

carrier that acquires a lease of bare capacity must operate that U.S. half-circuit under its own operating agreement with the carrier that provides the corresponding capacity on the foreign end. We accordingly amend our rules to define a U.S. international facilities-based carrier as one that holds an ownership, indefeasible-right-of-user, or leasehold interest in an international facility, regardless of whether the underlying facility is a common or non-common carrier submarine cable, or an INTELSAT or separate satellite system.

131. Teleglobe asserts that our definition of facilities-based carrier is inconsistent with our proposed market access test because this policy only considers facilities-based *ownership* as valid evidence of effective competitive opportunities in a foreign country, while our proposed definition would consider some leases as facilities-based in the United States.¹⁶⁹ We agree with Teleglobe on this point and, accordingly clarify the application of our effective competitive opportunities analysis for facilities-based entry by foreign carriers. Under our effective competitive opportunities test for facilities-based entry, as stated above, we could find that a country offers effective competitive opportunities where it allows competitive carriers to provide facilities-based service over circuits obtained through a lease of bare capacity.¹⁷⁰ We would not find that a country offers effective competitive opportunities for facilities-based entry where it limits competitive carriers to reselling private lines. This approach is entirely consistent with the definition of facilities-based carrier as adopted here.

B. Resale Entry by Affiliates of Foreign Carriers

1. Application of the Effective Competitive Opportunities Analysis to Resale Entrants

132. The *Notice* proposed to continue our current policy on foreign carrier entry by resale of private lines interconnected to the public switched network.¹⁷¹ We requested comment, however, on whether we should conform the equivalency requirement established in the *International Resale Order*¹⁷² to the entry standard we adopt in this proceeding. We sought comment on whether a consistent approach to determining equivalency and effective market access would make the equivalency standard clearer and more administratively feasible. We also sought comment on the issue of whether we should maintain our open entry policy for resale of switched services and for resale of non-interconnected private lines. For the reasons stated below, we conform our equivalency requirement to the effective competitive opportunities analysis and also apply this analysis to foreign carriers seeking to provide service via switched resale and resale of non-interconnected private lines.

¹⁶⁹ Teleglobe Comments at 31.

¹⁷⁰ See *supra* ¶ 47.

¹⁷¹ *Notice* ¶ 77.

¹⁷² 7 FCC Rcd 559.

a. Conformance of Equivalent Resale Opportunities with Effective Competitive Opportunities

133. In the *International Resale Order*, we found that a policy encouraging the resale of international private lines would further the public interest in cost-based international telecommunications services and the more efficient use of international facilities. We recognized, however, that allowing "one-way" resale, where resold private lines are used only for inbound switched traffic into the United States, could enable foreign carriers unilaterally to divert U.S. inbound switched traffic to private lines. We found that permitting unilateral evasion of the settlements process would exacerbate the U.S. net settlements deficit and ultimately increase the burden on U.S. ratepayers through, for example, higher rates. We therefore required that applicants seeking to provide switched service over resold private lines demonstrate that the destination foreign country affords resale opportunities equivalent to those available under U.S. law.¹⁷³ In our *Notice*, we requested comment on whether we should conform the equivalency test to our proposed effective market access analysis in order to make our standards clearer and more administratively feasible.¹⁷⁴

134. AT&T and MCI urge replacement of the equivalency approach with whatever market entry test is adopted in this proceeding. AT&T observes that we currently consider in our equivalency determinations not only whether foreign countries offer equivalent resale opportunities as a matter of law, but whether U.S. companies in fact may offer such services on a competitively equal basis with the foreign carrier. To make this determination, AT&T argues, we should consider the same factors we consider under our market entry analysis because equivalency cannot exist unless the test is satisfied. In essence, AT&T argues that we should not allow carriers to offer switched service via resale of private lines from countries that do not allow facilities-based competition.¹⁷⁵ Cable & Wireless and Citicorp oppose replacement of the "equivalency" determination because they find that the equivalency policy has been successful at accomplishing the Commission's goals, while providing certainty and sufficient flexibility to accommodate different market structures and regulatory regimes. Both urge that we not abandon equivalency in favor of a construct more relevant in the facilities-based context.¹⁷⁶

135. We declined in the *International Resale Order* to adopt specific criteria for determining whether equivalency exists in a given foreign country. We did state, however, that in order for equivalency to exist, the subject foreign country must, at a minimum, permit open entry for, and nondiscriminatory treatment of, U.S. carriers. It also must authorize U.S.-

¹⁷³ *International Resale Order*, 7 FCC Rcd at 562; see also *ACC/Alanna*, 9 FCC Rcd 6240; *fONOROLA and EMI*, 7 FCC Rcd 7312 (1992), *recon.*, 9 FCC Rcd 4066 (1994).

¹⁷⁴ *Notice* ¶ 77.

¹⁷⁵ AT&T Comments at 49-50.

¹⁷⁶ Cable & Wireless Reply at 11-13; Citicorp Reply at 7.

based carriers to interconnect international private lines to the public switched network at both ends. We emphasized that licensing, prices, terms, and conditions afforded to U.S.-based resellers should be equivalent to those made available to foreign-based resellers providing service in their country.¹⁷⁷ Our effective competitive opportunities test as revised is now substantially similar to the framework we have applied in implementing the *International Resale Order*. We modified our effective competitive opportunities analysis based in part on the position of Cable & Wireless and Citicorp that the approach we have followed in applying the equivalency standard has provided certainty and is sufficiently flexible to accommodate a variety of market structures and regulatory regimes. We believe the success of our equivalency standard is largely due to the fact that the emphasis has been on a broad set of guiding principles, rather than on a specific set of requirements that must be met by every foreign country.¹⁷⁸ The four principles we find relevant in evaluating whether effective competitive opportunities exist are essentially the same as those that have guided us in determining the existence of equivalent resale opportunities in a particular country.¹⁷⁹

136. Because the four effective competitive opportunities principles and the equivalency test are so similar, we believe it will reduce uncertainty and confusion if we restate our equivalency criteria in the same manner as our effective competitive opportunities criteria. We will amend our rules in Section 63.01 to do so. Our rules will thus require that applicants seeking to provide switched service over resold private lines demonstrate that the foreign country at the other end of the private line provides U.S. carriers with: (1) the legal right to resell international private lines, interconnected at both ends, for the provision of switched services; (2) nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carrier facilities for termination and origination of international services, with adequate means of enforcement; (3) competitive safeguards to protect against anticompetitive and discriminatory practices affecting private line resale; and (4) fair and transparent regulatory procedures, including separation between the regulator and operator of international facilities-based services.

137. This restatement of our equivalency standard does not represent a substantive change. In making our equivalency and effective competitive opportunities inquiries, we will focus on the overall effect of the various elements of the foreign regulatory regime on the opportunities for viable operation.¹⁸⁰ A finding of "equivalent resale opportunities" is a finding of "effective competitive opportunities" to resell international private lines for the provision of switched services. To avoid confusion, however, we will continue to use the term equivalency to denote the required finding for authorizing private line resale on a

¹⁷⁷ *Id.*

¹⁷⁸ Cable & Wireless Reply at 11; Citicorp Comments at 3-4.

¹⁷⁹ *See supra* ¶¶ 43-55.

¹⁸⁰ *See ACC/Alanna*, 9 FCC Rcd 6240, 6254. *See also supra* ¶ 54.

particular route. We do not here adopt AT&T's proposal that we refuse to allow carriers to provide interconnected private line service, for the provision of switched services, to and from a country that does not offer facilities-based competition. Although the existence of facilities-based competition in a given market has been an important factor in our equivalency determination to date, it has by no means been dispositive.

