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

FCC 95-475

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

DEC 5 11 18 AM '95
FCC MAIL SECTION

REPORT AND ORDER

Adopted: November 28, 1995 Released: November 30, 1995

By the Commission: Commissioners Barrett and Ness issuing separate statements.

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I. INTRODUCTION

1. With this *Report and Order*, we adopt standards for regulating the entry of foreign carriers into the United States market for international telecommunications services. This *Report and Order* explicitly sets forth the entry criteria we believe are necessary to promote effective competition in the U.S. market for these services, including global, seamless network services. Effective competition means competition among service providers in a market that benefits consumers by expanding service offerings, promoting development of innovative technology, and lowering prices. We do not believe that effective competition will occur if foreign carriers that continue to hold market power in foreign markets are allowed unlimited access to the U.S. market. We seek to ensure the public interest benefits of effective competition through application of public interest criteria that consider the availability of opportunities for all U.S. carriers to innovate in the provision of international services, including through entry to foreign markets, and that limit the ability of dominant foreign carriers to leverage their market power into the U.S. international services market. We believe that our new standards may also encourage other countries to remove barriers to competitive entry in their international telecommunications services markets.

2. As part of our overall public interest analysis under Section 214 of the Communications Act,[1] we will examine whether effective competitive opportunities exist for U.S. carriers in the destination markets of foreign carriers seeking to enter the U.S. international services market through affiliation with a new or existing U.S. carrier. Similarly, in deciding whether it is in the public interest to permit foreign investment in licensees of common carrier radio facilities in excess of the benchmarks contained in Section 310(b)(4) of the Act,[2] we will examine whether foreign markets offer effective competitive opportunities to U.S. entities. We note that this approach is fully consistent not only with our existing jurisdiction under Section 310, but also with telecommunications bills currently

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1 47 U.S.C. § 214 (1988).

2 47 U.S.C. § 310(b)(4)(1988).

pending in Congress which would specifically incorporate an effective competitive opportunities analysis as part of a Section 310(b)(4) determination.[3]

3. Our effective competitive opportunities analysis under Section 214 of the Act will focus first on the legal framework for entry into the international basic services market by U.S. carriers in the destination markets where the applicant has market power. If there are no legal barriers to entry, we also will consider the practical ability for U.S. carriers to compete in those markets. We will apply the effective competitive opportunities analysis to foreign carriers seeking to provide facilities-based or resale service in the United States. Our analysis under Section 310 is similar to that under Section 214, but with some important distinctions. Our public interest analysis under Sections 214 and 310 also will continue to consider additional public interest factors, including the general significance of the proposed entry to the promotion of competition in the U.S. communications services market, the presence of cost-based accounting rates (under Section 214), as well as national security, law enforcement issues, foreign policy, and trade concerns brought to our attention by the Executive Branch.

4. For purposes of implementing this entry standard, we adopt a new definition of "affiliation" and modify our definition of "facilities-based" carrier. We now define affiliation as an ownership interest of greater than 25 percent, or a controlling interest at any level, in a U.S. carrier by a foreign carrier. This definition of affiliation will apply both for purposes of determining when to apply the effective competitive opportunities analysis and of determining the regulatory status of all affiliated carriers, including U.S-based carriers that invest in a foreign carrier. We modify our definition of a "facilities-based carrier" to include any carrier that holds an ownership, indefeasible-right-of-user or leasehold interest in a U.S. international facility.

5. In this *Report and Order,* we also modify the safeguards that we apply to foreign-affiliated carriers regulated as dominant under our *International Services* decision.[4] And we extend our modified dominant carrier safeguards to U.S. carriers on particular routes where they are engaged in a co-marketing or other arrangement with a dominant foreign carrier, and such arrangement presents a substantial risk of anticompetitive effects in the U.S. market for international telecommunications services.

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[3] Our action here is within the discretion granted us under the current statute, but does not go so far as the proposed language in the pending bills. Both the House and Senate have passed bills which would authorize the Commission to incorporate an effective competitive opportunities analysis in Section 310(b)(4) determinations, but both bills also would amend Section 310 more broadly. *See* S 652, § 303; HR 1555, § 302. *See also, infra* Section V.

[4] *Regulation of International Common Carrier Services,* 7 FCC Rcd 7331 (1992) (*International Services*).

II. COMMISSION GOALS

6. In the *Notice*, we set out three goals of our regulation of the U.S. international telecommunications market: (1) to promote effective competition in the global market for communications services; (2) to prevent anticompetitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their communications markets.[5] We stated our belief that establishing an effectively competitive global communications market could result in reduced rates, increased quality, and new innovative services for U.S. consumers, including the availability of global communications services. We emphasized that prevention of anticompetitive conduct in the provision of international services or facilities would be a necessary step in achieving effective competition. We observed that unrestricted entry into the U.S. international telecommunications market by foreign carriers from closed markets presents a risk of anticompetitive effects in U.S. markets, particularly the high-end market for global network services. Therefore, we tentatively concluded that another key to promoting the public interest by creating effective competition is foreign market liberalization.

7. Over fifty parties filed comments and thirty five parties submitted reply comments in this proceeding.[6] Our goals received overwhelming support from the commenters.[7] Even many commenters who oppose the means by which we seek to achieve those goals comment favorably on them. Some commenters have concerns with the third goal of encouraging foreign countries to open their telecommunications markets. Deutsche Telekom, for example, argues that, if safeguards are fully capable of preventing anticompetitive conduct, it is difficult to see why effective competition hinges upon the opening of foreign markets.[8]

8. We adhere to our goals as stated in the *Notice*, with this clarification: our primary purpose in adopting entry criteria under Sections 214 and 310 of the Act is to promote effective competition in the U.S. telecommunications services market, particularly the market for international telecommunications services. As discussed *infra* in Section VI, several commenters read our proposed primary goal of promoting effective competition in the "global" market as extending beyond our jurisdiction. We clarify that our regulatory focus under Section 214 is on the U.S. international telecommunications services market, which consists of all the routes between the United States and foreign countries. This market

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5 *Market Entry and Regulation of Foreign-affiliated Entities*, Notice of Proposed Rulemaking, 10 FCC Rcd 4844 (1995) (*Notice*).

6 *See Appendix A* for a list of parties submitting Comments and Reply Comments.

7 *See e.g.*, NYNEX Comments at 3; AT&T Comments at 1; MFSI Comments at 1; BTNA Comments at 2; fONOROLA Comments at 4; LDDS Comments at 1; European Union Reply Comments at 3.

8 Deutsche Telekom Comments at 24.

includes the U.S. end of the market for global, seamless network services (collectively referred to herein as the U.S. international services market).

