as to foreign ownership and control of licenses in the aeronautical en route and fixed services, ARINC argues that a general policy developed for other services would be inappropriate and that the public interest would be better served by a case-by-case determination based upon the specific facts presented should such an issue arise in the aeronautical context.[262]

196. We agree with ARINC that the effective competitive opportunities test should not be applied at this time in the aeronautical context. Aeronautical services play a critical role in aviation safety in the United States, and their proper use in supporting air navigation is vital to national security. The Commission has not had an opportunity to consider the implications of allowing foreign ownership above the 25 percent statutory benchmark in this context, and we are unwilling to establish a rule where we have no historical guidance.

B. Methodology for Implementing Effective Competitive Opportunities Analysis

197. Whenever an application presents the Commission with more than 25 percent foreign ownership of a company that directly or indirectly controls a licensee subject to Section 310(b), we must determine whether the proposed level of foreign ownership is consistent with the public interest. In this *Report and Order*, we adopt an effective competitive opportunities test as an important element in that determination as it applies to foreign investment in common carrier licensees. Many parties, whether opposed to or in favor of adoption of that test, suggest ways in which it could be implemented to best serve the public interest. In addition, Congress has given us additional guidance in the proposed legislation.

198. Under our methodology, we find that if an alien entity or combination of entities ultimately controls more than 25 percent of the capital stock of the parent company of an applicant for a common carrier license, we will determine the "home market" of each such alien entity based on an analysis of its principal place of business. We will then apply our effective competitive opportunities analysis to the radio-based service in the home market analogous to that service in which the foreign investor seeks to participate in the U.S. market.

1. Identifying the Appropriate National Market for Comparison

199. In the *Notice*, we referred to a comparison of market access in the "primary markets" served by the alien entities or investors seeking entry into the U.S. market.[263] Some commenters argue that the "primary market" concept should not be used in the Section 310(b)(4) context. Both CTIA and Motorola assert that the term might undermine Commission objectives by creating unintended limitations on entry into the U.S. market that would result in barriers to entry into foreign markets by U.S. companies. CTIA suggests

262 ARINC Comments at 10.

263 *Notice* at ¶ 95. *See supra*, ¶ 110.

clarifying the definition of "primary market" so as to avoid such unintended consequences.[264] Motorola finds the concept of "primary market" unworkable and, instead, prefers focusing on the foreigner's "home market."[265]

200. The arguments made by CTIA and Motorola are well taken. An alien investor could have any number of "primary markets" as that term was defined in our *Notice*. We previously decided to modify the "primary market" concept as it applies in the analytical framework of Section 214 in order to identify foreign "destination markets" in which an applicant may have sufficient market power to discriminate against unaffiliated U.S. international carriers.[266] This is an important consideration in determining the public interest in allowing a particular foreign carrier to provide U.S. international service between the United States and a market in which the carrier has monopoly or other economic market power. Under Section 214, we can apply the effective competitive opportunities test to any number of destination markets in which the foreign carrier has market power to achieve our stated goals.

201. Section 310(b)(4), on the other hand, does not necessarily focus on the consequences of affording an alien investor the ability to provide service between the United States and particular foreign markets; rather, it considers in all cases the consequences of affording an alien investor the ability to provide a service within this country. We agree with the commenters that these differing concerns call for different analytical tools. Under Section 310(b)(4), we must make a single determination to allow or prohibit the proposed foreign investment. We cannot simply assess the openness of the market at the other end of a proposed international route (if any), but instead presumably would have to simultaneously assess all markets in which an applicant had sufficient market power. Depending upon the methodology chosen for this assessment, a multinational entity could find itself effectively held hostage by the policies of a single government with a closed market. If we were instead to attempt to balance the totality of the markets in which such a corporation had market power, we necessarily would introduce uncertainty into the process. We therefore believe that, for purposes of our analysis of effective competitive opportunities under Section 310(b)(4), we must identify a "home market" upon which to perform our analysis.[267]

202. In identifying a home market for this analysis, we could look simply to the country in which the corporate entity is organized. In an age in which complicated investment, co-marketing, joint venture, and other alliance relationships are a common fact of

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264 CTIA Comments at 6.

265 Motorola Comments at 3.

266 *See* Section III.D.3, *supra*.

267 We note that the use of a single "home market," rather than either a "primary market" or "destination market," is consistent with the approach taken by congress in the pending legislative revision of Section 310. *See supra* note 259.

international business life, however, we believe that the place of organization might not be sufficient alone to identify the proper market for our effective competitive opportunities analysis. Moreover, we are concerned that potential foreign investors might try to manipulate the process by engaging in a form of international corporate "forum shopping," trying to associate themselves with liberal foreign communications markets in order to justify a departure from the Section 310(b)(4) benchmark.