138. Finally, we note that there are two practical distinctions between the two standards. Our effective competitive opportunities test applies only on routes where the foreign carrier applicant controls bottleneck facilities, whereas our equivalency test applies on all routes. In addition, our effective competitive opportunities test requires that these four principles be satisfied in the near future, while our equivalency standard requires that the four principles be satisfied at the time we make an equivalency finding. We retain these two distinctions for purposes of our equivalency analyses because we believe they serve the underlying purpose of the equivalency requirement -- to prevent undue increase in the U.S. settlements deficit.

b. Switched Resale and Resale of Non-interconnected Private Lines

139. The *Notice* proposed to adopt a rebuttable presumption that there is no competitive harm in permitting unlimited foreign carrier entry for switched resale and resale of non-interconnected private lines, even to affiliated countries. In the switched services context, we relied on our conclusion in *International Services* that foreign carrier resale of U.S. international switched services presents no substantial possibility of anticompetitive effects in the U.S. international services market.¹⁸¹ In the non-interconnected private lines context, we relied on the competitive benefits of such resale and the existence of safeguards to prevent abuse. After taking into account the concerns of several commenting parties, we revise our proposal and find that switched resale and resale of non-interconnected private lines by a foreign carrier do indeed present competitive issues worthy of our scrutiny and that applying the effective competitive opportunities test is the appropriate remedy.

140. Americatel, Cable & Wireless, Sprint and TLD argue that we should maintain our open entry policy for switched resale. Americatel makes the same argument for the resale of non-interconnected private lines. These carriers argue we should not apply the proposed market entry analysis to foreign carriers seeking to offer such service.¹⁸² Cable & Wireless argues in particular that the effective market access standard, as articulated in the *Notice*, is most relevant in the facilities-based context and that there is no prospect that an

¹⁸¹ *Notice* at ¶ 74 (citing *International Services*, 7 FCC Rcd at 7335, ¶ 31).

¹⁸² Americatel Comments at 6-7; Cable & Wireless Reply at 11-13; Sprint Comments at 39-40; TLD Reply at 50.

effective market access policy for resale would convince a foreign government to open its closed market.¹⁸³

141. AT&T, GTE and MCI argue to the contrary that we should modify our existing policy for switched resale and apply the effective market access test.¹⁸⁴ MCI argues that a foreign carrier should be required to demonstrate affirmatively that its resale of U.S. international switched services would be consistent with the public interest.¹⁸⁵ AT&T opposes foreign carrier entry for resale generally because it argues that the ability to provide service via resale gives a foreign carrier from a closed market an unfair advantage in the marketing of global services. TLD disputes AT&T's argument. It states that the ability to provide service via resale would not allow a foreign carrier to compete effectively with a U.S. facilities-based carrier because it lacks the control over facilities that is necessary to pose a competitive threat in the market for global network services.¹⁸⁶

142. We find that an open entry policy for switched resale and resale of non-interconnected private lines is no longer desirable in the present international market environment. An open entry policy for resale would allow a foreign carrier that cannot satisfy the effective competitive opportunities analysis to serve the U.S. market via switched resale and resale of non-interconnected private lines, even though it may be barred from serving a given market on a facilities basis. Allowing such a carrier to provide international service via switched or non-interconnected private line resale could give it a significant competitive advantage in marketing global network services to multinational customers that seek a single provider of such services. U.S. carriers that are denied the ability to provide these services in the market of the foreign carrier, whether on a facilities or resale basis, would be unable to provide the same kinds of seamless global network services to their international clients. A foreign carrier from a highly restricted market could provide global services by serving its own market via resale and the rest of the world on a facilities-basis. We find that there is a significant danger that such a marketing advantage will allow a foreign carrier to compete on the basis of access to its closed home market rather than on the basis of price or quality of service.

143. We stated in *International Services* that the competitive concerns associated with switched resale are less significant than those associated with facilities-based entry.¹⁸⁷ In that decision, we found anticompetitive conduct unlikely, and dominant carrier regulation unnecessary, because in order for a foreign carrier to favor its U.S. resale affiliate it would

¹⁸³ Cable & Wireless Comments at 11-13.

¹⁸⁴ AT&T Comments at 22-25; GTE Comments at 6; MCI Comments at 19.

¹⁸⁵ MCI Comments at 19.

¹⁸⁶ TLD Reply at 50-51.

¹⁸⁷ 7 FCC Rcd at 7335.

necessarily have to favor the underlying U.S. facilities-based carrier as well.¹⁸⁸ We continue to consider it unlikely that a foreign carrier reseller would engage in discriminatory conduct under such circumstances. We therefore reject GTE's proposal that we regulate switched service resellers as dominant. We are concerned, however, that a foreign carrier's ability to provide switched service via resale to a closed market where it possesses market power will provide that carrier with an unfair advantage in marketing global network services. Such unmeritorious advantages create a risk of anticompetitive effects in the emerging market for global network solutions.

144. The record in this proceeding persuades us that resale is a viable form of entry for a foreign carrier. Although an international reseller does not control pricing or operation of the underlying transmission facilities, no party disputes that the existence of multiple U.S. facilities-based carriers provides pricing flexibility for resellers and the technical capability to serve the U.S. end of the market for global, seamless network services.¹⁸⁹ A foreign facilities-based carrier that resells international services in the United States can offer ubiquitous 1+ service as well as dedicated private lines to customers on both ends of a particular U.S. international route, while a U.S. carrier could not make that same representation to U.S. customers seeking end-to-end telecommunications services and "one-stop" shopping. Ultimately, this disserves U.S. consumers because, in the absence of full competition on the merits by all competitors, consumers do not receive reduced rates, increased quality, and innovation.¹⁹⁰ We therefore will apply the effective competitive opportunities test to those foreign-affiliated carriers that seek to provide international service to markets in which they possess market power via switched resale and resale of non-interconnected private lines.

145. Our effective competitive opportunities analysis in this context focusses on whether effective competitive opportunities exist in the destination market of a carrier with market power to provide the particular resale service which the foreign carrier seeks to provide in the United States -- either switched or non-interconnected private line. We consider the particular resale service the carrier seeks to provide in order to guard against marketing advantages that stem from the asymmetrical ability to provide switched or private line service on a resale basis. Although this approach differs from that which we adopt in the facilities-based context, where we focus on the ability to provide IMTS, we find that it is important to encourage market opening on an incremental basis in the resale context. The ability to provide service via resale does not offer as great a potential for anticompetitive conduct as does facilities-based entry.¹⁹¹ Nor does the ability to market service on an end-to-end basis via resold U.S. circuits provide as great a potential for anticompetitive effects in the

¹⁸⁸ *Id.*

¹⁸⁹ See AT&T Ex Parte Presentation in IB Docket No. 95-22 and File No. ITC-95-248, October 5, 1995 at 6-9.

¹⁹⁰ *Cf. Notice* ¶ 29.

¹⁹¹ See *Notice* at ¶¶ 75-76.

U.S. international services market as does facilities-based entry, which maximizes a carrier's cost and operational advantages. An incremental approach to authorizing foreign carrier resale, either for switched or non-interconnected private lines, recognizes that not all countries will be able to liberalize their international market at the same pace, and provides benefits to U.S. consumers who will be served by new resale carriers from liberalized countries. We therefore find that considering the ability to resell non-interconnected private lines separately from resale of switched services will provide consumer benefits, significant flexibility for carriers and incentives for them to further encourage liberalization of their markets.