9. In supporting our goals, commenters agree that effective competition in the U.S. international services market promotes the opportunity for U.S. consumers to choose among multiple suppliers based on innovative offerings, service quality and efficiencies, and price competitiveness. Our concern for the achievement of the full range of these benefits is consistent with competition objectives that we have sought to achieve in a number of proceedings, both domestic and international, over many years.[9] We have repeatedly found that, in a competitive environment, market forces can provide the public the statutorily mandated protection against unreasonably high rates and undue discrimination; that is, marketplace forces can replace regulation and make unnecessary burdensome regulatory requirements for both non-dominant carriers and the Commission. Where we can reduce our regulations because of effective competition, carriers are better able to respond to consumer demand for innovative services at the lowest reasonable price.[10]

10. Effective competition directly advances the public interest and the Commission's paramount goal of making available a rapid, efficient, worldwide wire and radio communication service with adequate facilities at reasonable charges.[11] Competitive entry alone, however, is not enough to achieve all the desired public interest benefits in the most effective manner. Such entry must occur within a framework that ensures effective competition. In this proceeding, we address our concern that, absent such a framework, new entry into the U.S. market by foreign carriers could increase concentration or otherwise extend existing monopoly power, threatening the loss of some or all of the desired consumer benefits.

11. Over the past few years, international telecommunications markets have begun to move rapidly away from a model of correspondent national monopolies to a different model that includes multiple national carriers and a variety of international ventures and provisioning arrangements to meet sophisticated user needs for global connectivity. Foreign domestic markets are also undergoing critical transformations with increasing privatization

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9 *See, e.g., Regulation of International Common Carrier Services,* 7 FCC Rcd 7331 (1992); *Telefonica Larga Distancia de Puerto Rico,* 8 FCC Rcd 106 (1992); *BT/MCI Declaratory Ruling and Order,* 9 FCC Rcd 3960 (1994); *AmericaTel Corporation,* 9 FCC Rcd 3993 (1994). *See also Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, First Report and Order,* 85 FCC 2d 1 (1980); *Second Report and Order,* 91 FCC 2d 59 (1982); *Third Report and Order,* Mimeo No. 012, released October 6, 1983, 48 Fed. Reg. 46,791 October 15, 1983; *Fourth Report and Order,* 95 FCC 2d 554 (1983); *Fifth Report and Order,* 98 FCC 2d 1191 (1984); *Sixth Report and Order,* 99 FCC 2d 1020 (1985), *rev'd MCI vs. FCC,* 765 F. 2d 1186 (D.C. Cir. 1985).

10 *Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, First Report and Order,* 85 FCC 2d at 14.

11 47 U.S.C. § 151.

and liberalization. Thus, the international services market is in a period of transition in the general direction of competition.

12. As in all periods of transition, there is a great deal of diversity and asymmetry. In many countries, even those moving toward competition, significant monopoly control, or control over bottleneck services and facilities, continues to be held by national carriers.[12] Movement toward competition is being handled in different countries on different timetables and in different ways. Also, in many countries regulatory processes are new and competitive safeguards are just being developed. Against this backdrop, we also see increasing international joint ventures, alliances and co-marketing arrangements, many of which involve horizontal mergers or other combinations that include national carriers that continue to hold monopoly power or other dominant market positions.

13. This proceeding focuses on two important sets of preconditions for effective competition in this changing environment. First, effective competition requires regulation that precludes undue discriminatory and exclusionary behavior. Our international regulatory policies have long addressed the ability of carriers to abuse their market power on the foreign end of U.S. international routes to the detriment of U.S. consumers. Because a foreign carrier can abuse its market power with or without a U.S. affiliate, we have sought to prevent foreign carriers from "whipsawing" or extracting concessions from U.S. carriers through, for example, our international settlements policies.[13] We also have previously recognized that a foreign telecommunications entity that has investments in a U.S. carrier could use its foreign monopoly power to benefit its U.S. affiliate, to the disadvantage of other U.S. carriers. We have applied dominant carrier regulation in such circumstances as a safeguard against these abuses. [14] Our regulation of discriminatory and exclusionary behavior in these instances has sought to control the potential misuse of monopoly power while maintaining the benefits of competitive entry.

14. Second, effective competition requires that carriers have the ability to compete through forming new organizations and new means of providing service. In this regard, international alliances or affiliations themselves may be positive innovations in that they may bring important consumer benefits of efficiency and service innovation in international services. However, liberalization initiatives and new global opportunities create incentives for carriers to find more profitable ways to participate in international markets. For existing

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12 "Bottleneck services or facilities" are those that are necessary for the delivery of international services, including inter-city or local access facilities on the foreign end.

13 *See Implementation and Scope of Uniform Settlements Policy for Parallel International Communications Routes, Report and Order*, CC Docket No. 85-204, 51 Fed. Reg. 4736 (Feb. 7, 1986), *Reconsideration*, 2 FCC Rcd 1118 (1987), *Further Reconsideration*, 3 FCC Rcd 1614 (1988). *See also, Regulation of International Accounting Rates, Phase I, Report and Order*, 6 FCC Rcd 3552 (1992), *on recon.* 7 FCC Rcd 8049 (1992).

14 *See International Services*, 7 FCC Rcd 7331 (1992).

dominant carriers, incentives are intensified to enter into combinations and other arrangements that will preserve current market shares and protect against competitive pressures. Such combinations may hinder effective competition in the U.S. international services market if, due to the dominance of strategic partners in foreign markets, other U.S. international carriers are precluded from competing because they have no possibilities for forming similar organizations or offering similar consumer benefits. We believe it is important to ensure that major organizational innovations take place in an environment where such innovations can lead to new forms and dimensions of competition, rather than to the establishment and entrenchment of monopoly power.

15. We disagree with Deutsche Telekom's assertion that safeguards, absent open competition in foreign markets, can adequately promote an effectively competitive market for the provision of U.S. international services. Competitive safeguards can be used to prevent carriers with market power from leveraging that market power into an adjacent competitive market to the disadvantage of competition and, ultimately, consumers. We are not, however, convinced that our regulatory safeguards, standing alone, are the optimal way to ensure that entry, particularly facilities-based entry, by a foreign carrier on routes where it has bottleneck control will preserve and promote competition in the U.S. international services market. Effective competition in such circumstances depends upon the ability of U.S. carriers to participate in a competitive market on the foreign end. If there is no opportunity for U.S. participation in competitive markets abroad, then the benefits of providing international service on an end-to-end basis will flow solely to a dominant foreign carrier and its U.S. affiliate. The foreign carrier has the competitive advantage, not necessarily because of any superior business acumen, responsiveness to customers, or technological innovation, but because of its protected status in its home market. As a result of this advantage, consumers of international services do not receive the maximum benefits of reduced rates, increased quality, and innovation.

