delay for additional authorization. An additional authorization requirement merely would be used as a device by other telecommunications providers to delay competitors from entering other markets.

In addition, DOMTEL disagrees with AT&T's proposal that cost-based accounting rates should be included as a condition for authorizing U.S. carriers with foreign affiliates to resell interconnected private lines to affiliated countries. A primary purpose of the Commission's *International Resale Order* was that "the public interest in cost-based international telecommunications will be served by the adoption of policies that encourage resale of international telecommunications services."<sup>30/</sup> The Commission specifically stated that it "remained convinced that unlimited international resale would yield the additional public benefit of exerting pressure to reduce above-cost international accounting rates for

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<sup>28/</sup> *Id.* at 7331-7332.

<sup>29/</sup> Americatel and the British Government also supported this approach. *See* Americatel Comments at 8; British Government Comments at 3-4.

<sup>30/</sup> *Regulation of International Accounting Rates*, 7 FCC Rcd 559, 560 (1991).

switched services, including IMTS.<sup>31/</sup> Loading the time-consuming, ill-defined, always illusive, accounting function of proving "cost," particularly in a developing country, adds a regulatory burden so great as to discourage new entrants and thus be anticompetitive. Again, AT&T's proposal injures the competitors far more than the old monopolies, or the established giants.

**V. DOMTEL SUPPORTS COMMISSION EVALUATION OF U.S. INVESTMENT IN FOREIGN CARRIERS.**

**A. U.S. Carriers With Ownership Interests in Dominant Foreign Carriers Should be Subject to the Proposed Test.**

For purposes of triggering the "effective market access" test, the Commission proposes to adopt a new "affiliation" definition. The Commission proposes to define "affiliation" on a benchmark level, or a controlling interest at any level, in a U.S. carrier.<sup>32/</sup> Currently, the Commission applies "affiliation" to a situation where a U.S. carrier is controlled by a foreign carrier, as well as where a foreign carrier is controlled by a U.S. carrier.<sup>33/</sup> This approach applies to "control" by both a U.S. carrier or a foreign carrier and does not merely penalize foreign carriers that acquire an interest in a U.S. carrier. Now, the Commission appears to be proposing that for purposes of triggering the "effective market access" test, "affiliation" only would apply to foreign carriers having an ownership interest in a U.S. carrier which reaches a certain benchmark level, or a controlling

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<sup>31/</sup> *Id.*

<sup>32/</sup> NPRM, *supra* note 1, at ¶ 65.

<sup>33/</sup> Under the Commission's Rules, "affiliation" only comes in play when the Commission determines a carrier's regulatory classification, i.e., dominant or nondominant, after it has entered the market. *See* 47 C.F.R. § 63.01(r)(1)(i).

interest at any level.<sup>34/</sup> U.S. carriers would not fall under the "affiliation" definition because they would not be subject to the "effective market access" test.

DOMTEL disagrees with the Commission's tentative decision to exclude U.S. carriers that acquire an ownership interest in, or enter into arrangements with, foreign carriers from its proposed test.<sup>35/</sup> U.S. carriers that acquire such ownership interests or enter into such arrangements possess the ability and incentive to discriminate against carriers that do not possess such a relationship in these foreign markets. This is particularly true where the U.S. carrier acquires an ownership interest in a foreign carrier, or enters into an arrangement with, a foreign carrier that possesses dominant market power in the foreign country. The Dominican Republic is a perfect example. GTE's market power in the United States, coupled with its 100% ownership in the former monopoly and now dominant carrier CODETEL in the Dominican Republic, was the precise reason that CODETEL was able to ward off carriers like RCA, ITT, and a host of other local companies, and protect its monopoly for 62 years. A similar situation would be created potentially if AT&T and GTE's discussions with Telefónica Internacional ("TISA") were to be consummated and either GTE and/or AT&T acquired an ownership interest in TISA as reported in the press.<sup>36/</sup>

The Commission should apply whatever definition of "affiliation" it adopts to U.S. carriers acquiring ownership interests in foreign carriers. As such, a U.S. carrier that

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<sup>34/</sup> NPRM, *supra* note 1, at ¶ 57.

<sup>35/</sup> *Id.* at ¶ 50.

<sup>36/</sup> *AT&T, GTE, Telefónica Plot Pan-American Ties*, COMMUNICATIONS WEEK INTERNATIONAL 1 (Oct. 10, 1994); *AT&T, GTE, Telefónica talks hit roadblocks*, COMMUNICATIONS WEEK INTERNATIONAL 6 (Apr. 10, 1995).

acquires a controlling interest, or a certain benchmark ownership interest in a foreign carrier, would have an affiliation. If that affiliation is with a foreign carrier that is dominant -- i.e., satisfies the primary market definition -- then the effective market access test would be triggered.