203. We believe that an alien investor's home market should reflect its principal place of business, the market with which it has the most contact and therefore most fairly is associated.[268] This may often be the same as the entity's place of organization, but that may not always be the case. In fashioning a workable definition of home market, therefore, we have considered the body of law developed by the federal courts in determining a corporate entity's "principal place of business" for purposes of federal diversity jurisdiction.[269] Using the framework for determining a corporation's "principal place of business" for jurisdictional purposes as a guide can assist us in determining the appropriate market for comparison under Section 310(b)(4). This jurisdictional concept is well tailored to that analysis since it is designed to yield only one principal place of business.[270]

204. In determining an entity's principal place of business for this jurisdictional purpose, the courts look at the totality of its business activity to identify both the place in which that entity has its "nerve center" from which direction and control of its business conduct radiates and the place in which the entity carries out its business operations.[271] When

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268 Although Motorola suggested using a "home market" rather than a "primary market" for our analysis, it did not suggest how best to determine an alien investor's "home market." *See* Motorola Comments at 3-5.

269 Federal courts have diversity jurisdiction over cases in which the parties are citizens of different states and the amount in controversy exceeds $50,000. *See* 28 U.S.C. § 1332(a). Such jurisdiction "is founded on the assurance to non-resident litigants of courts free from susceptibility to potential local bias." *Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945). For purposes of diversity jurisdiction, by statute a corporation is deemed to be a "citizen" of its principal place of business. A corporation is also deemed to be a "citizen" of its state of incorporation. *See* 28 U.S.C. § 1332(c)(1) ("For purposes of this section . . . a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."). The two locations thus described can be deemed to be the corporation's center of gravity, such that it is sufficiently "local" in either jurisdiction to avoid unfair prejudice. *See Dimmitt & Owens Financial, Inc. v. United States*, 787 F.2d 1186, 1190 (7th Cir. 1986).

270 *See Gafford v. General Elec. Co.*, 997 F.2d 150, 161 (6th Cir. 1993); *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 406 (5th Cir. 1987).

271 *See Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 914-15 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1057 (1994); *Gafford*, 997 F.2d at 162; *Harris v. Black Clawson Co.*, 961 F.2d 547, 549 (5th Cir. 1992); *Vareka Inv., N.V. v. American Inv. Properties, Inc.*, 724 F.2d 907, 910 (11th Cir.), *cert. denied*, 469 U.S. 826 (1984); 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 3625, at 621-24 and 161 (2d ed. and Supp. 1995).

the nerve center and the center of its business operations are not located in the same place, the courts balance the facts of each case to determine the citizenship that is most fairly attributable to the business.[272]

205. The courts have identified a number of factors that may be of use in determining an entity's principal place of business for jurisdictional purposes. These factors include the location of the investment principals, officers, and directors of the entity,[273] the location of its headquarters,[274] the location of its tangible property, including production facilities,[275] and the place from which the entity derives its greatest volume of sales and revenues.[276] All of these factors are weighed in an effort to determine the center of gravity of the entity's business function that can most fairly be said to be its "principal" location.

206. We believe that a similar analysis would be appropriate in identifying the home market of alien entities that seek to obtain indirect ownership of common carrier licensees. Since the jurisdictional analysis described above relates generally to determining which state within the United States is a corporation's "principal place of business," we will modify the factors slightly to reflect the international scope of our inquiry.

207. Therefore, in determining an alien entity's home market for purposes of our public interest determination under Section 310(b)(4), we will identify: (1) the country of its incorporation, organization, or charter; (2) the nationality of all investment principals, officers, and directors; (3) the country in which its world headquarters is located; (4) the country in which the majority of its tangible property, including production, transmission, billing, information, and control facilities, is located; and (5) the country from which it derives the greatest sales and revenues from its operations. If all five of these factors indicate that the same country should be considered to be the entity's home market, it will be presumed to be

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272 *See United Nuclear Corp. v. Moki Oil & Rare Metals Co.*, 364 F.2d 568, 570 (10th Cir.), *cert. denied*, 385 U.S. 960 (1966); *Neat-N-Tidy Co. v. Tradepower (Holdings) Ltd.*, 777 F. Supp. 1153, 1156 (S.D.N.Y. 1991).

273 *See Quaker State Dyeing & Finishing Co. v. ITT Terryphone Corp.*, 461 F.2d 1140, 1144 (3d Cir. 1972); *KS Corp. v. Chemstrand Corp.*, 198 F. Supp. 310, 315 (S.D.N.Y. 1961).

274 *See Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991); *Riggs v. Island Creek Coal Co.*, 542 F.2d 339, 342 (6th Cir. 1976); *Masterson-Cook v. Criss Bros. Iron Works, Inc.*, 722 F. Supp. 810, 812 (D.D.C. 1989).

275 *See Grinter v. Petroleum Operation Support Serv., Inc.*, 846 F.2d 1006, 1008 (5th Cir.), *cert. denied*, 488 U.S. 969 (1988); *Quaker State*, 461 F.2d at 1144; *Anniston Soil Pipe Co. v. Central Foundry Co.*, 329 F.2d 313 (5th Cir. 1964) (*per curiam*); *Kelly v. United States Steel Corp.*, 284 F.2d 850, 854 (3d Cir. 1960).