16. In our view, full facilities-based competition on the foreign end of a U.S. international route is ultimately the most potent safeguard against anticompetitive effects from the entry of a foreign carrier in the U.S. international services market. Our goal of promoting effective competition in the context of foreign carrier entry into the U.S. international market is thus best served by considering the extent to which foreign countries have opened their markets to U.S. carriers. Only with effective opportunities to compete on the foreign end can both the benefits of foreign carrier affiliation and the prevention of anticompetitive conduct actually be achieved.

17. Our primary goal is, as proposed, to advance the public interest by promoting effective competition in the U.S. telecommunications services market, particularly the market for international services. We also reaffirm our goals of preventing anticompetitive conduct in the provision of international services or facilities, and encouraging foreign governments to open their communications markets.

18. As discussed in detail below, our goal to promote effective competition is best served by adoption of an effective competitive opportunities test as part of our overall public interest analysis of Section 214 applications filed by foreign carriers or their affiliates seeking to operate as international carriers on affiliated routes. Our goal of promoting effective competition also is served by adopting a similar analysis in our public interest analysis of applications for common carrier radio facilities that fall within the scope of Section 310(b)(4) of the Act.

III. PUBLIC INTEREST ANALYSIS UNDER SECTION 214

19. We adopt in this *Report and Order* an effective competitive opportunities test that will serve as an important element in our public interest analysis of Section 214 applications filed by foreign carriers or their U.S. affiliates (collectively referred to here as "foreign carriers") seeking to provide U.S. international services on routes where the foreign carriers have market power on the foreign end. We invoke our authority under Sections 1 and 214 of the Act[15] to review and apply this test to all planned investment in U.S. carriers by foreign carriers above a 25 percent equity threshold, or a controlling interest at any level. Under this test, we will examine the ability of U.S. carriers to compete effectively as international carriers in destination foreign markets where the foreign carrier has market power.

20. This test is similar to the effective market access test proposed in our *Notice*, but with some important distinctions. We have changed the proposed standard from "effective market access" to "effective competitive opportunities." This term signals our focus on ensuring that a genuine potential exists for competition, without going so far as to guarantee market access for U.S. carriers. In addition, we have narrowed our inquiry to allow for a more predictable yet flexible application of the test. We have identified both the factors for evaluating effective competitive opportunities and other factors relevant to our overall public interest analysis under Section 214. Our objective is to adopt a clear entry standard to replace our *ad hoc*, case-by-case approach to foreign carrier entry into the U.S. international services market.

21. All applicants filing for Section 214 authority to provide international services must certify whether they are affiliated with a foreign carrier in their proposed destination markets. We will apply the effective competitive opportunities test on a route-by-route basis. We will consider the existence of effective competitive opportunities only in reviewing applications filed by a foreign carrier to operate as a U.S. carrier to destination markets where the foreign carrier has market power. Where the affiliated foreign carrier does not have market power in a particular destination market, we will not apply the effective competitive opportunities test in reviewing the public interest merits of the carrier's Section 214

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[15] *See* 47 U.S.C. §§ 151, 214 (1988).

application on that route.[16] We will allow the carrier to serve that market, unless there are other public interest factors that warrant otherwise.[17]

A. Adoption of an Effective Competitive Opportunities Analysis

22. In the *Notice*, we stated that our current *ad-hoc*, case-by-case approach may not adequately address the questions of market access and potential anticompetitive effects that arise in today's evolving telecommunications markets where carriers seek to operate on both ends of international circuits.[18] Our current approach also has caused some uncertainty in the market because of the lack of a clear standard for evaluating applications by foreign carriers with different degrees of market power. To resolve those issues, we initiated this proceeding and proposed an effective market access test as part of our public interest analysis under Section 214.

23. We proposed that, if a foreign carrier desires to enter the U.S. international facilities-based market either directly or through an affiliation or investment in an authorized U.S. carrier, we would consider whether there was effective market access in the primary market, or markets, of the foreign carrier seeking entry. We defined effective market access as the ability for U.S. carriers, either currently or in the near future, to provide basic, international facilities-based telecommunications services in these markets. In order to make this determination, we proposed to examine six factors we believed to be indicative of effective market access.[19] None of these factors would be dispositive of this determination. We defined "primary markets" 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."[20]

24. We further proposed that, once we reviewed the effective market access element of our public interest analysis, we would assess other public interest factors that might weigh in favor of, or against, allowing entry in the U.S. international market.[21] Finally,

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16 For a discussion of application of the effective competitive opportunities analysis to resale, see *infra*, ¶ 139-148.

17 *See infra* ¶ 56.

18 *Notice* ¶ 23.

19 *See infra* ¶ 40.

20 *Notice* ¶¶ 40-43.

21 *Notice* ¶ 45; *infra* ¶ 56.

we proposed to solicit the views of the Executive Branch on the proposed foreign carrier's entry into the U.S. market.

Position of the Parties

25. Most commenters in this proceeding support the adoption of some variation of an effective market access test.[22] They believe that a market access test will help us achieve our goal of promoting effective competition. They also believe that by replacing the *ad-hoc* approach with a clear entry standard, we will add certainty and predictability to the Section 214 application process.[23] A significant number of commenters, however, oppose the specific proposal in the *Notice*.[24] They argue that the proposed standard would add uncertainty and delays to the application process.[25] In particular, a number of commenters express concern with our solicitation of the Executive Branch's views as a measure that would significantly delay the application process.[26] Some argue that we should expedite the process by establishing and publishing a timetable by which we will process all new and pending Section 214 international facilities-based applications.[27] Some of the commenters did not specifically support or oppose the adoption of an effective market access test, but rather reserved their comments for specific proposals within the *Notice*.

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22 These include: AT&T, ACC (expand to include alliances), ARINC, Ameritech, AmericaTel, Arch Communications Group, Professor Jonathan D. Aronson, BTNA, CTIA (limited Comments to 310(b)(4)), Citicorp, Columbia Communications Corporation, Communications Telesystems International, Economic Strategies Institute, French Government, GE American Communications (applicability to satellite services), GTE (only to the extent that it is flexibly applied), Department of Justice, K&S International Communications, Inc., Loral/QUALCOMM, MCI, MFSI, MPAA(favors multilateral approach, until then it supports effective market access), Motorola, NTIA (great deference should be given to the Executive Branch), PanAmSat, SDN Users Association, Telecommunications Resellers Association, Transworld Communications (U.S.A.), Inc.(exemption from any rules for small U.S. international carriers), and TRW (mainly comments on satellite issue).

23 *See e.g.*, BTNA Comments at 5 (a clear standard will lend predictability to business planning by carriers in the United States and abroad).