B. U.S. Participation in Global Alliances and Co-Marketing Arrangements With Dominant Foreign Carriers Should Create a Presumption of Affiliation.

In addition, there is a danger regarding anticompetitive behavior and exclusive arrangements between carriers that enter into global alliances or co-marketing arrangements which fall under the benchmark or control level that may be established by the Commission. This danger is particularly prevalent when the alliances or arrangements are between large established U.S. carriers and dominant foreign carriers. Arrangements such as WorldPartners provide a strong economic incentive for certain carriers to favor each other in the operative equivalent of a "closed user group" in a controlled membership society.

As such, DOMTEL urges the Commission to establish a presumption that U.S. carriers that enter into an alliance or co-marketing arrangement with a dominant foreign carrier would be considered affiliated and subject to the Commission's proposed test. This presumption of affiliation would be rebuttable by the participants in the arrangement.

DOMTEL considers that it is disingenuous for certain large established U.S. carriers to advocate that the Commission review all foreign interests in U.S. carriers, even when the foreign interest is held by small nondominant foreign carriers that possess no market power, and simultaneously to oppose any type of review when U.S. carriers acquire an ownership interest in, or enter into an arrangement with, a dominant foreign carrier. Regardless of ownership, U.S. or foreign, it is market power that enables a carrier to engage

in anticompetitive behavior. Thus, it is appropriate that when a U.S. carrier acquires an ownership interest in, or enters into an arrangement with such market power, it too should be subject to the Commission's proposed test.

## VI. CONCLUSION

Sisyphus'<sup>37/</sup> task was a small feat compared with the task that U.S. carriers affiliated with nondominant foreign carriers would have to encounter to obtain authorization under the Commission's proposed test under Section 214. DOMTEL, which without the new lead chapeau has been waiting 21 months for Section 214 authorization, urges that if the Commission decides to adopt the proposed test that it adopt an exemption for U.S. carriers affiliated with nondominant foreign carriers and approve such applications on a streamlined 6 month basis. U.S. carriers affiliated with nondominant foreign carriers that are aggressively pushing for greater competition abroad should be assisted, not obstructed, in their efforts.

In addition, DOMTEL requests that the Commission grant presumptive waivers to nondominant foreign carriers of developing countries to allow up to a 60% equity interest in the holding company of a licensee pursuant to Section 310(b)(4).

DOMTEL agrees with the Commission's proposals regarding the resale of switched services and noninterconnected private line resale. It also supports a streamlined approach for private line resale for switched services which allows authorized resellers, without additional authorization or notification, to add countries as new service points once the countries have been determined equivalent.

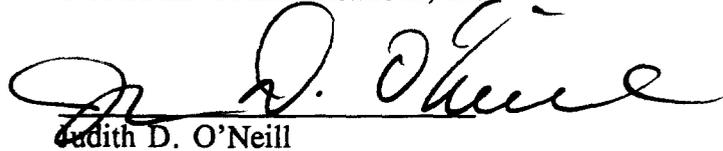
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<sup>37/</sup> "In Greco-Roman mythology the cruel king in Corinth whose punishment in Hades was to roll up a hill a heavy stone that constantly rolled down again." Webster's Third New International Dictionary 2128 (1986).

Finally, DOMTEL disagrees with the Commission's tentative decision to exclude U.S. carriers with ownership interests in, or co-marketing or other arrangements with, dominant foreign carriers from the proposed test. Such ownership interests or arrangements raise anticompetitive concerns and should be reviewed under the proposed test if the ownership interest or relationship is with a dominant foreign carrier. U.S. carriers with an a foreign ownership interest equivalent to the levels established for foreign carriers should be considered affiliated and subject to the Commission's proposed test. U.S. carriers participating in global alliances or co-marketing arrangements with dominant foreign carriers should receive a rebuttable presumption that they have an affiliation and are subject to the Commission's "effective market access" test.

Respectfully submitted

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## CERTIFICATE OF SERVICE

I, Janet Hernandez, do hereby certify that a copy of DOMTEL Communications, Inc.'s Comments To Notice Of Proposed Rulemaking, dated May 12, 1995, was hand delivered (\*) or sent by United States mail (\*\*), postage prepaid, to the following:

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