146. In applying our effective competitive opportunities analysis, we first consider the legal ability to provide the relevant resale service in the destination country where the applicant possesses market power. Next, we consider practical barriers to entry, including the existence of reasonable and nondiscriminatory charges, terms and conditions for the provision of such resale service, competitive safeguards to protect against anticompetitive and discriminatory practices affecting resale, fair and transparent regulatory procedures, and separation between the regulator and operator of international facilities-based services. We will amend our rules in Section 63.01 to require that applicants affiliated with a foreign carrier with market power in the destination country provide information on the above factors when seeking authority to provide service via switched resale or resale of non-interconnected private lines.

147. We disagree with Cable & Wireless that applying the effective competitive opportunities test to switched resale will not provide a significant incentive for foreign governments to open their markets.¹⁹² Because our effective competitive opportunities test may preclude a foreign carrier from providing service to closed markets in which it possesses market power, the ability to serve those markets via resale could be very significant for a carrier seeking to provide global seamless services. Indeed, an open entry policy for switched resale could actually cause the effective competitive opportunities analysis in the facilities-based service context to be less effective at opening foreign markets. By allowing a carrier to serve via switched resale a closed market in which it is dominant, entry on a facilities-basis becomes less important, particularly as an initial means of penetrating the U.S. international services market. If such a carrier is barred from serving its closed dominant market altogether, however, the incentive becomes much greater to pressure its government to make the necessary changes to its regulatory regime in order that the carrier may gain access to that route from the United States. Even TLD, which does not support a market entry test, argues that applying the test does not provide a foreign government with sufficient incentives to liberalize its facilities-based services market where there is an open entry policy for resale.¹⁹³

148. As a final matter, it is important for purposes of enforcing our policies on private line resale and interconnection to emphasize what we mean by the term "non-

¹⁹² Cable & Wireless Reply at 12-13.

¹⁹³ TLD Comments at 30; *see also* TLD Reply at 50.

interconnected." Our *International Resale Order* confirmed the right of an end user to interconnect its international private line to the public switched network.¹⁹⁴ We did not make any distinction in that order between end user private lines interconnected at the end user's premises or at a carrier's central office. Pending the outcome of our *Further Notice* on this issue,¹⁹⁵ we here confirm that a U.S. end user that subscribes to the international private line offering of a U.S. resale or facilities-based carrier may interconnect its private line to the U.S. public switched network at its own premises or at a carrier's central office. If an end user at any time desires to use a U.S. international private line to provide service to a third party on a common carrier basis, it requires specific prior Section 214 authority to do so.

2. Other Resale Issues

149. In the *Notice*, we requested comment on AT&T's proposal that we adopt cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries.¹⁹⁶ In order to eliminate any confusion over the scope of the prior certification requirement adopted in the *International Resale Order*, we also proposed to codify the requirement that any carrier that seeks to connect a U.S. half-circuit with a leased, foreign private line half-circuit for the provision of a switched, basic service must obtain specific Section 214 authorization to do so.¹⁹⁷

150. For the reasons stated below, we decline to require cost-based accounting rates as a condition of foreign carrier entry for private line resale. In addition, we find it in the public interest to allow a carrier to connect a U.S. facilities-based private line half-circuit to a foreign leased, private line half-circuit in order to provide a switched, basic service without a demonstration of equivalency. We find that such a configuration should only be allowed, however, where the circuit is interconnected to the public switched network at one end only and the U.S. carrier does not correspond with a carrier that owns the foreign half-circuit. Finally, we will allow hubbing of switched services over resold private lines through equivalent countries to "points beyond," subject to certain conditions.

a. Relevance of Cost-based Accounting Rates

151. AT&T argues that we should adopt cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries. It argues that absent such a precondition the foreign carrier has no incentive to

¹⁹⁴ 7 FCC Rcd at 560.

¹⁹⁵ See *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, CC Docket No. 90-337, 7 FCC Rcd 7927, 7928 (1992) (*Further Notice*).

¹⁹⁶ *Notice* ¶ 78. The *Notice* did not propose any specific action on this topic.

¹⁹⁷ *Notice* ¶ 79.

reduce its accounting rate because its U.S. affiliate can avoid the above-cost accounting rate by diverting its outbound traffic over international private lines.¹⁹⁸ Opposing commenters argue that as such resale develops, accounting rates will become less relevant, and competition will put its own pressure on above-cost accounting rates.¹⁹⁹

152. We decline to require cost-based accounting rates as a condition for authorizing affiliates of foreign carriers to resell interconnected private lines to affiliated countries. Such a requirement could deter foreign administrations from allowing resale carriers to serve the United States, and thus would delay or limit an important source of competition to incumbent carriers on routes to the United States. The development of private line resale is a form of arbitrage that will create additional competition, leading to lower accounting rates. We will consider, however, the presence of cost-based accounting rates as a general public interest factor in our review of Section 214 applications to provide international switched service over private lines.²⁰⁰ Where a carrier can demonstrate that a cost-based accounting rate is available to U.S. carriers on a particular U.S. international route, there would appear to be no public interest reason to prohibit use of private line circuits for the provision of switched services on that route.

b. Provision of Switched Services over Facilities-based Private Lines

153. The *Notice* proposed that any U.S. carrier that seeks to connect its authorized facilities-based half-circuit to a leased, foreign private line half-circuit to provide a switched basic service must obtain specific Section 214 authority to do so. In light of the issues raised by the commenting parties, we find it is not necessary to impose a Section 214 requirement in all such cases. We instead conclude the concerns raised in the *Notice* are better addressed by modifying our proposal to allow U.S. carriers to provide switched services over their authorized facilities-based private lines where those private lines are interconnected to the public switched network at one end only, and where the U.S. carrier does not correspond with a carrier that owns the foreign half-circuit. We conclude that it is not in the public interest to require U.S. carriers in these circumstances to obtain prior Section 214 authorization and demonstrate that equivalent resale opportunities exist in the foreign market. We will require in all other cases that a U.S. carrier obtain Section 214 authorization and demonstrate equivalency prior to providing switched services over its authorized facilities-based private lines.

¹⁹⁸ AT&T Comments at 35.

¹⁹⁹ British Government Comments at 5-6; FONOROLA Comments at 18, n.25; K&S Comments at 8; MFSI Comments at 8.

²⁰⁰ We will also consider as a favorable factor in our review of these Section 214 applications the disclosure of the accounting rates a dominant foreign carrier maintains with carriers in other foreign countries. *See supra*, ¶ 72.

154. IDB argues in response to the *Notice* proposal that we have not properly justified modifying what it sees as a successful policy that permits facilities-based carriers to interconnect their private lines on the U.S. end without making an equivalency demonstration. According to IDB, the *International Resale Order* was meant only to apply to resale of the U.S. end of an international private line, and not to "single-end foreign resale," where the U.S. half-circuit is provided by a U.S. facilities-based carrier rather than by a U.S. reseller. IDB argues that our proposal would preclude U.S. carriers from entering newly open foreign markets and competing for the private line traffic of foreign customers. IDB also argues that any impact on the settlements imbalance due to interconnected private lines is slight. Further, IDB argues that we lack the jurisdiction and authority to impose an additional certification requirement on authorized facilities-based private line carriers.

