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May 15, 1995

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222/Stop Code 1170
Washington, D.C. 20554

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MAY 15 1995

STATE OF NEW JERSEY
COMMUNICATIONS COMMISSION

Re: Market Entry and Regulation of Foreign-Affiliated
Entities: IB Docket No. 95-22; RM-8355; RM-8392

Dear Mr. Caton:

AT&T Corp. ("AT&T") hereby corrects typographical errors contained in footnotes 38, 88 and 95 of AT&T's Reply Comments in the above-referenced proceeding, which were filed with the Commission on May 12, 1995. New pages with the corrections are enclosed with this letter and have been sent to all parties of record. For the Commission's convenience, a new copy of the Reply Comments with the corrections also is enclosed.

Respectfully submitted,

Stephen C. Garavito

Attachment

cc: All Parties of Record

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III. AN EFFECTIVE MARKET ACCESS TEST WOULD PROTECT AND PROMOTE THE U.S. PUBLIC INTEREST

The comments filed in this rulemaking confirm that an effective market access standard would protect and promote the U.S. public interest.³⁸ The overwhelming majority of commenters support adoption of an effective market access test. Moreover, an effective market access standard will further the Commission's goal of protecting U.S. competition and U.S. customers against the anticompetitive leveraging of foreign monopoly power.

A. The Commenters Overwhelmingly Support Adoption of an Effective Market Access Standard

Of the more than fifty comments filed in this proceeding, the overwhelming majority agree that an effective market access test of some sort is required to protect and promote the U.S. public interest. The SDN Users Group, which represents more than 435

³⁸ It is ironic that those few parties who contend that the U.S. should continue to "lead by example," rather than adopt the proposed test, include two foreign monopoly carriers, DT and Teleglobe, whose home country international facilities-based services are firmly closed to U.S. carriers. Although DT describes the German marketplace as being "liberalized in all areas except network infrastructure and public voice" (DT Comments at 36-37), it fails to acknowledge that "public voice" accounts for over 80 percent of telecommunications revenues in Germany. Moreover, DT's infrastructure must be used to provide services in the "competitive" sectors. Teleglobe opposes the Commission's proposed test because it seeks to avoid a finding that Canada, which presently allows Teleglobe a monopoly over facilities-based international services, does not provide effective market access to U.S. carriers. Teleglobe Comments at 20. Not only does Teleglobe enjoy monopoly status in Canada, but it also has a 20% equity interest in the CANUS-1 private cable system between the Canada and the United States, which arguably could be used on a non-common carrier basis to provide international services to U.S. customers. The Commission should consider how the effective market access test would be applied in such a situation

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

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 points 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.*

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

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 12, 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 Salemmme to Kathleen Wallman, Chief Common Carrier Bureau, Federal Communications Commission, in CC Docket No. 79-252, dated April 24, 1995.

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

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

REPLY COMMENTS OF AT&T CORP.

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Dated: May 12, 1995

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SUMMARY

In its NPRM, the Commission proposed an effective market access standard in order to maintain and promote competition in the U.S. international services market. The overwhelming majority of commenters -- including U.S. customers, U.S. resellers, U.S. facilities-based carriers, a foreign carrier and a foreign government -- support adoption of such a test. Citicorp, the Motion Picture Association of America, the SDN Users Association (representing more than 435 large users of domestic and international telecommunications) and the Telecommunications Resellers Association (representing more than 300 resale carriers) support an effective market access test. Even France Telecom supports the Commission's effective market access test in principle, while arguing that it should not apply to non-controlling minority interests.

The Commission's proposal is endorsed by the National Telecommunications and Information Administrations ("NTIA"), on behalf of the Executive Branch. The proposed effective market access standard also is endorsed by France's Directorate General of Post and Telecommunications ("DGPT"), which comments that the Commission's proposed approach is "a positive step towards open telecommunications markets."