24 These include: British Government, Cable &Wireless, Inc. (unless significant changes are made), Deutsche Telekom, Domtel, fONOROLA (any effective market access test should be narrowly focused), France Telecom, German Government, Korean Government, LDDS, Mexican Government, TLD, NYNEX, Sprint, Teleglobe, Telex-Chile, S.A., US West.

25 Teleglobe Comments at 4; LDDS Comments at 9; British Government Comments at 1; Domtel Comments at 3, 5; NYNEX Comments at 2; U.S. West Reply at 8; France Telecom Comments at 8.

26 *See e.g.*,Telex-Chile Comments at 2; Domtel Comments at 3.

27 Teleglobe Comments at 11, 34; NYNEX Comments at ii, 3, 8; LDDS Comments at 11; European Union Reply Comments at 5.

26. A few commenters question whether we should adopt any effective market access entry standard for foreign carriers. As noted above, Deutsche Telekom argues that the competitive safeguards we have previously imposed on foreign carriers entering the U.S. market are sufficient measures to ensure effective competition.[28] It further states that these safeguards are a better way to promote competition than imposing barriers to entry. Several commenters also express concern that the adoption of an effective market access test would be viewed as a closing of the U.S. market and, potentially, invite retaliation by foreign governments.[29] For example, Teleglobe argues that foreign governments might react by delaying the removal of their own restrictions in the name of protecting their own national carriers from large U.S. carriers.[30] On the other hand, some commenters supporting the adoption of an entry standard argue that the test would open foreign markets by encouraging foreign governments to liberalize terms of entry into their markets.[31]

Discussion

27. The threshold issue is whether we should depart from our *ad-hoc* approach to processing applications by foreign carriers and adopt a market entry standard as part of our public interest analysis. We conclude that we should. An "effective competitive opportunities" analysis will serve the public interest significantly better than our current approach, while alleviating the main concerns of commenters opposed to adopting the proposed effective market access entry standard.

28. Adoption of the effective competitive opportunities test as one part of our overall public interest analysis under Section 214 will promote effective competition in the U.S. international services market in several ways. First, the effective competitive opportunities analysis will increase competition by explicitly setting forth the critical factors for foreign carrier entry into the U.S. market. The inadequacy of our *ad hoc* approach has become apparent in recent years as we have been presented with an increasing number of

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28 Deutsche Telekom Comments at 38. *See* France Telecom Comments at 21-22, 24. France Telecom argues that, with respect to any non-controlling investment in a U.S. carrier, the Commission should impose the same requirements as those imposed on MCI in connection with the BT/MCI transaction. *See also* TLD Comments at 38-41, Sprint Comments at vi, 34.

29 British Government Comments at 6; Deutsche Telekom Comments at 32-34, Reply at 20; Korean Government Comments at 1, 3; LDDS Comments at 5-8; SCT/Mexico Government Comments at 11-13; NYNEX Comments at 2, 5-8, 11, n. 24; Teleglobe Comments at 5-6; Telex-Chile Comments at 3, Domtel Comments at 2; U.S. West Reply at 9.

30 Teleglobe Comments at 24.

31 Ameritech Comments at 2; AT&T Reply at 25-28; Citicorp Comments at 2.

requests for approval of combinations between U.S. and foreign carriers.[32] In each of these cases, we considered the potential impact on international services markets and the appropriate means of best serving our competition goals. In each instance, we determined that the existence of competition on the foreign end was critical to a finding that the proposed affiliation would serve the public interest by fostering competition in U.S. international services markets. We anticipate additional proposals for new foreign investment and entry from countries with markets closed to competition or U.S. participation as well as from countries that have existing or emerging competition in international services.[33] The new principles and criteria we establish in this proceeding are intended to help us deal consistently with each of these cases. Instead of a case-by-case procedure that inherently creates uncertainty, we are establishing clear guidance as to the factors we deem necessary for effective competition to develop. The effective competitive opportunities test therefore facilitates and liberalizes entry into our market, creating new possibilities of well-financed competitors contesting for market share.

29. In addition to promoting the potential for more vigorous competition, the criteria of the effective competitive opportunities analysis spell out a better approach to addressing the potential for foreign carriers (or their U.S. affiliates) to unfairly leverage their market power in the U.S. market. As we explained above, we disagree with Deutsche Telekom when it contends that safeguards alone are adequate.[34] Safeguards by themselves are not as effective in achieving meaningful competition in the provision of U.S. international services as a market structure supported by competitive entry and safeguards on both ends of a particular international route. At a time when many countries are adopting regulatory reforms to permit competition in basic telecommunications services, it is possible for us to start moving beyond a reliance on safeguards to the more efficient and pro-competitive approach of encouraging competition. Our public interest mandate allows us to seek a comprehensive approach to increasing the level and quality of competition for U.S. consumers.

30. Adoption of an effective competitive opportunities analysis also will stimulate competitive entry on both ends of international routes. We believe that the ability of foreign carriers to serve, either directly or through an affiliation, an international route from the United States should provide a significant incentive to foreign governments who maintain rigid entry barriers, and foreign carriers who benefit from such barriers, to end such practices. As barriers to entry in foreign markets fall, foreign carriers will have greater incentives to

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32 For example, we have reviewed and approved, with conditions, the 20 percent equity investment of British Telecom plc ("BT") in MCI, and the 80 percent equity investment of ENTEL-Chile in AmericaTel. *See BT/MCI Order* 9 FCC Rcd 3960 (1994), and *AmericaTel Order* 9 FCC Rcd 3993 (1994). *See also Domtel Communications, Inc.*, FCC 95-377, released September 11, 1995.

33 A proposal for equity investment in Sprint by France Telecom and Deutsche Telekom is currently pending in a separate proceeding. *Sprint Corporation*, File No. ISP-95-002.

34 *See supra* ¶ 15.

work with U.S. carriers in delivering new services at lower prices. Thus, facilitating the added option of competition on both ends of international routes should promote competition in the U.S. market and thereby benefit U.S. consumers.

31. A key benefit of the effective competitive opportunities analysis we adopt here is that it liberalizes entry into the U.S. market. As modified, our approach applies an effective competitive opportunities test only to those situations that give rise to anticompetitive effects, i.e., destination markets where a dominant foreign carrier can leverage market power. Further, the standards created by the effective competitive opportunities analysis are ones which we also believe U.S. legal and regulatory systems must meet. We look for no more from others than we demand of ourselves. We believe that all governments and their consumers would benefit from encouraging entry while safeguarding against abuse of market power. But the choice of whether to permit competition, and thus meet the effective competitive opportunities test, is that of the foreign government.