276 *See, e.g.*, *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990)(determination based on state from which corporation derived 61% of sales, 69% of operating income, and 64% of receivables).

so, subject only to rebuttal based on clear and convincing evidence to the contrary. If these five factors yield inconsistent results, however, we will balance them, as well as any other information that is particularly relevant to the case, to determine the appropriate home market under the totality of the circumstances.

208. In most cases, we believe that our analysis will identify a single home market relevant to any given case. The possibility remains, however, that in certain circumstances we might have to consider more than one home market. One such example could arise in the context of aggregate multiple carrier interests, in which two or more foreign carriers acquire a combined interest in a U.S. carrier which either exceeds, or causes the applicant to exceed, 25 percent and they are likely to act in concert to influence the affairs of the licensees.[277] We expect that such cases will be rare. However, where circumstances are such that our analysis should take into account competitive opportunities in a number of different markets, we will not hesitate to do so.

2. Identifying the Appropriate Market Segment for Comparison

209. Once the appropriate home market has been identified, we must decide the scope of the effective competitive opportunities inquiry. For example, we could make a market-wide determination of competitive opportunities. Such an analysis would be virtually unaffected by the particular service in which the foreign investor sought to participate in the U.S. market. In the alternative, we could break the home market down into sectors defined by the type of facility involved in the service proposed -- *e.g.*, the satellite sector vs. the wireless terrestrial sector. We also could sharpen the focus still further by analyzing the specific service in the foreign investor's home market in which it proposed to invest in the U.S. market.

210. Those parties who comment on the market definition issue differ over what the Commission should be comparing to determine effective competitive opportunities. Most advocate a service-by-service approach, arguing that it is the fairest and most practical alternative.[278] NBC proposes a slight variation on this approach that would require absolute mirror image investment rights to exist in the alien investor's home market.[279] Motorola proposes another variation that would allow a comparison within categories of similar services (*e.g.*, wireline as well as wireless services), with the goal of achieving greater flexibility.[280] Two commenters propose separating the competitive opportunities analysis entirely from consideration of particular applications, one by making a single market-wide determination for

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277 *See* Section III.D.1.c, *supra*.

278 AirTouch Comments at 6; Arch Comments at 6-7; French Government Comments at 3; MCI Comments at 27.

279 NBC Comments at 6-7.

280 Motorola Comments at 5.

each country,[281] and the other by determining constraints on all content-based services in the home market and applying any resulting limitation to the alien's proposed investment in the United States.[282]

211. We agree with those commenters who support a service-by-service approach. This approach has a number of advantages over the less focused alternatives. First, it narrows the scope of our inquiry, which makes the analysis more practicable and less time-consuming to perform. Instead of assessing foreign entry restrictions applicable to an entire market or to a large sector of it, we need only identify those restrictions directly applicable to the relevant service. Second, this approach leads to greatest certainty and predictability of result, since it has the fewest variables. It is far less likely that a particular service will be open for some purposes but closed for others, than it is that a sector or an entire market could have some open aspects and other closed aspects. Third, this approach provides continual incentives for market opening, whether a particular service is the first one being liberalized or the last one, since each time a country opens a new service to U.S. investors, it independently has the effect of opening the U.S. market to its own investors. If instead a country were required to open an entire sector of its market, or the telecommunications market as a whole, in order to create comparable opportunities in the U.S. market, we might create a first step so daunting that many countries would refuse to take it. We believe that rewarding each step toward market liberalization will encourage a greater number of countries to act and will still enable those willing to open large sectors or their entire market to enjoy comparable opportunities in the U.S. market.

212. We therefore conclude that a service-by-service comparison will best serve our goal of encouraging foreign governments to open their telecommunications markets to U.S. participation and investment. Because liberalization of each service in a foreign market will result in additional opportunities for foreign participation in the U.S. market, this approach will also achieve our goal of promoting effective competition in this country. We therefore conduct our effective competitive opportunities analysis under Section 310(b)(4) by comparing restrictions on U.S. participation in the home market for the particular wireless service in which the foreign investor seeks to participate in the U.S. market. If the services in the U.S. and home markets are not precisely matched, we will use the most closely substitutable wireless service in the home market, as determined from the consumers' perspective.

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281 OFII Comments at 4.

282 MPAA Comments at 5. The French government specifically opposed this approach as irrelevant to this proceeding. French Government Reply at 15.

3. Factors of the Effective Competitive Opportunities Analysis

213. Once we have identified the appropriate comparable service within the appropriate home market, we can conduct our analysis of effective competitive opportunities available within that service to U.S. companies and investors. As in the context of Section 214, we believe that the first factor -- *de jure* restrictions -- should be the initial focus of our inquiry for purposes of Section 310(b)(4). This focus also will result in greater predictability in applying our effective competitive opportunities analysis. To the extent they are relevant, however, we will also consider the practical, or *de facto*, limitations on U.S. participation, including the price terms and conditions of interconnection, competitive safeguards, and the regulatory framework of the relevant market(s).[283]

214. If we determine that U.S. interests are allowed to hold a controlling interest in a provider of the relevant service in the relevant home market, then the effective competitive opportunities test would justify placing no limit on the level of alien ownership in the U.S. service provider, absent significant *de facto* barriers. If we determine, however, that U.S. interests are *not* allowed to acquire and hold a controlling interest in a provider of the relevant service in the relevant home market, then the effective competitive opportunities test would support allowing the foreign applicant to exceed the 25 percent statutory foreign ownership benchmark only up to the level of ownership available to U.S. interests. For example, if Country A allowed a U.S. company to acquire a non-controlling forty percent interest in a cellular licensee, then an investor from Country A would be able to acquire up to a non-controlling forty percent interest in the holding company of a cellular licensee in the U.S. market.