Not surprisingly, those companies that seek to enter the U.S. international services market while maintaining closed home markets oppose an effective market access standard. Deutsche Telekom ("DT"), Teleglobe Canada ("Teleglobe"), and Telefonica Larga Distancia de Puerto Rico ("TLD") oppose any adoption by the

Commission of an effective market access test to protect U.S. customers from the leveraging of foreign monopoly power.

DT and TLD erroneously contend that the Commission lacks jurisdiction to adopt an effective market access standard. As the Comments of the NTIA, MCI, TRA and AT&T make clear, the Commission has ample authority under the Communications Act to adopt measures necessary to promote and maintain competition in the provision of U.S. international services. The proposed effective market access standard is simply an amplification of prior Commission precedent to consider the market opportunities in the foreign market as part of its public interest analysis under Section 214 and Section 310(b)(4). Adoption of this approach would complement the legal authority provided under Section 7 of the Clayton Act, as well as the Commission's mandate to regulate and promote foreign communications, to protect U.S. international services competition from the anticompetitive consequences where a foreign carrier seeks to acquire a non-controlling equity interest in a U.S. carrier.

Other commenters do not seek effective access to foreign telecommunications markets, but rather demand a guarantee of success in those markets. ACC Global ("ACC") and MFS International ("MFSI") thus would go far beyond the Commission's proposal and would prohibit any U.S. carrier from entering into any arrangement with a foreign carrier, even a non-equity, non-exclusive arrangement, unless the foreign market were sufficiently liberalized such that there were no substantial entry barriers, and unless ACC and MFSI were guaranteed immediate access to any innovations negotiated by the

parties. Such a test, however, would hurt, rather than promote, competition by removing any incentive for a carrier to meet evolving customer needs within the existing international services framework.

The broad base of support for an effective market access standard, contrasted with the objections of those few who say it does not go far enough and the protestations of those few who say it goes too far, demonstrates that the Commission properly seeks to exercise its authority to protect U.S. competition and U.S. customers. Further, the overwhelming support for an effective market access standard, especially the support by U.S. customers, demonstrates that the U.S. public interest demands prompt adoption of the Commission's effective market access standard. AT&T therefore urges immediate adoption of the effective market access standard proposed by the Commission.

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REPLY COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") submits these comments in reply to the comments filed by other parties with respect to the Notice of Proposed Rulemaking ("NPRM") released by the Commission on February 17, 1995. The overwhelming majority of commenters support the Commission's adoption of an effective market access test to protect the U.S. public interest. As those comments and these reply comments demonstrate, the Commission should promptly implement the effective market access standard proposed in the NPRM.

I. INTRODUCTION

More than fifty parties filed comments in this proceeding. The overwhelming majority (at least 30) -- including U.S. customers, U.S. resellers, U.S. facilities-based carriers, a foreign carrier and a foreign government -- believe the Commission should adopt an effective market access standard in order to maintain and promote competition in the U.S. international services market. Citicorp, the Motion Picture Association of America, the SDN Users Association (representing more than 435 large users of domestic

and international telecommunications) and the Telecommunications Resellers Association (representing more than 300 resale carriers) support an effective market access test.¹ As the Telecommunications Resellers Association states:

TRA members wholeheartedly agree that foreign market liberalization is a prerequisite to the achievement of global competition. As the Commission has recognized, barriers to competitive entry within a given country not only deny the citizens of that country the benefits of competition, but adversely impact U.S. carriers, U.S. business and U.S. citizens, as well as the global market as a whole. TRA also supports the Commission's proposal to utilize access to U.S. markets made available to foreign carriers through Section 214 authorizations as a tool to promote effective competition in the global telecommunications marketplace. (Citations omitted.)²

Even France Telecom supports the Commission's effective market access test in principle, while arguing that it should not apply to non-controlling minority interests.