155. K&S, a small international carrier, also supports the loosening of our rules regarding private line resale. K&S requests that we allow U.S. carriers to provide foreign private line service interconnected to the U.S. public switched network where the foreign market has begun to liberalize, where the private line carrier is unaffiliated with the monopoly or dominant foreign carrier, and where the private line half-circuits are not interconnected to the foreign public switched network. K&S argues that such new entrants provide needed competitive stimulus in foreign markets and that any increase in the settlements deficit caused by this activity is outweighed by the positive competitive impact of new entrants in foreign markets and the downward pressure such services put on collection rates and accounting rates.²⁰¹ IDB similarly argues that we should exempt "single-end foreign resale" from our private line resale policy to enable U.S. carriers to enter newly opening foreign markets and allow multinational customers access to "the kinds of IPL (international private line) interconnection configurations which they employ today."²⁰²

156. It has become evident that a certain amount of uncertainty surrounds our policy regarding the carriage of switched traffic over international private lines. We take here the opportunity to state this policy clearly. In 1991, the *International Resale Order* permitted private line resellers to carry switched traffic over private lines outside the settlements process where equivalent resale opportunities exist in the destination foreign country. Carriers are required to demonstrate in their applications for Section 214 authority to resell international private lines that such opportunities exist.²⁰³ In our subsequent order finding that the United Kingdom offers such equivalent opportunities, we stated specifically that resellers must show equivalency whether the resold private line is interconnected at one or both ends.²⁰⁴ We did not, however, explicitly adopt a requirement that facilities-based carriers in all circumstances

²⁰¹ K&S Comments at 8; *see also* IDB Comments at 33.

²⁰² IDB Comments at 39.

²⁰³ *International Resale Order*, 7 FCC Rcd at 561.

²⁰⁴ *ACC Global Corp. and Alanna, Inc.*, 9 FCC Rcd 6240, 6271 (1994).

obtain additional Section 214 authority to carry switched traffic over their existing facilities-based private lines. By its terms, the *International Resale Order* adopted such a requirement only in circumstances where a facilities-based carrier sought to resell a U.S. private line half-circuit.²⁰⁵

157. Because of the confusion surrounding this issue, we proposed to codify the requirement that any carrier that seeks to connect a U.S. half-circuit with a leased, foreign private line half-circuit to provide a switched, basic service must obtain specific Section 214 authority to do so.²⁰⁶ This codification was proposed in order to apply our equivalency requirement to switched traffic carried over facilities-based private lines so as to bring their treatment in line with that which we adopted for resold private lines. In light of the comments filed in this proceeding, however, we adopt a modified version of this proposal. Those carriers commenting on this issue argue that we should allow a U.S. carrier to interconnect its private lines to the public switched network on the U.S. end, as long as the foreign end is not interconnected to the public switched network. K&S and IDB argue that the beneficial impact of allowing competitive entrants into foreign markets outweighs any concerns resulting from the diversion of traffic from the switched network.²⁰⁷ We find these arguments persuasive. Although diversion of traffic from the switched network can increase the settlements deficit in the short term,²⁰⁸ we find that increased competition in foreign markets will have the greater beneficial effect of putting downward price pressure on foreign monopoly facilities-based carriers, stimulating foreign outbound traffic and decreasing the incentive for the foreign carrier to maintain above-cost accounting rates. Further, we find that increased competition in foreign markets generates additional public interest benefits as discussed above.²⁰⁹ Together, these long term competitive benefits outweigh any short term harm caused by an increase in the net settlements imbalance. We therefore will allow a U.S. facilities-based carrier to provide switched services over its private lines without a demonstration of equivalency, subject to two exceptions as discussed below.²¹⁰

158. We emphasize that we do not find it in the public interest to modify our policy as it was applied in the *International Resale Order*, i.e., to private lines resold on the U.S. end. Our modification applies only to a configuration not directly addressed in that order, the interconnection of facilities-based U.S. private line half-circuits to foreign leased circuits. To

²⁰⁵ *International Resale Order*, 7 FCC Rcd at 562.

²⁰⁶ *Notice* at ¶ 79.

²⁰⁷ K&S Comments at 8; IDB Comments at 31.

²⁰⁸ For a discussion of the negative impact of the carriage of switched traffic on an inbound basis only, see *supra*, ¶ 133.

²⁰⁹ *See supra* ¶ 15.

²¹⁰ *See infra* ¶¶ 159-160.

the extent this new application allows diversion of switched traffic off the settlements regime on an inbound basis, it diverts return traffic from all IMTS carriers (based on their share of proportionate return traffic) to private line carriers. Restricting application of this policy to facilities-based carriers redistributes revenues among U.S. facilities-based carriers, all of which are free to engage in this practice and compete against each other. Opening the policy to resellers would, however, allow resellers to gain at the direct expense of the facilities-based carriers without creating any avenue for facilities-based carriers to recoup lost settlement revenues.

159. There are two circumstances in which we do not believe that the positive competitive effects of our policy described above can justify permitting carriers to use facilities-based private lines to carry switched traffic. The first is where the U.S. carrier corresponds with a carrier that directly or indirectly owns the foreign half-circuit in a market that we have not found to offer equivalent resale opportunities. Allowing switched traffic to be carried over private lines in such an instance would not create any competition to the foreign facilities-based carrier. Where there is equivalency, however, U.S. carriers have the ability to divert outbound switched traffic on to private lines, and any harm from the diversion of U.S. inbound switched traffic is effectively negated. We therefore find it necessary to prohibit a facilities-based carrier from providing switched services over private lines in correspondence with a carrier that directly or indirectly owns those facilities where the foreign market does not offer equivalency.

160. Second, we continue to believe that the potential for diverting large amounts of traffic off the settlements process is too great where the private line circuit is interconnected to the public switched network on both ends. We therefore will allow switched traffic to be carried over facilities-based private lines that are interconnected to the public switched network only on one end. Limiting the provision of these services to instances where the customer must connect to the international circuit via dedicated access on one end would result in this service being provided only to customers with sufficient international traffic volumes to justify the expense of a dedicated local connection. This restriction would thus place an effective limit on the amount of traffic that would be diverted off the switched network.

161. In sum, we will allow U.S. carriers to provide switched services over facilities-based private lines that are interconnected to the public switched network on one end only. Where the U.S. carrier connects its facilities-based private line half-circuit with a foreign half-circuit in correspondence with a foreign carrier that owns the underlying half-circuit, we will require that it obtain additional Section 214 authority and demonstrate that equivalency exists. Likewise, where a U.S. carrier seeks to interconnect its facilities-based private line to the public switched network on both ends, we will also require that it obtain additional Section 214 authority and demonstrate equivalency. A U.S. facilities-based private line may be used to carry switched traffic where it is interconnected on one end only -- either the U.S. end or the foreign end -- without prior separate Section 214 authorization and a demonstration of

equivalency.²¹¹ We reaffirm that this approach applies only to facilities-based private line carriers, and should in no way be read to allow one-way inbound resale absent equivalency.²¹² We amend Part 63 of our rules²¹³ to implement this policy for facilities-based carriers. We also make a conforming change to Section 63.01(k)(5) of the rules to reflect our decision, on reconsideration of the *International Resale Order*, that we did not intend to require applicants seeking to resell international private lines for the provision of private line service to demonstrate equivalency.²¹⁴

162. We do not find persuasive IDB's legal objections that, absent a specific condition in a carrier's Section 214 authorization, we lack authority to limit a carrier's use of its authorized facilities by imposing a prior certification requirement under Section 214. IDB argues that the *Execunet* case does not allow us to require a carrier to obtain additional Section 214 authority to provide services over a facility for which it has already received a Section 214 authorization.²¹⁵ IDB states that only an express prohibition imposed upon issuance of the certificate may be used to prevent the provisioning of a particular service over an authorized facility. As we discussed in ¶ 233 *infra*, however, it is well established that the Commission is authorized to modify a carrier's existing Section 214 certificate through notice and comment rulemaking adopting rules of general applicability.