215. We believe that this approach will encourage other countries to continue to lift restrictions, even if only incrementally, by rewarding each step taken. Were we to enforce the benchmark unless and until U.S. interests could acquire control in the home market, we would risk creating too high a hurdle for action by other countries and also unnecessarily penalize U.S. companies seeking foreign investment. Conversely, were we to adopt the suggestion of several commenters and apply the effective competitive opportunities test only when an alien enterprise seeks to acquire a controlling interest in a U.S. company,[284] we would greatly decrease the incentive for foreign governments to open their communications markets to U.S. participation at a higher but non-controlling level. We will therefore apply this test to any proposed foreign ownership above the 25 percent benchmark level. We will, however, continue to allow foreign investors to acquire ownership interests up to the statutory benchmark level even if the home market limits U.S. interests to less than the same 25 percent level of ownership.

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283 *See supra*, Section III.B.

284 *See, e.g.*, Fox Comments at 6; France Telecom Comments at 28; Sprint Comments at 36.

4. Consideration of Additional Public Interest Factors

216. As in the Section 214 context, in addition to our effective competitive opportunities analysis, we will consider other public interest factors that weigh in favor of, or against, foreign investments subject to Section 310(b)(4). These additional factors include the general significance of the proposed entry to the promotion of competition in the U.S. telecommunications market, any national security, law enforcement, foreign policy and trade concerns raised by the Executive Branch, and the extent of alien participation in the applicant's parent corporation (in particular the presence of alien officers and directors in excess of the statutory benchmarks). These factors have always been germane to our Section 310(b)(4) analysis.[285]

217. NTIA and OFII suggest that the Executive Branch, and not the Commission, should make the determination of whether effective competitive opportunities exist and whether there is an overriding international obligation that also should affect the public interest determination under Section 310(b)(4).[286] Motorola suggests instead that the Commission coordinate with other government agencies in making its determination.[287]

218. We believe that the Commission should make the effective competitive opportunities determination as part of its overall assessment of the public interest. The Commission has been responsible for regulating foreign ownership of its Title III licensees ever since Section 310 was enacted as part of the Communications Act of 1934. The statute specifically gives the Commission broad discretion in applying Section 310(b)(4). Over the last sixty years, we have been called upon many times to determine the public interest under this section, and we see no reason to abdicate that responsibility now.

219. We also recognize, however, that other federal agencies have developed specific expertise in matters that may be relevant in particular cases, such as international trade, national security, law enforcement, and foreign policy. In any given case, a requested departure from the statutory benchmark may implicate any one or a combination of those concerns by, for example, conflicting with or having other consequences under this country's international treaty obligations or running counter to an international trade or foreign policy established by the Executive Branch. The Commission has no desire to run afoul of any such legitimate concerns. Our goal is to complement and support Executive Branch policies in these areas and, therefore, we will coordinate with appropriate executive agencies to make sure that our actions are consistent with national policy. Accordingly, in making our public interest determination, we will accord deference to the views of the Executive Branch on any

285 *See BT/MCI*, 9 FCC Rcd at 3964 and n. 40.

286 NTIA Comments at 18; OFII Comments at 4.

287 Motorola Comments at 9.

national security, law enforcement, foreign policy, or trade policy concerns, or the interpretation of international agreements.[288]

VI. JURISDICTION ISSUES

220. In our *Notice*, we asked for comment on the scope of our statutory jurisdiction to consider effective market access as an important element of our public interest analysis under Sections 214 and 310(b)(4) of the Act.[289]

221. Most commenters on this issue, including Justice and NTIA, agree that we have jurisdiction to consider the availability of effective market access as part of our overall public interest analysis under Sections 214 and 310(b). Justice states that our policy is especially warranted "in light of the substantial harms that foreign carriers with monopoly rights or market power can cause to U.S. consumers of international telecommunications services and the potential for full facilities-based competition in foreign countries to redress these harms...."[290] NTIA observes that the effective market access test simply refines our established precedent of considering the character of foreign markets as part of our public interest analysis for Section 214 applications.[291] NTIA further observes that we have concurrent authority with the Executive Branch to protect competition involving telecommunications carriers by enforcing antitrust laws such as the Clayton Act.[292] A few commenters, however, argue that we are attempting to set trade policy and, thus, are encroaching on the duties of the Executive Branch.[293]

222. We believe that each of the three goals we have adopted is squarely within our mandate under Section 1 of the Act to create a "rapid, efficient, Nation-wide *and world-wide* wire and radio communications service with adequate facilities at *reasonable charges*."[294]

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288 In order to facilitate input from the Executive Branch, the Commission will alert appropriate executive agencies whenever an applicant seeks to exceed the statutory benchmark.