The Commission's proposal to consider the extent of market access available to U.S. firms in its evaluation of foreign carrier applications to enter the U.S. market is endorsed by the National Telecommunications and Information Administration ("NTIA"), on behalf of the Executive Branch. The proposed effective market access standard also is endorsed by France's Directorate General of Post and Telecommunications ("DGPT"),

¹ Other supporters of an effective market access standard for common carriers include: ACC Global; ARINC; AirTouch; AmericaTel; Professor Jonathan D. Aronson; BTNA; C&W International; Cellular Telecommunications Industry Association; Columbia Communications; Communications Telesystems International; Directorate General of Posts and Telecommunications - France; Domtel; Economic Strategy Institute, fONOROLA; France Telecom; GTE; E. F. Johnson; Loral/Qualcomm Partnership; MCI; MFS International; Motorola; NTIA; Orion Atlantic; Panamsat; Roamer One; Transworld Communications; and TRW.

² TRA Comments at 3-4.

which comments that the Commission's proposed approach is "a positive step towards open telecommunications markets."³

Not surprisingly, those companies that seek to enter the U.S. international services market while maintaining closed home markets oppose an effective market access standard. Deutsche Telekom ("DT"), Teleglobe Canada ("Teleglobe"), and Telefonica Larga Distancia de Puerto Rico ("TLD") thus oppose any adoption by the Commission of an effective market access test to protect U.S. customers from the leveraging of foreign monopoly power.

DT and TLD erroneously contend that the Commission lacks jurisdiction to adopt an effective market access standard.⁴ As the Comments of the NTIA, MCI, TRA and AT&T make clear, the Commission has ample authority under the Communications Act to adopt measures necessary to promote and maintain competition in the provision of U.S. international services. The proposed effective market access standard is simply an amplification of prior Commission precedent to consider the market opportunities in the foreign market as part of its public interest analysis under Section 214 and Section 310(b)(4). Adoption of this approach would complement the legal authority provided under Section 7 of the Clayton Act, as well as the Commission's mandate to regulate and

³ DGPT Comments at 1.

⁴ Sprint contends that the Commission should not attempt to "stretch" Section 214 to encompass an effective market access test, but instead should protect U.S. competition through rules of general applicability. Sprint Comments, at 10-11. Sprint thus appears to concede the Commission's jurisdiction to establish an effective market access standard.

promote foreign communications, to protect U.S. international services competition from the anticompetitive consequences where a foreign carrier seeks to acquire a non-controlling equity interest in a U.S. carrier.

Other commenters do not seek effective access to foreign telecommunications markets, but rather demand a guarantee of success in those markets. ACC Global (“ACC”) and MFS International (“MFSI”) thus would go far beyond the Commission’s proposal and would prohibit any U.S. carrier from entering into any arrangement with a foreign carrier, even a non-equity, non-exclusive arrangement, unless the foreign market were sufficiently liberalized such that there were no substantial entry barriers, and unless ACC and MFSI were guaranteed immediate access to any innovations negotiated by the parties. Such a test, however, would hurt, rather than promote, competition by removing any incentive for a carrier to meet evolving customer needs within the existing international services framework.

The broad base of support for an effective market access standard, contrasted with the objections of those few who say it does not go far enough and the protestations of those few who say it goes too far, demonstrates that the Commission properly seeks to exercise its authority to protect U.S. competition and U.S. customers. Further, the overwhelming support for an effective market access standard, especially the support by U.S. customers, demonstrates that the U.S. public interest demands prompt adoption of the Commission’s effective market access standard. AT&T therefore urges immediate adoption of the effective market access standard proposed by the Commission.

II. THE COMMISSION HAS JURISDICTION TO ADOPT AN EFFECTIVE MARKET ACCESS STANDARD

Contrary to the arguments advanced by two foreign-owned carriers that the FCC's proposal impermissibly infringes on Executive Branch authority to develop and implement U.S. trade policy, NTIA confirms that the Commission may properly exercise jurisdiction in this area. As NTIA explains that the Commission has independent jurisdiction under the Communications Act to protect and promote competition in U.S. international telecommunications services through adoption and implementation of an effective market access standard. DT and TLD are unpersuasive in their contentions that the proposed test would breach the constitutional separation of powers and compromise U.S. efforts to obtain a multilateral agreement opening global telecommunications markets. Not only is the proposed test a proper and appropriate exercise of the Commission's authority, as NTIA makes clear in its Comments, but it will complement the goals of trade negotiators that seek open markets.⁵