163. IDB also argues that subsection (a) of Section 214 cannot be construed to require that U.S. carriers obtain separate and additional authority for existing authorized capacity depending upon what services are provided and how such services are provided by the foreign carrier to customers on the foreign end. We agree with IDB that Section 214(a) does not require that such additional authorization be granted. Rather, we find that the public convenience and necessity require that we adopt an additional condition under Section 214(c)²¹⁶ that such authorization be obtained prior to providing switched service over an interconnected private line. We find it in the public interest to require that authorized U.S. facilities-based international private line carriers obtain Section 214 authority to provide switched services in correspondence with a foreign facilities-based carrier or its affiliate, or to

²¹¹ We note that this limited exception applies notwithstanding conditions which are in many facilities-based carriers' Section 214 authorizations limiting such offerings absent a finding of equivalency.

²¹² See *International Resale Order*, 7 FCC Rcd at 560. We do not mean to suggest that carriers may avoid our equivalency policy by merely settling traffic carried over resold private lines under a non-discriminatory accounting rate.

²¹³ 47 C.F.R. § 63.01-63.702 (1994).

²¹⁴ See *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, CC Docket No. 90-337, 7 FCC Rcd at 7928.

²¹⁵ IDB Comments at 45 (citing *MCI Telecommunications Corp. v. F.C.C.*, 561 F.2d 365 (D.C. Cir 1977) (*Execunet*)).

²¹⁶ 47 U.S.C § 214(c) (1988).

provide such services over a private line interconnected to the public switched network at both ends. We find this requirement necessary to promote competition and to ensure that private line carriers comply with our policies designed to prevent the diversion of foreign switched traffic on to private lines on a U.S. inbound basis only.²¹⁷

164. Finally, IDB contends that, in adopting a prior certification requirement, we are impermissibly regulating foreign carriers operating in foreign markets.²¹⁸ IDB's argument misses the mark. Our requirement that a private line carrier receive specific Section 214 authority to provide switched service via a private line interconnected on both ends or one which is connected to a foreign facilities-based half-circuit concerns only the interconnection of U.S. facilities with specified types of foreign facilities, a practice clearly within our regulatory fold, and does not in any way regulate foreign carriers operating in foreign markets.

c. Provision of Switched Services over Resold Private Lines, including to "Points Beyond"

165. The *Notice* requested comment on whether we should permit a carrier with initial Section 214 authority to resell private lines to a particular country for the provision of switched service to add countries without additional approval once we have found such countries afford equivalent resale opportunities.²¹⁹ We have since made a specific proposal on this issue in IB Docket No. 95-118.²²⁰ We stated there that we would incorporate by reference in that docket the relevant comments filed in this proceeding. We therefore do not resolve this issue here.

166. Swidler & Berlin, on behalf of several new international carriers, asks that we modify our policy to permit carriers to provide switched service over resold international private line to "points beyond" a country for which we have made an equivalency finding.²²¹ It argues that permitting carriers to route traffic between the United States and third countries over resold private lines that are connected to authorized equivalent countries will encourage development of international services competition and place increased pressure on foreign

²¹⁷ See *International Resale Order*, 7 FCC Rcd at 561; See also *ACC/Alanna*, 9 FCC Rcd at 6242.

²¹⁸ IDB Comments at 42-44.

²¹⁹ *Notice* at ¶ 79.

²²⁰ *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, FCC 95-286, released July 17, 1995, at ¶¶ 20-22.

²²¹ See generally S&B Comments.

governments to reduce above-cost accounting rates and open their markets to competition.²²² Swidler & Berlin believes that current Commission policy that restricts the "hubbing" of U.S. originating or terminating traffic through equivalent countries to or from "points beyond" impairs the ability of U.S.-owned carriers to establish competitive service offerings in niche markets abroad and to utilize least cost-routing to configure their networks efficiently. It contends that removal of the points beyond restriction will not have a significant impact on the settlements deficit because the attendant settlements bypass will be small in scope and likely to occur initially more outbound from the United States; and that services such as "country direct" and "call-back" already substantially distort the settlements flow. ACC and MFS concur with Swidler & Berlin's proposal.²²³

167. BTNA endorses the "points beyond" proposal to the extent it applies to U.S.-outbound traffic carried over resold private lines to an equivalent country, where it is then forwarded to its ultimate destination over the public switched network. BTNA reasons that, because its proposal would require the private line reseller to take the IMTS of a foreign facilities-based carrier at published rates in order to hub its traffic through the equivalent country, there could be no realistic possibility or incentive for the terminating country to discriminate in favor of such traffic, because the traffic would be included in the broad IMTS traffic stream. BTNA believes that hubbing or, in its words, "transiting" of U.S. outbound traffic by private line resellers through equivalent countries to third countries would permit U.S. resellers to compete more effectively with facilities-based carriers and place downward pressure on accounting rates. It notes that current Commission policy limits the extent to which private line resellers may capture economies of scale, because U.S. outbound traffic destined for countries not deemed equivalent must be carried separately from traffic permitted to be carried over resold private lines. However, because of a potential adverse impact on U.S. settlement payments, BTNA requests that we condition any routing of U.S.-inbound traffic from non-equivalent third countries on the U.S. private line reseller filing quarterly traffic reports detailing the number of minutes transited from each point of origination. Based on this data, reasons BTNA, the Commission can decide at a future date whether traffic flows warrant any change in policy.

168. Under Swidler & Berlin's proposal, countries which we find to satisfy our equivalency standard for private line resale could operate as "hubs" for the routing of U.S. international traffic. We are concerned, however, that this approach would sanction the routing of U.S.-inbound traffic to the hub country via a private line originating in a non-equivalent third country. Such a configuration would effectively eliminate our policy to

²²² Swidler & Berlin argues that the routing of U.S.-outbound traffic through equivalent countries will pressure foreign administrations to reduce accounting rates to avoid a diversion of traffic and loss of settlements revenue from directly routed traffic. S&B Comments at 15. It also believes that permitting equivalent countries to become "hubs" for third country-destined traffic will create additional incentives for countries to liberalize their policies.

²²³ It should be noted that Swidler & Berlin represent both ACC and MFS.

prohibit one-way resale of private lines into the United States.²²⁴ We agree with Swidler & Berlin, ACC and MFS that the routing of traffic in this manner has many pro-competitive benefits, including enhancing the ability of U.S.-based carriers to compete at home and abroad. We find insufficient evidence in the record, however, for such a sweeping reversal of our policies. The comments do not persuade us that the competitive benefits from such a proposal outweigh the potential for significant amounts of U.S.-inbound traffic to be diverted from the settlements process, with no opportunity for U.S. facilities-based carriers to offset lost settlement revenues by routing traffic over resold private lines in the reverse direction.

169. We do, by contrast, find record support for a more cautious approach to the resale of international private lines to "points beyond." We will therefore permit U.S. carriers -- both private line resellers and facilities-based carriers -- to route U.S.-outbound switched traffic over U.S. international private lines that terminate in equivalent countries, and then forward the traffic to a third, non-equivalent country by taking at published rates and reselling the IMTS of a carrier in the equivalent country. Similarly, we will permit U.S.-inbound switched traffic that is carried to an equivalent country as part of the IMTS traffic flow from a non-equivalent third country to be terminated in the United States over resold private lines from the equivalent hub country. We will refer to this practice as "switched hubbing." Certain existing facilities-based and private line resale Section 214 authorizations do not permit this particular routing configuration. Notwithstanding the conditions in these authorizations, our action permits switched hubbing as we have described it. As BTNA suggests, this approach should limit the potential for discrimination among carriers hubbing U.S. traffic through an equivalent country. It should also permit traffic to flow over resold U.S. international private lines in both directions -- both into and out of the United States. Because this approach requires that traffic flows be settled between the facilities-based carriers in the non-equivalent and hub countries, it will limit the amount of U.S.-inbound traffic permitted to be terminated over U.S. international private lines and the potential resulting loss of settlement revenues to U.S. facilities-based carriers from such resale activity.