289 *Notice* ¶ 39 (citing 47 U.S.C. §§ 214, 310 (1995)).

290 DOJ Comments at 22; NTIA Reply at 8.

291 NTIA Reply at 8. ("The Commission's intent in proposing a new rule...appears to be to provide a greater measure of certainty for foreign investors by formalizing considerations of market openness that were previously undertaken without specific written criteria or standards. In addition, the Commission seems to be proposing a new rule to codify past practices and to more carefully reflect competition policy.")

292 NTIA Comments at 10.

293 Deutsche Telekom Reply at 11-12; TLD Reply at 22; OFII Comments at 4; Sprint Comments at 23-25; Sprint Reply at 7-9.

294 47 U.S.C. § 151 (1995) (*emphasis added*).

Moreover, we conclude that we have jurisdiction under the Act to adopt the effective competitive opportunities analysis as part of our public interest determination under Sections 214 and 310(b)(4) as set forth in this *Report and Order*, and that this does not infringe upon trade policy or other matters within the primary jurisdiction of the Executive Branch. Further, we believe that our action in this rulemaking is consistent with our responsibilities under the Clayton Act to consider anticompetitive issues under the public interest standard.[295]

A. Jurisdiction Under Section 214

223. Section 214 expressly directs the Commission to take action as the "present or future public convenience and necessity require."[296] In applying this standard to foreign carrier Section 214 applications to enter the U.S. market, the Commission previously has considered the competitiveness of foreign markets. For example, in *International Competitive Carrier*,[297] we determined that the public interest required close monitoring of foreign carriers' U.S. international operations to ensure that markets were not manipulated in such a way that would harm U.S. consumers and U.S. carriers. Further, in *Telefonica Larga Distancia de Puerto Rico,* we stated: "We...consider the closed nature of foreign markets to be a serious problem because of the potential for discrimination among U.S. carriers terminating traffic in the foreign market."[298] We further noted that "this potential for discrimination could adversely affect the public interest by undermining the benefits of competition, and is one factor, among several, that is relevant to the Section 214 public interest determination."[299] Similarly, in *AmericaTel,* we examined the competitiveness of the Chilean telecommunications market as part of our Section 214 public interest analysis of a Chilean carrier's application to acquire control of AmericaTel, a U.S. facilities-based carrier.[300] In that case, the grant of the Section 214 application depended in part "on the

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295 15 U.S.C. § 21(1995); 47 U.S.C. § 602(d)(1995) (authorizing the Commission to enforce Section 7 with respect to "common carriers engaged in wire or radio communication"); 15 U.S.C. § 18 (proscribing the acquisition of "the whole or any part" of the stock or assets of another corporation where the effect of such acquisition may be substantially to lessen competition); *see also United States v. F.C.C.* 652 F.2d 72 (D.C. Cir. 1980) (*en banc*) (Clayton Act gives Commission antitrust enforcement responsibilities).

296 47 U.S.C. § 214 (1995).

297 *In the Matter of International Competitive Carrier Policies*, 102 FCC 2d 812, 843 (1985)(*International Competitive Carrier*); *see also BT/MCI*, 9 FCC Rcd 3960, 3964 (recognizing that the pressures of a competitive market minimize the ability of a carrier to engage in anticompetitive conduct); *International Services*, 7 FCC Rcd 7331 (applying dominant carrier regulation to U.S. affiliates of foreign carriers on routes where the foreign carrier has the incentive and ability to discriminate against unaffiliated U.S. carriers).

298 *Telefonica Larga Distancia de Puerto Rico*, 8 FCC Rcd. 106, 109 (1992).

299 *Id.* at 108.

300 *AmericaTel Corp*, 9 FCC Rcd 3993, 4000 (1994).

degree to which we find that market conditions and regulation in Chile are adequate to protect unaffiliated U.S. international carriers from potential discrimination by ENTEL-Chile or from other unfair competitive advantages that may accrue to [AmericaTel] as a result of its affiliation with ENTEL-Chile."[301]

224. TLD concedes that the Commission acted within its jurisdiction in those cases. It attempts to distinguish these cases, however, by arguing that the Commission focused on the potential anticompetitive effects of foreign carrier entry into the U.S. market, not on the acts of foreign governments and the potential effects that foreign market structures might have on the global telecommunications trade environment.[302] TLD argues that, in contrast, the effective market access test regulates both foreign governments and their domestic telecommunications markets and, thus, exceeds our authority.[303]