32. Does our approach provide incentives for foreign carriers and governments to support liberalization? This rests on three factors -- the value of direct entry as an international carrier for new foreign entrants, the value of foreign investment in U.S. carriers for new entrants, and the value to foreign carriers of maintaining competitive parity with non-dominant carriers. There is good reason to believe that the option of entry into the U.S. telecommunications market is a significant advantage, especially for those who are trying to establish their U.S. market position largely through their own marketing organization. Direct entry on a facilities basis offers large foreign carriers maximum flexibility in pricing, service provisioning, and marketing. Entry on a resale basis offers carriers considerable flexibility to establish their brand presence in the U.S. market with minimal financial risk. Therefore, we believe that a foreign carrier would have a significant incentive to encourage its government to liberalize sufficiently to meet the effective competitive opportunities test for facilities-based or resale entry if that were necessary for the carrier to control an end-to-end network service.

33. There also is significant value in being able to establish a substantial investment relationship with a U.S. carrier. BT's investment in MCI and the proposed investment of France Telecom and Deutsche Telekom in Sprint are clear testimony that foreign carriers highly value (in the billions of dollars) even twenty percent shares of major U.S. carriers. Partnerships with U.S. carriers, cemented by large equity holdings, provide foreign carriers with lower cost options for pursuing the U.S. customer base. The partnerships also provide immediate access to the established customer base of the U.S. affiliate. And the partnerships greatly strengthen the capacity to offer the benefits of one-stop shopping for all global needs, including a single customized billing and cost control system for all global services, and specialized service and software designed to meet the special needs of the client. In short, these partnerships offer important strategic capabilities in a critical global market. And the ability to invest substantially in the U.S. affiliate/partner permits the foreign carrier to strengthen its partner's capabilities in the U.S. market while creating a management structure that better safeguards its competitive interests in the joint venture. In sum, the ability of a foreign carrier to acquire a substantial equity position in a

U.S. carrier can be an important advantage in a major world market. This advantage can provide a significant incentive for a foreign government to support liberalization.

34. A third incentive to seek to satisfy the effective competitive opportunities test is the desire of dominant foreign carriers to maintain parity in competitive entry with non-dominant carriers. The effective competitive opportunities test adopted here applies only to carriers with market power. Thus, it greatly simplifies entry into the U.S. market for non-dominant carriers of foreign countries. If dominant carriers are to match these entry opportunities, and the competitive strategies that they make possible, they have an incentive to support policy reforms in foreign countries that would satisfy the effective competitive opportunities analysis.

35. In sum, using our effective competitive opportunities analysis as part of our public interest determination allows us to maintain our open entry policy, but limits the ability of foreign carriers to leverage their market power to the benefit of their U.S. affiliates, and to the detriment of unaffiliated U.S. carriers and ultimately U.S. businesses and consumers. Not only does this promote competition in the U.S. international services market, it also encourages foreign governments to join in our efforts to promote an effectively competitive international telecommunications market. While we are encouraging foreign governments to open their markets to competition and believe that in most cases open markets bring the maximum consumer benefits, we are not taking any actions that force governments to open their markets. The choice to protect a national carrier or promote competition is one that each government must decide.

36. We recognize that our approach necessarily entails limiting the activities of certain competitors in U.S. markets. Specifically, we may prohibit foreign carriers (or their affiliates) that have market power from offering service along routes where they can exercise such power. Such action may reduce nominal competition in the U.S. market in the short term, but should ultimately increase the competitive options available to U.S. telecommunications users. In our judgment, the benefits of allowing these foreign carriers unlimited access into the U.S. international services market are outweighed substantially by the ultimate costs. Those costs are, first, the cost of regulating such entities on a case-by-case basis to prevent anticompetitive misconduct.[35] Second, allowing entry by foreign carriers with significant market power could deter entry by other U.S. carriers or from foreign carriers that face competition (or, at least, a liberalized regulatory and legal regime) in their own markets. By contrast, increased competition in foreign markets will create additional benefits

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[35] For example, in *BT/MCI Order*, 9 FCC Rcd 3960, 3973 (1994), this Commission imposed conditions on the acquisition by British Telecom plc ("BT"), a foreign entity with market power in the United Kingdom, of 20% of the stock of a U.S. interexchange carrier MCI. The U.S. Department of Justice ("DOJ") imposed additional, similar conditions. *United States v. MCI Communications Corp. and BT Forty-Eight Co. (NewCo)*, Case No. 1:94CV01317 (D.D.C. filed June 15, 1994), Final Judgment *passim*. Enforcing and monitoring these conditions entails, at a minimum, significant record-keeping by this Commission, DOJ, BT, MCI, and the latters' competitors. If any violation of these conditions is alleged, there will be additional litigation and enforcement expenses.

for the United States by facilitating the creation of jobs for U.S. citizens and investment opportunities for U.S. capital.

37. In response to those who argue that our proposed test will add delays to the process, we have refined our criteria for determining whether effective competitive opportunities exist. These refined criteria should assist us in making our determination in a timely and predictable manner by giving clear guidance on what we deem critical for approving an application. These modified factors can be applied flexibly, but also provide applicants guidance on what factors are relevant to consideration of their applications. We disagree with those commenters urging us to publish a timetable by which we must issue a final determination on international Section 214 applications. Establishing a timetable for disposing of international Section 214 applications would limit our ability to examine all the issues that affect the public interest. We will, however, work in the most expeditious manner to resolve complex and difficult issues.

38. We also believe that soliciting the views of the Executive Branch will not delay the process. The Executive Branch plays a significant role in assisting us with our review of important matters affecting the general public interest. We expect the Executive Branch review of foreign carrier applications to enter the U.S. market as international carriers to be done simultaneously with our review.[36] In addition, NTIA, commenting on behalf of the Executive Branch, states that, if the Executive Branch decides to respond to a particular Section 214 application, it would endeavor to do so within thirty days after the end of the pleading cycle.[37] Therefore, we believe that according deference to the Executive Branch's input on trade, foreign policy, national security and domestic law enforcement issues will not create any additional delays in the process. We believe our public interest analysis will benefit from such input by the Executive Branch.

39. We emphasize that the effective competitive opportunities test *and* additional public interest factors[38] collectively constitute our Section 214 public interest analysis for international service applications. The emphasis under this analysis will be on the ability of U.S. carriers to compete effectively in the provision of international facilities-based or resale services in particular foreign countries. If those opportunities do not exist, then the public interest is best served by denying a foreign carrier the ability to enter the U.S. market on a resale and/or facilities basis on such routes where the carrier has market power, absent the existence of other compelling public interest factors.

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[36] We will notify the relevant Executive Branch agencies upon receipt of Section 214 applications filed by foreign carriers or their affiliates as well as of notifications of foreign carrier investments in existing U.S. carriers. *See infra* ¶ 62.

[37] NTIA Reply Comments at 6. NTIA filed comments in this proceeding on behalf of the Departments of Commerce, Defense, Justice, State, Treasury, and the Office of United States Trade Representative.