A. The Commission Has Jurisdiction under the Communications Act to Protect U.S. Carriers and their Customers from Anticompetitive Abuse

As NTIA, MCI, TRA and AT&T demonstrate in their Comments, the Commission has clear jurisdiction to consider the availability of effective access to foreign markets as part of its public interest determinations under Sections 214 and 310(b)(4), and it has

⁵ DGPT Comments at 1. See NTIA Comments at 15, 20.

previously exercised this jurisdiction in a manner similar to that proposed in the NPRM.⁶ The Commission's promulgation of an effective access test is required by its statutory obligation to promote the availability of interstate and foreign communications through creating a "rapid, efficient Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges"⁷ Further, the prevention of anticompetitive conduct in the provision of international services or facilities is an integral part of the Commission's public interest mandate to protect competition, of its authority to enforce the Clayton Act, and of its authority to ensure reasonable, nondiscriminatory practices and services.⁸

The Commission frequently has considered the availability of effective access to foreign markets as part of its Section 214 and Section 310 public interest determinations. The Commission's 1985 decision to apply dominant carrier regulation to the U.S. affiliates of foreign carriers was predicated on the Commission's concern with the entry barriers

⁶ As MCI observes, "the Commission clearly has authority under Section 214 to employ the effective market access standard and to balance other public interest concerns in reaching an entry decision." MCI Comments at 6-7. *See also* TRA Comments at 8-9. MCI also endorses the incorporation of the effective market access standard as part of the Commission's Section 310(b)(4) public interest analysis.

⁷ *See* 47 U.S.C. § 151.

⁸ *See* 47 U.S.C. § 202(a), (b); 47 U.S.C. § 702(d); 15 U.S.C. § 21. *United States v. F.C.C.*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (competition is an important part of the public interest standard under Section 214). The Commission also has emphasized that "our general mandate, and specifically our mandate under Section 214, calls for . . . a balancing of all relevant factors in assessing the public interest." *AT&T Application for Northeast Corridor Project*, 89 F.C.C. 2d 1168, 1178 (1982). *See also* *Telegraphers Union v. United States*, 87 F.Supp. 324 (D.D.C.), *aff'd per curiam*, 338 U.S. 864 (1949).

and discriminatory treatment that U.S. carriers face in foreign markets.⁹ More recently, the *International Resale Order*¹⁰ acknowledged the need for equivalent market access to protect U.S. consumers from the adverse consequence of one-way private line resale. Thus, the grant of a Section 214 authorization for the resale of international private lines interconnected to the public switched network depends on whether U.S. carriers are afforded opportunities in the relevant foreign market equivalent to those available under U.S. law.¹¹ Further, in its public interest determinations under Sections 214 and 310 regarding foreign carrier entry into the United States, the Commission has consistently recognized the need for competition in foreign markets to prevent foreign monopoly carriers from taking anticompetitive action against U.S. carriers.¹² The Commission's public interest evaluations of foreign carrier Section 214 applications have also taken account of the adverse impact of asymmetrical market access on U.S. carriers' ability to provide international "end-to-end" services.¹³ In sum, the proposed effective market

⁹ See *International Competitive Carrier Policies*, 102 F.C.C.2d 812, 842 (1985); *Regulatory Policies and International Telecommunications*, 4 FCC Rcd. 7387, 7428 (1988).

¹⁰ *Regulation of International Accounting Rates*, 7 FCC Rcd. 559 (1991).

¹¹ See, e.g., *ACC Global Corp.*, 9 FCC Rcd. 6240 (1994).

¹² *Telefonica Larga Distancia de Puerto Rico*, 8 FCC Rcd. 106, 109 (1992) ("TLD Order"); *AmericaTel Corp.*, 9 FCC Rcd. 3993, 4000 (1994) ("AmericaTel"); *MCI Communications Corp., British Telecommunications plc*, 9 FCC Rcd. 3960, 3964 (1994) ("BT/MCP").