225. TLD's argument depends on a fundamental misperception of our objective. Our primary goal is to promote effective competition in the U.S. market for international telecommunications services through policies that prevent anticompetitive conduct in the provision of international services or facilities and which encourage foreign governments to open their communications markets to competition. We have adopted a goal of encouraging the opening of foreign markets as a necessary means of promoting U.S. international service competition and preventing anticompetitive conduct -- not as an end in itself. As the District of Columbia Court of Appeals recently reconfirmed, we have ample authority under Section 214 to prescribe the conditions necessary to protect the public interest, convenience and necessity from anticompetitive conduct.[304] Here, we find that open foreign markets are the most effective safeguard against the anticompetitive conduct that could otherwise result from foreign carrier investment in an affiliated U.S. carrier. Further, we find that only with effective competitive opportunities to compete at the foreign end can both the benefits of foreign carrier affiliation and the prevention of anticompetitive conduct actually be achieved.[305]

226. Some commenters also argue that we do not have authority under Section 214 to adopt a foreign carrier market entry test because Section 214 does not expressly mention "reciprocity," and does not authorize us to consider the openness of foreign markets. In support, they point to Congress' express provision of a reciprocity requirement in Sections 308(c) and 310(c) of the Act and in Section 35 of the Submarine Cable Licensing Act, but the

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301 *Id.* at 4000.

302 TLD Reply at 29-31, *see also* Deutsche Telekom Reply at 6-7.

303 TLD Reply at 24.

304 *Atlantic Tele-Network, Inc. v. F.C.C.*, 59 F.3d 1384 (DC Cir., 1995); *see supra* ¶ 223.

305 *See supra*, ¶¶ 15,16.

absence of such a reciprocity requirement in Section 214.[306] TLD further notes that Congress enacted Section 308 in 1934, the same time that it enacted Section 214, and that this further suggests that it did not contemplate a reciprocity requirement under Title II.[307] It also references legislation introduced in 1993 that, if enacted, would have granted the Commission specific authority to deny a Section 214 application based on a lack of comparable access in the applicant's home market. These commenters also cite *Regulatory Policies and International Telecommunications*,[308] as an example of an Executive Branch challenge to the Commission's authority to adopt reciprocity requirements, and *Second Cable Foreign Ownership Act*,[309] as an example of the Commission declining to adopt a rule of reciprocity for foreign ownership of cable companies.

227. We find these commenters' statutory arguments unconvincing because we are not adopting a reciprocity requirement. As explained above, we are adopting a public interest analysis that is comprised, in part, by an effective competitive opportunities analysis for those Section 214 applications filed by U.S. carriers affiliated with foreign carriers that have the ability and incentive to discriminate against unaffiliated U.S. carriers, thereby harming U.S. consumers and businesses. We apply this standard not to secure open markets as an end in itself, but rather to ensure that U.S. consumers and businesses realize the benefits of effective competition in the provision of their international telecommunications services. We find that effective competitive opportunities on the foreign end of U.S. international routes are necessary to limit the potential for anticompetitive conduct by foreign carriers and to ensure that their entry promotes rather than hinders competition in the U.S. international services market. The fact that Congress did not require us to consider specifically the openness of foreign markets under Section 214 in no way implies that this factor is not relevant under the broader concept of the public interest, convenience and necessity.[310]

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306 Deutsche Telekom Comments at 7; TLD Reply at 27.

307 TLD Reply at 27.

308 Deutsche Telekom Comments at 14 (citing *Regulatory Policies and International Telecommunications*, 2 FCC Rcd 1022 (1987) ("*Regulatory Policies*") (inquiring into the desirability of adopting an international competitive "model," along with possible retaliatory procedures).

309 TLD Reply at 29-31; Deutsche Telekom Comments at 12 (citing *Second Cable Foreign Ownership Act*, 77 FCC 2d 73 (1980) ("*Second Cable*")).

310 *Atlantic Tele-Network, Inc. vs. F.C.C.*, 59 F.3d 1384 (D.C. Cir 1995) (upholding the Commission's decision to impose proportionate return requirement as part of its public interest analysis). *See also Southwestern Cable v. U.S.*, 392 U.S. 157, 169-170 (1968) (where the court observed that Congress' failure to adopt legislation containing a specific grant of regulatory authority to the Commission does not address whether the Commission already had such authority under its general public interest mandate).

228. The Supreme Court's analysis in *Storer Broadcasting Co.* also supports this conclusion.[311] In *Storer Broadcasting Co.*, the Commission limited the ownership of broadcast stations pursuant to its authority to determine whether the "public interest, convenience and necessity would be served" by the granting of applications under sections 308 and 309 of the Act.[312] Parties challenging these rules asserted that Sections 308 and 309 did not specifically authorize such limitations. The Commission argued that it had the authority to limit the concentration of ownership to protect the public interest. The Supreme Court held the Commission could limit ownership concentration despite the lack of express authority to do so, reasoning that even though "the challenged rules contain limitations against licensing not specifically authorized by statute...that is not the limit of the Commission's rulemaking authority."[313]

229. The *Regulatory Policies* and *Second Cable* proceedings also do not conflict with our conclusion here that the Section 214 market entry standard adopted in this *Report and Order* is within our statutory jurisdiction. In these two earlier proceedings, we considered an investment reciprocity requirement. Here we do not. In *Regulatory Policies*, the Commission was concerned not only with the potential for discrimination by foreign carriers, but also with the ability of U.S. corporations, such as equipment manufacturers, to participate in foreign markets. The Commission ultimately decided in *Regulatory Policies* that this agency should not take regulatory action solely for trade purposes. In *Second Cable*, we declined to adopt a reciprocity requirement on foreign investment in cable television systems. The Commission in that case found no nexus between the proposed reciprocity requirement and its responsibilities under the Cable Act. Unlike this proceeding, there was no concern that foreign investment in U.S. cable companies created the potential for anticompetitive effects in the U.S. cable market.