[38] *See infra*, Section III.C.

B. Factors of the Effective Competitive Opportunities Analysis

40. We now address those factors that we will examine in making our determination whether effective competitive opportunities are available in the destination markets where the foreign carrier is dominant. In the *Notice*, we proposed the following criteria for determining effective market access: (1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those that the foreign carrier seeks to offer in the United States; (2) whether competitive safeguards exist in the foreign country to protect against anticompetitive and discriminatory practices, including cost-allocation rules to prevent cross-subsidization; (3) the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services; (4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities; (5) the protection of carrier and customer proprietary information; and (6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards.[39] We declined to make any of the factors dispositive, and we did not assign a specific weight to any one factor. An additional question raised in our *Notice* was whether effective market access must presently exist on a particular route or whether it is sufficient that it exist in the near future.

Position of the Parties

41. Some commenters are concerned that these factors are ambiguous, or that a specific weight is not accorded each factor.[40] AT&T argues that the factors proposed should be considered a "minimum" set of criteria for determining effective market access. It encourages us to expand these factors to include regulatory equal access, 800 number portability, and administration of the primary market's numbering plan by an independent regulator.[41] fONOROLA argues that a market entry test should be applied only to entities with statutory monopolies in foreign countries.[42] AT&T argues that the factors of the effective market access test must be present at the time of entry.[43] It discourages us from

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39 *Notice* ¶ 40.

40 *See, e.g.*, Deutsche Telekom Comments at 31 and n. 21; Domtel Comments at 4; France Telecom Comments at 16 (concern with inflexibility of test); BTNA Comments at 3 (while in support of the proposal, BTNA sought clarification of the first element of the analysis).

41 AT&T Comments at 29, 30-32.

42 fONOROLA Comments at 17.

43 AT&T Comments at 37-38; *see also* Letter, dated July 13, 1995, from Jacqueline D. Miller, Regulatory Director AT&T, to William F. Caton, Acting Secretary, Federal Communications Commission. *See also* Motorola Comments at 8.

considering factors that might lead to effective competition in the future because reliance on prospective events may unfairly handicap U.S. carriers in the interim.

Discussion

42. The factors of the effective competitive opportunities analysis will apply to our review of foreign carrier applications to provide international facilities-based or resale services. The first *de jure* factor, however, will vary depending on whether the applicant seeks authority to provide facilities-based service, switched resale, or private line resale. We discuss in this Section each factor as it applies to applications for facilities-based service. We address the factors of the effective competitive opportunities test for resale services in Section IV.B, *infra.*

43. To clarify the standard in the *Notice*, we have modified our criteria and made some of the original proposed factors illustrative of broader principles of effective competitive opportunities. We are placing a greater emphasis on the first factor of the test: the legal ability to provide international facilities-based service. This will provide a higher level of predictability to foreign carriers seeking entry. By providing a list of the other factors necessary for effective competition, we are providing foreign carriers with additional clarity when considering whether to invest in, or establish directly, a U.S. international facilities-based presence. Yet we respond to those parties that urge us to be flexible in applying our test by not making any particular criterion dispositive. Our test will not be, as fONOROLA urges, narrowed to focus solely on statutory monopolies; there are other factors that may produce anticompetitive concerns that we will not ignore.

44. The test we adopt examines first the legal, or *de jure*, ability of U.S. carriers to enter the foreign market and provide international facilities-based service. It then focuses on the actual conditions of entry, including the terms and conditions of interconnection, competitive safeguards, and the regulatory framework. We will focus on the overall effect of these four elements on the opportunities for viable operation as a facilities-based carrier in the foreign market. If, however, any of the factors of the effective competitive opportunities test are completely absent, we will deny authority to provide facilities-based service on that route, unless other public interest factors warrant a different result. We also will consider as relevant any evidence of existing competition in international facilities-based services. These factors should provide foreign carriers and governments clear guidance on what conditions we believe are necessary to ensure effective competitive opportunities.

45. We agree with the British Government that, if a market entry standard is too high, it might be viewed by other governments as a closing of the U.S. market.[44] For this reason, we rejected AT&T's original request for comparable market access. Our new approach does not deny access to the U.S. market. Rather, it requires a foreign carrier to demonstrate that effective competitive opportunities exist before it can serve a destination

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[44] British Government Comments at 6.

market where it has market power. This approach reflects our conclusion that we can best promote effective competition by focusing the application of our entry standard only on foreign carrier applications that present the greatest potential for anticompetitive conduct, and the least potential for effective competition, in the U.S. international market. We stress again that competition, not government regulation, is the most effective and, therefore the preferred, solution to eliminate the potential abuse of foreign market power.[45] Until countries eliminate the potential for abuse of monopoly power by opening their telecommunications markets to competition, we must preserve the right to act to protect U.S. consumers, businesses, and carriers from anticompetitive effects of foreign carrier entry.

46. We conclude that a favorable effective competitive opportunities finding can be made if such opportunities currently exist or if it is reasonably certain that they will be available in the near future. Much as we would prefer countries to have effective competitive opportunities today, we recognize that progress in this area takes time. Requiring all the factors of the effective competitive opportunities test to be present at the time of entry would be counterproductive. We are, however, concerned that intervening events could prevent or delay countries from following through on commitments to introduce competition if the implementation date is too far off. Under our approach, the foreign carrier must demonstrate that necessary measures will be adopted and implemented in the near future in order for us to reach a favorable determination about the destination country. Moreover, where commitments to effective competition have been made but not fully implemented, we will condition a carrier's Section 214 authority to serve a particular country upon these commitments being implemented in the near future.

1. Facilities-based entry

47. As noted, we will first determine whether U.S. carriers are permitted, as a matter of law, to offer international facilities-based services in the destination foreign country. This means that a U.S. carrier must have the legal right to obtain a controlling interest in a facilities-based carrier[46] and be able to originate and terminate International Message Telephone Service (IMTS) traffic. This does not mean, however, that a U.S. carrier must actually be providing a facilities-based IMTS service in the foreign market before we determine effective competitive opportunities exist; only that it not be legally prohibited from doing so. Even if the foreign-affiliated carrier seeks to provide a facilities-based service in the United States other than IMTS, such as private line service, we would still look to see if there are *any* legal restrictions on U.S. carriers' ability to enter the foreign country to provide facilities-based IMTS.[47] We believe that, unless and until U.S. carriers have the legal ability

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[45] *BT/MCI* 9 FCC Rcd at 3969-3970, note 88. *See also International Services* 7 FCC Rcd at 7333-34.

[46] Our definition of a facilities-based carrier is addressed in Section IV.A., *infra*.