170. U.S. international carriers that route U.S.-outbound traffic via switched hubbing through an equivalent country shall tariff their service on a "through" basis from the United States to the ultimate foreign destination, just as they tariff any other IMTS offering. We also note that all non-dominant private line resellers are required to file for the first three years after an equivalency finding, on a semi-annual basis, the information required by Section 43.61 of the rules. The current filing manual for Section 43.61 data requires that carriers engaged in private line resale, referred to in the manual as "facilities resale," report their traffic and revenue flows, both inbound and outbound, on a country specific basis.²²⁵ To provide an accurate view of the impact on U.S. traffic and revenue flows from switched hubbing, private line resellers that use such routing alternatives are required to report their outbound and inbound traffic and revenue flows according to the ultimate point of

²²⁴ See *supra* ¶ 133.

²²⁵ See generally *Manual for Filing Section 43.61 Data*, FCC Report 43.61, June 1995.

termination or origination. As a final note, as provided in ¶ 120 *supra*, a foreign carrier may not provide service via switched hubbing to an affiliated market where it is not specifically authorized to do so.

C. Other Forms of Market Entry

1. Domestic Interexchange and Enhanced Services; Separate Satellite and Other Non-common Carrier Systems

171. In the *Notice*, we proposed to apply the proposed rules adopted in this proceeding only to common carriers seeking to provide international facilities-based services pursuant to Section 214.²²⁶ We tentatively concluded that current rules and policies governing domestic interexchange services, enhanced services, separate satellite systems, and other non-common carrier facilities do not warrant change.

172. Parties commenting on this issue agree with our tentative conclusion.²²⁷ Orion notes that the absence of limitations on foreign investment in U.S. separate systems helped it secure needed equity for its non-common carrier system.²²⁸ We do not find any support in the record for imposing an effective competitive opportunities analysis on domestic interexchange or enhanced services, separate satellites or other non-common carrier facilities. We decline to do so for the reasons stated in the *Notice*.²²⁹

2. Other Satellite Issues

173. Cruisephone argues that a categorical exclusion of international Marine Mobile Satellite Systems (MMSS) and Land Mobile Satellite Systems (LMSS) from the Commission's proposed standards will allow U.S. firms to attract foreign capital and increase the number of potential competitors without creating a risk of anticompetitive conduct by foreign carriers or inhibiting competition. Cruisephone asserts that there is no indication that the adoption of a more restrictive standard for international MMSS or LMSS foreign carrier applications will encourage foreign governments to open their communications markets.²³⁰

²²⁶ *Notice* ¶ 80.

²²⁷ Ameritech Comments at 3; Citicorp Comments at 4, Reply at 7; Columbia Comments at 4; Cruisephone Comments at 3-4; MCI Comments at 21; Orion Comments at 3; TRW Comments at 3-5; Although AT&T did not comment on this issue, it urged us in its petition for rulemaking to apply a comparable market access standard to all forms of entry in the U.S. telecommunications market.

²²⁸ Orion Comments at 3.

²²⁹ *Notice* ¶¶ 81-83.

²³⁰ Cruisephone Comments at 3-4.

We conclude that there is not a sufficient record at this time to exclude MMSS and LMSS from our market entry standard.

174. PanAmSat and Columbia contend that our proposed effective market access analysis should be expanded beyond the *Notice* to apply to any application proposing use of a non-U.S. licensed satellite. In considering such applications, PAS and Columbia would have us consider the extent to which U.S. satellites have effective market access overseas enabling them to compete with the non-U.S. satellite. They argue that we should not allow foreign satellites to be used to provide service to the United States where the country licensing the satellite does not allow carriers to use U.S. satellites to provide service in its market. They contend that, if satellite providers from countries that preclude or discriminate against U.S. satellite providers are permitted to compete without limitation, the resulting asymmetric market access will be detrimental to both U.S. service providers and consumers.

175. Similarly, Loral/Qualcomm urges us to expand the effective market access analysis beyond the *Notice* to consider whether the degree of openness extends broadly over multiple service segments. Loral/Qualcomm proposes that we consider mobile satellite service (MSS) and other communications services in determining effective market access, including discriminatory and anticompetitive behavior in foreign markets against U.S. Low Earth Orbit (LEO) systems.²³¹

176. The request of PanAmSat and Columbia raises several issues: (1) whether there is a need at this time for a formal entry standard to evaluate requests for use of non-U.S. licensed satellites in the United States; (2) if so, what the elements of that standard should be; and (3) whether the record before us supports development of any such standard. We agree with PanAmSat and Columbia that the ability of U.S. licensed systems to serve foreign markets is a legitimate consideration in reviewing applications to use foreign satellite systems in the U.S. market. We also agree that there is a need at this time for a formal standard. However, while PAS and Columbia articulate the general thrust of a formal entry standard that would apply to satellites, the record in this proceeding is insufficient to develop the elements of such a standard. We believe that such a standard more appropriately should be developed within the context of IB Docket No. 95-41, in which we are reviewing our international and domestic satellite policies.²³²

177. For similar reasons we decline to extend our market analysis to multiple service segments as requested by Loral/Qualcomm. The focus of our effective competitive opportunities analysis should remain the provision of international service by U.S. carriers in

²³¹ Loral/Qualcomm Comments at 4-5.

²³² Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, *Notice of Proposed Rulemaking*, IB Docket No. 95-41, 10 FCC Rcd 7789 (1995).

a foreign market.²³³ In this respect, restrictions on a U.S. carrier's ability to obtain access to MSS or other satellite systems licensed to operate on the foreign end of a U.S. international route would be relevant to our effective competitive opportunities analysis. Also, notwithstanding whether or not a satellite system is U.S.-licensed, or whether it is being utilized for MSS or fixed services, a Section 214 application by a foreign carrier to provide service to or from the United States using satellite system capacity will be subject to our effective competitive opportunities analysis.

178. TRW urges us to treat foreign carriers that own an Inmarsat-P system with Comsat as affiliates of Comsat for purposes of applying the rules adopted in this proceeding - - apparently in order to make a Comsat application to provide Inmarsat-P service subject to the proposed effective market access analysis. Motorola also urges us to use our authority under Section 308(c) of the Act to consider market access in conjunction with the provision of Inmarsat-P services in the United States.²³⁴ As we read the comments of TRW and Motorola, they seek similar relief for MSS services as requested by PanAmSat and Columbia for the satellite services provided by their systems. United States policy supports the Inmarsat-P system subject to the existence of principles to assure fair competition in MSS services agreed to by the U.S. government at the Tenth Inmarsat Assembly of Parties.²³⁵ These principles include access to national markets on a nondiscriminatory basis for all mobile satellite communications networks subject to spectrum availability. We can utilize our authority under Section 214 and Title III, as appropriate, to assure satisfaction of these principles in considering applications for U.S. participation in and provision of Inmarsat-P services. Comsat currently has one such application pending, and the Executive Branch has filed comments on that application pursuant to its authority under the Communications Satellite Act of 1962, as amended.²³⁶ In view of this pending application and the particular circumstances surrounding U.S. policy on Inmarsat-P, we conclude that Comsat applications involving Inmarsat-P entry into the U.S. market should be considered outside this rulemaking proceeding.