230. Deutsche Telekom and TLD further challenge our jurisdiction to adopt a market entry test by arguing that Section 2 of the Act limits our jurisdiction to communications or transmissions which begin or end in the United States. They contend that, to the extent the "global" market referred to in the *Notice* extends beyond such communications, regulation of this extended "global" market was not contemplated by Congress.[314] As we clarified in Section II, *supra*, the telecommunications market that is the focus of our regulatory concern in this rulemaking is the U.S. market for international telecommunications service, *i.e.*, telecommunication services that originate or terminate in, or

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311 *United States v. Storer Broadcasting Co.*, 76 S.Ct. 763, 769-70 (1956).

312 47 U.S.C. §§ 308, 309 (1995).

313 *Storer Broadcasting Co.*, 76 S.Ct. at 770; *see GTE Service Corp. v. F.C.C.*, 474 F.2d 724 (1973)(Congress' failure to grant express authority to Commission to regulate data processing services did not preclude the Commission from doing so pursuant to its general mandate under Section 1 and broad and comprehensive rulemaking authority).

314 Deutsche Telekom Comments at 9-14; TLD Reply at 24.

that transit the United States. This includes the U.S. market for global, seamless network services that increasingly are being used by U.S. businesses. These services require close coordination and cooperation between U.S. and foreign carriers. Permitting dominant foreign carriers to provide U.S. international services when U.S. carriers are denied the opportunity to provide such services on the foreign end of a U.S. international route presents a substantial risk of anticompetitive effects in the U.S. international services market, denying U.S. consumers the benefits of competition among multiple full-service carriers on a given route. We believe that full competition on both ends of a communications link is far more effective than safeguards in achieving effective competition, and offers U.S. consumers the best opportunity to enjoy the benefits of price, quality and service competition.

231. Deutsche Telekom and TLD also claim that the market entry analysis that we are adopting in this *Report and Order* is really a surrogate for requiring reciprocity in investment and that Sections 2 and 3 of the Act limit our authority to "regulation of commerce or transmission" of communications, and not investment.[315] We do not agree the Act precludes us from considering whether foreign entry or investment in the U.S. market is in the public interest. The question of investor identity is also relevant to several issues we have traditionally addressed in our public interest inquiry, including national security and the prevention of anticompetitive conduct.[316]

232. Commenters such as Deutsche Telekom also argue that, even if Section 214 confers jurisdiction to apply a market entry test to transfers of controlling interests, Section 214 confers no jurisdiction to apply such a test to transfers of non-controlling interests because it does not explicitly refer to non-controlling interests.[317] We reiterate that Congress granted the Commission broad jurisdiction in Section 214 to grant applications pursuant to the public interest, convenience and necessity. Congress is not required to expressly authorize us to consider non-controlling investments where this factor is relevant to our public interest analysis.[318]

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315 Deutsche Telekom Comments at 11. ("Section 3 defines 'foreign communication' as a communication or transmission from or to any place in the United States, to or from a foreign country, or between the United States and a mobile station located outside the United States." *Id.* Section 2 forbids Commission jurisdiction over "any carrier engaged in ... foreign communication[s] solely through physical interconnection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such a carrier."*Id.*)

316 *Cf. In the Matter of Orion Satellite Corporation*, 5 FCC Rcd 4937, 4939 (1990)(addressing investor identity in the context of national security); *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1198-1202 (1986) (adjudicated, broadcast-related violation of antitrust laws by the broadcast applicant is relevant to grant of authority); *modified in* 5 FCC Rcd 3252 (1990) (expanded to include adjudicated violations involving any media of mass communications).

317 Deutsche Telekom Comments at 5, 26-27; France Telecom Comments at 2; Sprint Comments at 7-10.

318 *See supra* ¶¶ 87, 228; *Cf. Storer Broadcasting Co.*, 76 S.Ct. at 770; *GTE Services Corp.*, 474 F.2d at 731.