¹³ See *AmericaTel*, 9 FCC Rcd. at 3996. The Commission's analysis was "based on the criteria we have previously applied in ruling on application of foreign carriers to enter the U.S. telecommunications market." *Id.*

access test is wholly consistent with prior Commission decisions and equally supported by statute.

In like manner, and contrary to the assertion of DT,¹⁴ the Commission has statutory jurisdiction to apply an effective market access test to non-controlling investments by foreign carriers in U.S. carriers. The Commission has a statutory obligation to enforce Section 7 of the Clayton Act, which applies to the acquisition of “the whole or any part” of the stock or assets of another corporation where the effect of such acquisition may be substantially to lessen competition.¹⁵ In fulfilling that obligation, the Commission must seriously consider, as part of its public interest analysis, “the antitrust consequences of a proposal and weigh those consequences with other public interest factors.”¹⁶ Through its current rulemaking process, the Commission is doing precisely that -- considering the anticompetitive consequences of foreign equity interests in U.S. international carriers and proposing rules to mitigate the anticompetitive threat posed thereby.

¹⁴ DT Comments at 4-5. DT thus concedes, however, that the Commission has ample jurisdiction under Section 214 with respect to direct foreign carrier entry into the U.S. telecommunications market on a *de novo* basis or through acquisition of control.

¹⁵ 15 U.S.C. § 18. Section 11 of the Clayton Act (15 U.S.C. § 21) grants explicit authority to the Commission to enforce Section 7 with respect to “common carriers engaged in wire or radio communication.” As the Supreme Court has held, “[a] company need not acquire control of another company in order to violate the Clayton Act.” *Denver & Rio Grande Railroad Co. v. United States*, 387 U.S. 485, 501 (1967).

¹⁶ *United States v. F.C.C.*, 652 F.2d 72, 88 (D.C. Cir. 1980)(*en banc*).

The Commission previously has found that its mandate under the Communications Act is sufficiently broad to require the filing of a Section 214 application in the context of an acquisition that implicates Section 7 of the Clayton Act:

Section 11 of the Clayton Act authorizes the FCC to enforce compliance with Section 7 of the Clayton Act which specifically applies to transactions involving acquisition of stock.

Our conclusion that prior Commission consent is required in this case rests upon the basic premise that the Commission -- pursuant to Section 214 of the Communications Act and Section 11 of the Clayton Act -- must look to the underlying realities of the transaction at issue and not simply at its legal form.¹⁷

Our mandate to “regulat[e] interstate and foreign commerce by wire and radio” is sufficiently broad as applied to common carriers, to enable us to administratively review a merger involving such a carrier by requiring the filing and prior approval of a Section 214 application.¹⁸

The Commission’s *AmericaTel* decision confirms the Commission’s authority under the Communications Act and the Clayton Act to protect competition in the U.S. international services market by denying or conditioning entry to the U.S. market based on the state of competition in the foreign country. As the Commission stated in *AmericaTel*:

Our determination of whether and under what conditions to grant the *AmericaTel/ENTEL* Application . . . depends in part on the degree to which we find that market conditions and regulation in Chile are adequate to protect unaffiliated U.S. international carriers from potential discrimination by ENTEL-Chile or from other unfair competitive

¹⁷ *GTE-Telenet Merger*, 70 F.C.C.2d 2249, 2250 (1979).

¹⁸ *GTE-Telenet Merger*, 72 F.C.C. 2d 91, 108-09 (1979).

advantages that may accrue to ATA as a result of its affiliation with ENTEL-Chile.¹⁹

The Commission found that liberalization in Chile, together with additional regulatory safeguards, were sufficient to ensure that the entry of ENTEL-Chile into the U.S. international services market would not harm competition.²⁰

In short, the Commission has ample authority under both the Communications Act and the Clayton Act to implement an effective market access test to protect carriers and customers in the U.S. international services market against anticompetitive abuse.