V. SECTION 310(b)(4) STANDARD FOR INDIRECT FOREIGN OWNERSHIP OF RADIO LICENSES

179. Section 310(b)(4) of the Communications Act establishes a 25 percent benchmark applicable to foreign investment in and ownership of the parent company of a common carrier, broadcast, aeronautical fixed, or aeronautical en route licensee, but gives the Commission discretion to allow higher levels of foreign ownership as long as the Commission

²³³ See *supra* ¶ 121.

²³⁴ TRW Comments at 2; Motorola Comments at 13.

²³⁵ See Report of the Tenth (Extraordinary) Session of the Inmarsat Assembly of Parties, December 5-9, 1994.

²³⁶ Application of Comsat Corporation (FCC No. 106-SAT-MISC-95) filed May 1, 1995.

determines that such ownership would not be inconsistent with the public interest.²³⁷ In our *Notice*, we asked whether the market access test proposed for the public interest determination under Section 214 also should be incorporated as an important (but non-dispositive) factor in the public interest analysis under Section 310(b)(4).²³⁸ We also requested specific comment on whether the market access standard, if adopted as part of the Section 310(b)(4) public interest analysis, should apply in the context of broadcast licenses, which traditionally have been treated differently from common carrier licenses due to the broadcasters' control over the content of their transmissions.²³⁹

180. A majority of the commenters in this proceeding support the adoption of some variation of a market access test for *common carrier* licenses.²⁴⁰ They argue that including such a test in our public interest analysis will promote global competition in communications markets. Those who commented on applying a market access test to *broadcast* licenses are fairly evenly split among favorable and unfavorable responses.²⁴¹ Those in favor cite the benefits to competition and the lack of offsetting national interest, while those opposed argue that the effective market access test is irrelevant to the statute's underlying purpose and might adversely affect minority broadcast ownership. ARINC opposes applying the market entry test to aeronautical licenses since the Commission has never even had a request for foreign investment above the benchmark level for this license category.²⁴² Many parties, whether in favor of or opposed to the market access test, propose that Section 310 foreign ownership

²³⁷ Section 310(b)(4) provides in pertinent part:

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by . . . any corporation directly or indirectly controlled by any other corporation . . . of which more than one fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. § 310(b)(4).

²³⁸ *Notice* at ¶ 92.

²³⁹ *Notice* at ¶ 103.

²⁴⁰ AT&T, AirTouch, AmericaTel, Arch Communications Group, C&W, Inc., Columbia Communications Corporation, CTIA, Department of Justice, E.F. Johnson, Loral/QUALCOMM, MCI, Motorola, and PanAmSat.

²⁴¹ Four parties endorse the new test (MPAA, Cook Inlet, Hefstel, and NBC) and five oppose it (Professor Jonathan D. Aronson, Fox Television Stations, Inc., Minority Media Telecommunications Council, NTIA, and Univisa).

²⁴² ARINC Comments.

restrictions be further liberalized or even abolished, because they are no longer needed to serve their intended function of safeguarding national security.

181. The parties also differ on the mechanics of applying the effective market access test, if adopted. Their views diverge on such matters as what foreign market(s) should be compared to the U.S. market, what segment, or segments, of the market, or markets, should be compared, and what governmental body should make the comparison.

182. Our review of the record leads us to conclude that the effective competitive opportunities test set forth in Section III, *supra*, would be appropriate to include as an important element in our public interest determination under Section 310(b)(4) for foreign investments in U.S. common carrier licensees. We will not however, apply an effective competitive opportunities test for broadcast or aeronautical licenses at this time. This outcome is consistent with our practice of treating broadcast licenses differently in determining whether to allow foreign ownership above the statutory benchmark level. Since the Commission lacks any historical guidance with respect to foreign ownership of aeronautical licenses, we also decline to apply the proposed test in that context.

183. Although Section 310(b)(4) gives the Commission the discretion to allow foreign ownership above the 25 percent benchmark level, that discretion has been exercised sparingly.²⁴³ We believe that, by adopting a clear and explicit effective competitive opportunities public interest criterion, this *Report and Order* will result in a more open and competitive U.S. telecommunications market by informing foreign investors how to maximize their investment opportunities in this country. Adopting this test also will promote a competitive U.S. telecommunications market by creating additional opportunities for the Commission to find that foreign investments in excess of the Section 310(b)(4) benchmark are consistent with the public interest. We believe that the methodology outlined below provides a framework that will allow both the Commission and potential applicants to apply the test to yield predictable and consistent results in the Section 310(b)(4) context by: (1) identifying a single "home market" for each foreign investor; (2) making the comparison on a service-by-service basis; and (3) focusing in the first instance upon *de jure* restrictions on alien ownership. As we did in the context of Section 214, we will refer to this as the "effective competitive opportunities," rather than the "effective market access," analysis.

²⁴³ See, e.g., *C&W*, FCC 95-422 (October 17, 1995); *Fox Television Stations, Inc.*, FCC 95-313 at ¶ 21 (July 28, 1995); *BT/MCI*, 9 FCC Rcd 3960 (1994); *Teleport Transmission Holdings*, 8 FCC Rcd 3063 (1993); *GCI Liquidating Trust*, 7 FCC Rcd 7641 (1992); *IDB Communications Group, Inc.*, 6 FCC Rcd 4652 (1991); *MMM Holdings, Inc.*, 4 FCC Rcd 8243 (1989); *GRC Cablevision*, 47 F.C.C.2d at 467-68.

A. Desirability of the Effective Competitive Opportunities Analysis for Section 310 Determinations

1. Common Carrier Licenses

184. Those parties that favor adoption of an effective market access test as part of the Commission's public interest determination under Section 310(b)(4) for common carriers do so on a number of grounds. They acknowledge that Section 310(b) is perceived by some foreign governments as a highly restrictive barrier to entry into the U.S. market and that explicitly adding this factor to our public interest analysis will help encourage other countries to open their markets, create a level international playing field, and promote global competition.²⁴⁴ Because common carriers generally exercise no control over the content of their transmissions, these commenters find little basis for concern over national security.²⁴⁵ They also favor having a similar test apply under both Section 310(b) and Section 214.²⁴⁶

185. Some commenters oppose including the effective market access criterion in the Section 310(b)(4) public interest analysis for indirect investment in common carrier licensees. They argue that it is unfair to hold foreign-owned firms hostage to the policies of their home governments.²⁴⁷ They also contend that the proposed test would not be compatible with, and might actually constitute a *de facto* violation of, international agreements.²⁴⁸

186. We agree with the majority of commenters in this proceeding, who favor the addition of an effective market access test to our analysis as a mechanism for promoting an open and competitive communications market. Like those commenters, we recognize that foreign ownership limitations may inhibit the ability of U.S. firms to compete in foreign markets because foreign countries use Section 310(b) as a reason to deny U.S. companies entry into their markets. Lifting those limitations to the extent that other countries do so in their own markets can allow new investors and new players to compete in our market, thereby increasing competition in the provision of U.S. telecommunications services, while at the same time ensuring that U.S. investors have similar opportunities to compete in foreign markets. The promise of increased access to the U.S. telecommunications market should be a significant incentive for foreign countries to reduce or eliminate their own barriers to foreign investment.

²⁴⁴ See, e.g., AirTouch Comments at 3; Arch Comments at 5; AT&T Comments at 38-40; Motorola Comments at 1; PanAmSat Comments at 2-3.