[47] *See infra* ¶ 121 for a discussion of how this analysis focusses on the ability of a carrier to enter a foreign market and provide IMTS.

to acquire a controlling interest in a carrier that is able to provide facilities-based IMTS in the foreign market, the incumbent carrier will continue to have the ability to leverage economic power into the U.S. international services market. Absent the ability to obtain such an interest in a competitive enterprise, U.S. carriers cannot obtain a degree of bargaining power sufficient to constrain anticompetitive behavior by the incumbent, or respond effectively to competitive inroads made by the incumbent as a result of its unique ability to operate on an end-to-end basis. We do not believe that the legal ability to acquire a non-controlling interest is sufficient to achieve robust competition in the provision of U.S. international services on that route and the provision of global, seamless network services to U.S. customers.

48. If U.S. carriers are prohibited *de jure* from competing in the provision of facilities-based IMTS, then we would find there are not effective competitive opportunities on that route. For example, if there is a law, regulation, or policy prohibiting facilities-based competition in the provision of IMTS in a foreign country, effective competitive opportunities do not exist on that particular route. In this case, there would be no need to consider any other factors of the test for service on that route. The applicant would not be allowed to provide any type of international facilities-based service in any manner from the United States to that country, unless other public interest factors warranted a different result. If the foreign carrier's destination market has no explicit legal restrictions on entry, we will then examine the other factors of the effective competitive opportunities test to determine whether there are *de facto* effective competitive opportunities or whether measures are in place to allow such competition to develop in the near future.

2. Interconnection

49. The second factor we will examine as part of the effective competitive opportunities test is whether there exist reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services. In addition, there must be adequate means to monitor and enforce these conditions, *e.g.*, published charges. For example, should a foreign carrier operate as a dominant provider of local access services, its terms and conditions for interconnection should be publicly available on a nondiscriminatory basis and at reasonable prices.[48] This would prevent that foreign carrier from favoring its affiliated U.S. carrier over competing unaffiliated U.S. carriers in terms of both economic and technical interconnection with its facilities. The ability to grant preferential interconnection to one carrier over another is anticompetitive and the ability to do so likely would result in a finding that effective competitive opportunities do not exist on that route. Unless other public interest factors warrant otherwise, we would likely deny a foreign carrier authorization for international

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[48] *See ACC Global Corp. and Alanna, Inc.*, 9 FCC Rcd 6240, 6254 (1994) (ACC/Alanna). In that order, we concluded that the nondiscriminatory offering of published standard interconnect arrangements at standard prices is an adequate alternative to our regulatory approach of requiring tariffed service offerings and rates. A similar type of analysis would be applied under our effective competitive opportunities test.

facilities to that country until measures were adopted to prevent such discriminatory conduct.

50. AT&T argues that this interconnection criterion should include equal access in the foreign market, as well as some form of number portability.[49] Certainly these would be illustrative of adequate terms and conditions for interconnection in the foreign market. We will not go, however, as far as AT&T suggests by requiring that equal access or number portability be present in order for us to find effective competitive opportunities in the foreign market. Even AT&T acknowledges that there is some reasonable transition time to nationwide equal access in a foreign market.[50] AT&T also argues that the Commission should examine as part of its public interest analysis the extent to which U.S. carriers can provide facilities-based, domestic long distance service.[51] We will not go so far as to adopt AT&T's proposal. Rather, we will consider the extent to which U.S. carriers have access to intercity services as relevant to the issue of whether interconnection is available on nondiscriminatory charges, terms and conditions. The examples of interconnection issues mentioned above are not exhaustive of the elements we would examine for purposes of an adequate interconnection regime.[52]

3. Competitive Safeguards

51. The third factor that we will examine is whether competitive safeguards exist in the foreign country to protect against anticompetitive practices. The safeguards we will consider important include: (1) existence of cost-allocation rules to prevent cross-subsidization; (2) timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities; and (3) protection of carrier and customer proprietary information.

52. While the actual facilities-based presence of a U.S. carrier in a foreign country is not required under our test, a government policy that allows a competitor to enter its international facilities-based market, yet fails to contain the necessary safeguards that would allow competition to develop, is of minimal value in protecting new entrants against potential abuses of market power. It has been our experience that interconnection and other competitive safeguards are critical for the development of an effectively competitive market in countries where one carrier is dominant.

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[49] AT&T Comments at 29 (equal access), 32 (number portability).

[50] AT&T Comments at 32, n. 34.

[51] AT&T Comments at 36-37.

[52] For example, where facilities are available only on a leased basis, we will consider the underlying lease arrangement in the same manner as we consider the availability of interconnection arrangements. That is, terms and conditions of such arrangements must be fair and nondiscriminatory.

53. An emerging competitive market particularly requires these safeguards in order to prevent market power abuse. Should we allow a dominant carrier from such a country into the U.S. market, the carrier would have little incentive to support and, in fact, would have the incentive to oppose a foreign government's implementation of competitive safeguards because it already would have gained the benefit of access to the U.S. international facilities-based market. Moreover, where the foreign government owns the foreign carrier, it may have even less incentive to implement competitive safeguards.

4. Regulatory Framework

54. The fourth factor of the effective competitive opportunities test is whether there is an effective regulatory framework in the destination country to develop, implement and enforce legal requirements, interconnection arrangements and other competitive safeguards. Our focus will be on whether there is separation between the foreign regulator and the operator of international facilities-based services, and whether there are fair and transparent regulatory procedures in the destination market. In order for effective competition to develop in a foreign country, there must be no unfair advantage bestowed on that country's carrier through government regulatory policies. Absent sufficient separation between the operator and the regulator to ensure that the regulator is independent, empowered, and does not have a conflict of interest in regulating the operator, there is little reason to believe that such favoritism will not occur. Transparent procedures are important as well to allow competitors to know precisely what obligations are required of the incumbent dominant carrier and what rights they have to seek enforcement of such obligations. Fair and transparent procedures that allow public input into the decision-making process help ensure that the resulting rules are effective and nondiscriminatory.

55. Deutsche Telekom expresses concern that an inquiry into the regulatory process of other countries is likely to offend these countries.[53] Our inquiry into the degree of separation between the regulator and the operator and of the regulatory procedures is not meant as a measure of a foreign regulatory agency's integrity or competency. Rather, it reflects our experience that a regulator separate from an operator and fair and transparent procedures are essential to ensuring effective competitive opportunities.

C. Additional Public Interest Factors

56. In our *Notice*, we proposed to assess five additional factors in the public interest along with the effective market access test that might weigh in favor of, or against, allowing entry in the U.S. international market. These factors were: (1) the state of liberalization in the foreign carrier's domestic market and the availability of other market access opportunities to U.S. carriers; (2) the status of the foreign carrier as a government or non-government entity; (3) the general significance of the proposed entry to promotion of

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[53] Deutsche Telekom Comments at 33-34.

competition in global markets; (4) the presence of cost-based accounting rates; and (5) any national security implications.[54]

Position of the Parties

57. Citicorp argues that any test adopted be applied in a flexible manner and that the Commission not attach disproportionate weight to the market access element of the test.[55] It advocates that the Commission also consider the extent to which foreign countries satisfy the needs of international telecommunications users. It argues this would promote the widespread availability of the telecommunications services that users need to support their international business operations.