B. The Commission's Exercise of Jurisdiction to Protect Competition through Implementation of an Effective Market Access Standard Does Not Infringe upon the Executive Branch's Responsibility for Trade Matters

As demonstrated above, the Commission's obligation to protect competition in the U.S. international services markets requires consideration of foreign market conditions and a grant of access to the U.S. market only when effective competition in the United States will not be compromised thereby. The Commission's obligation to exercise its

¹⁹ 9 FCC Rcd. at 4000 (emphasis added). The Commission explained that the entry into the U.S. market of a foreign carrier with a closed home market threatens competition in U.S. international telecommunications in two respects. *Id.* at 3996. First, such entry provides an incentive for the foreign carrier to abuse its foreign market power to disadvantage the U.S. carriers with which it now competes for U.S. originating traffic. Second, even if no such abuse takes place, the foreign carrier will have an unfair competitive advantage over those U.S. carriers with which it now competes because of its ability to originate traffic on both ends of the international route while the U.S. carriers can originate traffic only at the U.S. end. *Id.* The Commission therefore considered the existence of "effective opportunities to compete" in the foreign market in performing its Section 214 public interest analysis. *Id.*

²⁰ *Id.* at 4001.

authority in this manner is strongly endorsed in the comments made on behalf of the Executive Branch by NTIA as coordinator of an interagency group comprising the Departments of Commerce, Defense, Justice, State, Treasury and the Office of United States Trade Representative. While noting that the Commission's authority overlaps in some areas with Executive Branch authority and that the Commission therefore should act with "deference and coordination with the Executive Branch," NTIA fully supports the Commission's application of the effective market access test:

[T]he Commission . . . may consider the extent to which foreign telecommunications markets are open to competition in determining the need for regulation of the international services of U.S. carriers with a foreign affiliation, as it already does under its dominant carrier policies, or in determining whether Section 214 authorizations should be granted for investment in a U.S. carrier amounting to a transfer of control. Subject to the requirement for deference to and coordination with the Executive Branch, the Commission may decline to grant a Section 214 authority entirely or partially if this would promote the interest of the public and international telecommunications services. For example, such a denial may be warranted if it would accelerate the introduction of competition to foreign telecommunications monopolies or dominant carriers or otherwise inhibit the ability of U.S. [sic] carriers to exercise market power in the provision of international services between the United States and the home countries of such carriers.²¹

NTIA also agrees "that it is appropriate for the Commission to liberalize its approach to Section 310(b)(4) by signaling that foreign entities that open their markets to U.S. companies may have increased investment opportunities in U.S. radio licenses."²²

²¹ NTIA Comments at 15 (emphasis added).

²² *Id.* at 19.

DT's and TLD's contentions that the Commission's proposed test would impermissibly encroach on Executive Branch authority are thus without merit. The agencies with Executive Branch authority for, *inter alia*, trade and foreign affairs acknowledge that the Commission may seek to open foreign telecommunications markets to competition where this is necessary to protect competition in international telecommunications, provided that the Commission acts in consultation and coordination with the Executive Branch.²³ The framework set forth in the NPRM, under which the Commission proposes to consult with the Executive Branch as part of its consideration of additional public interest factors, is fully consistent with NTIA's recommendations.²⁴

As NTIA's Comments confirm, TLD is equally mistaken in its assertion that the Commission somehow exceeds its authority and breaches the constitutional separation of powers if it undertakes actions that could "influence the behavior of foreign governments."²⁵ Prior Commission decisions have had precisely that effect -- and properly so. Notably, the Commission adopted its equivalency requirement, which expressly conditions the grant of Section 214 authorizations for the provision of basic

²³ Similarly, in Comments filed in an earlier Commission proceeding, NTIA stated that "the FCC should continue to take U.S. trade policy into account." The Commission was merely precluded from undertaking "unilateral retaliatory action" or actions "solely on trade grounds." *Regulatory Policies in International Telecommunications*, CC Docket No. 86-494, Comments of the National Telecommunications and Information Administration (filed April 17, 1987) at 5, 6.

²⁴ NPRM at 45.