²⁴⁵ See Arch Comments at 9; Roamer Comments at 7-8.

²⁴⁶ See, e.g., France Telecom Comments at 27-28; PanAmSat Comments at 2-3; Sprint Comments at 35.

²⁴⁷ See OFII Comments at 2-3; Roamer Comments at 4-5.

²⁴⁸ See German Government Comments at 2; Korean Government Comments at 4.

187. We do not believe it is unfair to hold foreign carriers accountable for the policies of their home governments. We adopt an effective competitive opportunities test for such entities because of the incentives they have to maximize profits by impeding or foreclosing competition in the radio-based services in which they participate or with which they compete. This test gives those entities desiring greater access to the U.S. market the incentive to encourage their governments to allow more open and competitive home markets, to the benefit of competition in telecommunications markets worldwide. Those firms that operate in closed and noncompetitive markets may continue to enjoy the advantages of operating in the sheltered environment of their own home markets, but they will also remain subject to the Section 310(b) restrictions currently in place in this country. Furthermore, while non-carrier foreign investors may not have the incentive to maintain closed foreign markets, these same potential foreign investor entrants have the ability and should have the incentive to support liberalization efforts within their home markets.

188. As some commenters note, it is possible that application of the effective competitive opportunities test as part of our Section 310(b)(4) analysis could implicate international agreements. As discussed below, however, we will defer to the Executive Branch on any matter involving the interpretation of international agreements.²⁴⁹ Such deference should ensure that we apply our analysis consistent with this country's international obligations.

189. We recognize that common carriers are progressing toward providing programming over common carrier facilities which they control. This is, however, still an emerging trend and is likely to be only a *de minimis* part of any common carrier's business in the near future. Thus, the traditional distinction between common carrier licenses and broadcast licenses is still valid at this time and justifies the disparate treatment accorded to those services in this *Report and Order*.

2. Broadcast Licenses

190. There was much more resistance to applying an effective market access test to indirect investment in broadcast licensees. Fox Television argues that such a test would be inconsistent with and irrelevant to the statute's underlying purpose of preventing foreign control.²⁵⁰ MMTC objects on the ground that by opening the U.S. market to foreign investors, the new standard could adversely impact the prospects for minority broadcast ownership.²⁵¹ The Korean and German Governments also raise the concern that the proposed

²⁴⁹ See Section V.B.4, *infra*.

²⁵⁰ Fox Comments at 5-7; *see also* Univisa Reply at 5.

²⁵¹ MMTC Comments at 2-4. MMTC argues that foreign investors will tend to finance larger U.S. companies, which typically are not minority-controlled. If the Commission nonetheless chooses to apply the effective competitive opportunities test to broadcast applicants, MMTC proposes that the Commission also adopt rules that will encourage foreign investment in minority-controlled companies

test might conflict with international agreements in this context as with common carrier licenses.²⁵²

191. Others support the idea of applying the effective market access test in the broadcast context. The MPAA argues that the traditional concern over the potential distribution of propaganda and misinformation by alien-owned mass media has been alleviated by the proliferation of news and entertainment sources available to U.S. customers, making room for new factors to be included in the Commission's assessment of the public interest.²⁵³ Cook Inlet and Heftel agree that there is no basis for treating broadcasters differently from common carriers in the Section 310(b) analysis.²⁵⁴ NBC contends that the social, cultural, political, and national security concerns that underlie restrictions on alien investment in foreign markets are so ingrained that only the incentive of a resulting departure from the 25 percent statutory benchmark in this country can overcome the bias against foreign ownership of broadcast facilities in other countries.²⁵⁵

192. Foreign ownership of broadcast licenses presents different questions than for other types of radio spectrum licenses, especially in view of the public trustee concept applied to broadcasting in this country.²⁵⁶ Historically, foreign control of limited broadcast information outlets, particularly in time of war, was a principal consideration in adopting the foreign ownership limitations.²⁵⁷ Although somewhat diminished, the same concerns exist today, namely, that foreign control of a broadcast license confers control over the content of widely available broadcast transmissions. Therefore, we should not at this time lift restrictions on the amount of foreign influence over, or control of, broadcast licenses that allow editorial discretion over the content of their transmissions. We note that the Executive

by, for example, allowing higher levels of foreign investment if made in a minority-controlled company.
Id.

²⁵² German Government Comments at 2; Korean Government Comments at 4.

²⁵³ MPAA Comments at 4-5.

²⁵⁴ Cook Inlet Reply at 5; Heftel Reply at 13-14.

²⁵⁵ NBC Comments at 5.

²⁵⁶ The public trustee concept for broadcast licensees is discussed in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

²⁵⁷ The legislative history of Section 310 is discussed at length in *Fox Television Stations, Inc.*, 10 FCC Rcd 8452, 8468-72 (1995).

Branch shares our view of the continuing need for treating broadcast licenses differently for purposes of exceeding the benchmarks imposed in Section 310(b)(4).²⁵⁸

193. Affording broadcast licenses disparate treatment from common carrier licenses is consistent with the distinction that the Commission has consistently drawn in applying Section 310(b)(4). The language in the pending legislation before Congress also makes this distinction.²⁵⁹ Although we have allowed common carrier licensees to exceed the statutory benchmark, in each case, we have noted that alien ownership of broadcast licenses would present a different issue.²⁶⁰ By contrast, the Commission almost never has allowed alien ownership of a broadcast licensee to exceed that level.²⁶¹ Creating the potential for higher levels of alien ownership for broadcast licenses thus would be a far greater departure from our prior course than it is for common carrier licenses.

194. We recognize that the burgeoning number of information and entertainment sources has lessened the concern that misinformation and propaganda broadcast by alien-controlled licensees could overwhelm other media voices. Although somewhat alleviated, this concern remains a real one. We do not believe that the time has yet come to ease restrictions on alien ownership of broadcast licenses to the extent that would result from the implementation of an effective competitive opportunities test in the broadcast context.

3. Aeronautical Licenses

195. ARINC is the sole licensee for aeronautical en route and fixed services in the conterminous United States and Hawaii. It is the only party that filed comments on the application of an effective market access test in the aeronautical context. ARINC opposes use of that test for aeronautical licenses, arguing that the international marketplace for aeronautical services is fundamentally different from that which has developed for common carrier services. Moreover, because the Commission has never been presented with questions

²⁵⁸ See *Hearings on H.R. 514 Before the Subcomm. on Commerce, Trade & Hazardous Materials of the House Committee on Commerce*, 104th Cong., 1st Sess., March 3, 1995 (testimony of Larry Irving, Asst. Secretary for Communications and Information, Dept. of Commerce).

²⁵⁹ We note that Congress is currently considering legislation that would allow application of the effective competitive opportunities test to common carrier licenses, based on the same grounds that have led us to adopt that standard. See S. Rep. No. 23, 104th Cong., 1st Sess. 3, 33-34 (1995); H.R. Rep. No. 204, 104th Cong., 1st Sess. 120-22 (1995).

²⁶⁰ See, e.g., *MMM Holdings, Inc.*, 4 FCC Rcd 8243, 8252 n.33 (1989) ("Because radio common carriers are not responsible for message content, character considerations, while relevant, do not carry the same crucial significance as in broadcast proceedings"); *GRC Cablevision*, 47 FCC 2d 467, 468 (1974) ("our action here represents no departure from our traditional policies in regulation of broadcast television," as "alien ownership in that medium presents different questions").

²⁶¹ Cf. *Fox Television Stations, Inc.*, FCC 95-313 (July 28, 1995) (allowing foreign ownership of television stations to exceed benchmark level under unique historical circumstances of the case).