58. In its Petition for Rulemaking, AT&T proposed that, as a prerequisite to entry, we require foreign carriers to reduce accounting rates for all U.S. carriers to the lesser of either cost-based levels or the lowest accounting rate that they offer to any other telecommunications entity from another country.[56] In our *Notice*, we declined to propose this approach based on our tentative conclusion that accounting rates will decrease as a natural consequence of the introduction of competition. As an alternative, we proposed to consider the presence of cost-based accounting rates as part of our total public interest analysis to determine whether facilities-based market entry should be allowed.[57]

59. Several commenters urge us to adopt cost-based accounting rates as a precondition to U.S. market entry, rather than considering the presence of such rates as among several public interest factors in our Section 214 assessment. They argue that competition alone will not solve the problem of above-cost accounting rates.[58] They contend that, without such a precondition, bilateral negotiations to reduce accounting rates will be futile because the foreign carrier will have every incentive to maintain above-cost accounting rates in order to keep the cost of U.S. facilities-based services higher and, thereby, "price squeeze" unaffiliated U.S. carriers, which will reduce competition and harm U.S. consumers.[59]

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54 *Notice* ¶¶ 42, 45.

55 Citicorp Comments at 2; Citicorp Reply at 2-3.

56 *Notice* at ¶ 42.

57 *Id.*

58 AT&T Reply at 32-35; ESI Comments at 4; SDN Comments at 1. For example, AT&T argues that, even though competition exists in Chile, above-cost accounting rates are the norm and interconnection charges are ten times higher for inbound traffic than for outbound calls. AT&T Reply at 33-34. AT&T also cites the United Kingdom as an example of the unwillingness of foreign carriers to lower accounting rates once they have access to the U.S. market. *Id.* at 34.

59 AT&T Comments at 35; AT&T Reply at 32; SDN Comments at 1.

60. Commenters who oppose requiring cost-based accounting rates as a condition of foreign carrier entry into the U.S. market[60] argue that such a requirement "puts the cart before the horse," and that market openness will provide competitive pressures which will drive down accounting rates.[61] Other commenters argue that our ongoing concern with the settlements deficit is myopic and misplaced in light of our authorization of services, such as country direct services, which exacerbate the settlements deficit.[62] TLD adds that cost-based accounting rates should not be tied to entry issues because the problem posed by above-cost accounting rates is not limited to foreign carriers seeking entry into the U.S. market, and thus such an approach would only address part of the problem.[63] Telex-Chile argues that current regulations are adequate to protect U.S. carriers and to promote international competition,[64] and France Telecom asserts that such a condition would be ineffective and overly intrusive.[65] Finally, BTNA and the British Government urge us to look at U.S. collection rates, arguing that traffic levels are a relevant and important factor in the establishment of accounting rates. Unless accounting rate reductions are passed through to the consumer, they argue, it is unrealistic to expect foreign carriers to agree to further reductions.[66] The British Government further opposes this proposal on the grounds that it raises concerns about what is "cost-based" and because it believes that this issue is tangential to the *Notice*.[67]

Discussion

61. In light of our review of the comments, we have modified the public interest factors that, in addition to our effective competitive opportunities test, will weigh in favor of, or against, authorizing a foreign carrier to serve destination countries where it has market power. We will consider these factors in our review of applications, whether facilities-based or resale, filed by foreign carriers. We now believe that some of the factors originally proposed are considered more appropriately in the context of the effective competitive opportunities criteria. For example, the status of the foreign carrier as a government or non-

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60 British Government Comments at 5-7; BTNA Comments at 5-7; Cable & Wireless Comments at 12, 13, Reply at 15-16; DOJ Reply at 18; France Telecom Reply at 12; GTE Comments at. 4, 5; K&S Comments at 8; MCI Comments at 8; MFSI Comments at 2; Telex-Chile Comments at 1, 2, 8; TLD Comments at 75.

61 fONOROLA Comments at 18, n. 25.

62 MFSI Comments at 2; K&S Comments at 8.

63 TLD Comments at 75.

64 Telex-Chile Comments at 1, 2.

65 France Telecom Reply at 12-13.

66 British Government Comments at 5-7; BTNA Comments at 5-7.

67 British Government Comments at 5.

government entity is now considered in the context of the fourth effective competitive opportunity factor that relates to the degree of separation between the regulator and the operator of international facilities-based services. The state of liberalization in the foreign carrier's domestic market for local access and intercity services is relevant to the existence of reasonable and nondiscriminatory charges, terms and conditions for interconnection for the provision of services other than resold switched services. We have decided not to include as one of our additional public interest factors the availability of other market access opportunities to U.S. carriers.

62. The additional factors we will consider relevant to foreign carrier applications include the general significance of the proposed entry to the promotion of competition in the U.S. communications market, and any national security, law enforcement, foreign policy, and trade concerns raised by the Executive Branch. Changing circumstances may require that we consider other factors as relevant to our Section 214 analysis in the future. The presence of cost-based accounting rates also will remain, as proposed, an additional public interest factor. These additional factors, with the exception of the presence of cost-based accounting rates, have always been germane to our public interest analysis under Section 214. There may be occasions under the standard adopted here when the public interest requires that such factors override our effective competitive opportunities determination, to either allow or deny entry. For example, the Executive Branch may raise national security concerns with particular Section 214 applications. The Executive Branch also may present countervailing foreign policy or trade concerns that may warrant either a favorable or unfavorable entry determination. The Executive Branch's input would continue to be important in our consideration of the overall public interest.

63. Where additional public interest factors warrant authorizing a foreign carrier to provide service to a country where it has market power, we may find it necessary to impose conditions on its authorization to supplement our dominant carrier regulations. For example, where the foreign carrier has granted a limited number of operating agreements to U.S. carriers on this route, additional safeguards may be appropriate to ensure that competition on this route is not adversely affected by the lack of effective competitive opportunities for U.S. carriers to operate on the foreign end.

64. We decline to adopt as an additional public interest factor the extent to which foreign countries satisfy the needs of international telecommunications users as advocated by Citicorp.[68] The needs of international telecommunications users ultimately are best served by allowing facilities-based competition to flourish on both ends on an international route. Moreover, such an analysis could require us to devote significant resources to examining the business arrangements of individual users, a task that generally is not appropriate for a regulatory body.

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[68] *See supra* ¶ 57.