²⁵ *TLD Comments* at 19.

switched services over resold international private lines upon foreign market conditions.²⁶ There has been no contention that the Commission has engaged in trade negotiations, or otherwise exercised “trade” authority in an impermissible manner, by conditioning Section 214 authorizations in this way. Recognizing this inconsistency, TLD unconvincingly attempts to distinguish the Commission’s equivalency requirement because it “safeguard[s] the U.S. market”²⁷ -- without acknowledging that this is the very function that the effective market access test would perform.

Nor is there any inconsistency between the proposed effective market access test and the Telecommunications Trade Act of 1988, as DT and TLD suggest.²⁸ Indeed, as AT&T noted in its Comments, that legislation endorses the requirement for effective access to foreign telecommunications market as a condition of access to the U.S. market.²⁹ While the actions the President and the United States Trade Representative

²⁶ Indeed, significant and relevant regulatory changes occurred in the foreign market during the pendency of one recent international private line resale application considered by the Commission. *ACC Global Corp.*, 9 FCC Rcd. 6240 (1994). During that proceeding, the U.K. regulator established a regulatory program under which new interconnection arrangements were to be made available to competitive carriers.

²⁷ TLD Comments at 19.

²⁸ See DT Comments at 19-22; TLD Comments at 11-12.

²⁹ The Congressional findings contrast extensive government intervention in foreign markets with the open U.S. telecommunications market and the “growing imbalance in competitive opportunities” for telecommunications trade. 19 U.S.C. § 3101(a). Unless this imbalance is corrected, the U.S. “should avoid granting continued open access” to the U.S. market. *Id.*

were directed to undertake in that legislation are consistent with the approach the Commission now proposes, they are entirely separate in nature and, indeed, highlight the different and complementary roles played by the President and the United States Trade Representative as U.S. trade negotiators, and by the Commission as a regulatory body. Unlike the Commission's proposed test, the Telecommunications Trade Act prescribed a proactive program to identify and remove foreign trade barriers in telecommunications.³⁰ In contrast, application of the effective market access test is triggered only by foreign carrier applications to enter the U.S. market and focuses on those foreign market conditions that are necessary to protect competition in the United States. The Commission's role is essentially reactive in nature and, in contrast to the wide range of retaliatory actions that the President was authorized to take, the Commission may only deny the relevant application if effective market access does not exist. Moreover, to the extent that any conflict does arise between the roles of the Commission and the Executive Branch, it can be handled through the coordination and consultation with the Executive Branch discussed in NTIA's Comments.

³⁰ The legislation required the United States Trade Representative to identify priority foreign countries and required the President to enter into negotiations for the purpose of entering into bilateral or multilateral trade agreements. If the President was unable to enter into an agreement with a priority foreign country achieving the negotiating objectives set forth in the Statute by the close of the negotiating period (which terminated in early 1990, and could be extended for two one year periods), the President was authorized to take certain retaliatory actions. 19 U.S.C. § 3105.

C. The Proposed Rule Is Consistent With Multilateral Efforts To Open Markets

NTIA's endorsement of the Commission's approach also rebuts claims that the proposed test would be inconsistent with U.S. participation in multilateral trade negotiations under the General Agreement on Trade and Services ("GATS"). NTIA's Comments reflect the views of the United States Trade Representative, the Executive Branch agency that represents the United States in the World Trade Organization and negotiates multilateral trade agreements. As noted above, the Comments filed by NTIA fully support the obligation of the Commission to use its Section 214 authority to protect competition in U.S. international services and to provide increased investment opportunities under Section 310(b) to countries with open markets.³¹

Through these policies, the Commission would be implementing the market opening policy described by Vice President Gore in his recent speech to the G-7 Ministerial Conference:

Whether by new law or new legislation, we intend to open foreign investment in telecommunications services in the United States for companies of all countries who have opened their markets.³²

³¹ NTIA Comments at 11, 15. The Commission's proposed consultation with the Executive Branch will ensure that Commission actions are consistent with U.S. international legal obligations.

³² Speech at G-7 Ministerial Conference, Brussels, Belgium, February 25, 1995.