233. Deutsche Telekom and Sprint further contend that the Commission has no jurisdiction to adopt an effective competitive opportunities analysis because *Execunet* held that Section 214 has only "a limited office with respect to regulation of service offerings on existing lines." They contend that Section 214 primarily prevents unnecessary duplication of *facilities* and that it does not regulate a carrier's provision of *services* on its authorized facilities.[319] To the extent that this Order does regulate services, *Execunet* does not prohibit us from doing so. While *Execunet* references the needless duplication of facilities as the primary purpose of Section 214, at the same time it acknowledges that through the use of proper procedures and findings, the Commission has authority under Section 214 to restrict the services that may be offered over authorized communications lines.[320] Furthermore, the use of this rulemaking proceeding potentially to alter the services a carrier may offer over previously authorized lines does not exceed our jurisdiction as alleged by Deutsche Telekom. In *Execunet*, the court addressed only whether the Commission could, in a tariff proceeding, restrict the services offered by a carrier over facilities previously authorized under Section 214 without express limitations. The court was not faced with, nor did it address, the Commission's authority to modify the terms of a carrier's existing Section 214 authorizations through a notice and comment rulemaking. It is well established that the Commission has the authority, through its broad rulemaking powers, to adopt rules of general applicability that modify existing authorizations and licenses.[321]

234. Finally, commenters argue that, in promulgating the Telecommunications Trade Act (TTA), Congress expressly gave the office of the United States Trade Representative (USTR) jurisdiction over telecommunications trade.[322] They further argue that NTIA's position that the Commission has jurisdiction, so long as it shows "great deference" to the Executive Branch, raises separation of powers concerns and may violate the Administrative Procedure Act.[323] There is no inconsistency between the market entry analysis adopted in this *Report and Order* and the TTA.[324] The market entry analysis adopted in this *Report and Order* and USTR's actions under the TTA are separate, but complementary, approaches.

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319 Deutsche Telekom Comments at 6 (emphasis in original) (*citing MCI v. F.C.C.*, 561 F.2d 365, 375 (D.C. Cir. 1977)("*Execunet*")). *See also* Sprint Comments at 9,10.

320 *Execunet*, 561 F.2d at 377.

321 *See Committee for Effective Cellular Rules v. F.C.C. & U.S.*, No. 93-1220 (D.C. Cir. 1995)(holding that Commission could properly implement a universal change to the technical requirements for cellular licenses by rulemaking, even though the change resulted in the modification of all existing cellular licenses).

322 TLD Comments at 11-17; Deutsche Telekom Comments at 19. *See also* TLD Comments at 7-8 (FCC cannot assume to itself a power that Congress cannot constitutionally delegate).

323 Deutsche Telekom Reply at 11-12.

324 AT&T Reply at 12-13.

USTR's mandate is to remove trade barriers *per se*, and the Commission's public interest responsibilities lead it to promote competitive communications services and to prevent anticompetitive conduct.

235. We agree with Justice and NTIA, representing the Executive Branch, that the Commission's jurisdiction to protect competition through the market entry analysis adopted in this *Report and Order* does not infringe upon the Executive Branch's ultimate responsibility for trade matters.[325] In this rulemaking, we are not regulating international trade. Rather, we are seeking to promote the consumer benefits of effective competition in U.S. international services and to protect U.S. businesses, consumers and carriers from foreign carriers that have both the ability and the incentive to act anticompetitively.

B. Jurisdiction Under Section 310(b)(4)

236. Section 310, like Section 214, authorizes the Commission to act in the "public interest, convenience, and necessity."[326] Deutsche Telekom and Sprint challenge the Commission's authority to impose a market access test as part of its public interest analysis under Section 310(b)(4). Deutsche Telekom argues that the analysis under Section 310 is limited to considering the public interest benefits of granting or denying individual licenses and that market access considerations are neither explicitly nor implicitly part of the statutory mandate.[327] Sprint similarly argues that the statute does not authorize the Commission to deny foreign ownership or voting, otherwise in the public interest, merely as a device to encourage foreign governments to open their telecommunications markets.[328]

237. Other government agencies and private parties argue that the Commission does have jurisdiction to consider market access in making its public interest determination under Section 310(b)(4). Justice argues that the Commission has jurisdiction to adopt a market access test in furtherance of its general public interest mandate and in exercise of the specific authority granted in Section 310.[329] NTIA, also on behalf of itself and other Executive Branch agencies, agrees that the Commission has jurisdiction to adopt this test and that doing so would send an appropriate signal to encourage the liberalization of the global

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325 *See supra*, ¶ 38.

326 47 U.S.C. § 310 (1995).

327 Deutsche Telekom Comments at 8-9.

328 Sprint Reply at 24.

329 DOJ Reply at 23.

communications market.[330] AT&T and MCI also agree that the proposed test falls within the Commission's jurisdiction.[331]

238. We believe that the effective competitive opportunities test is a permissible component of our public interest analysis under Section 310(b)(4). The Commission has a general mandate to promote the availability to U.S. consumers of a "rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges,"[332] and a specific mandate under Section 310(b)(4) to allow foreign investment above the benchmark level unless the Commission determines that the investment is inconsistent with the public interest. The effective competitive opportunities test will promote increased competition in the U.S. telecommunications market, thus furthering the public interest by reducing rates charged to consumers, increasing the quality of services, and encouraging the development of new and innovative services for U.S. consumers.

C. Impact on International Trade Policy

239. Various commenters raise international trade policy concerns as reasons why we should not adopt the proposals contained in the *Notice*. We find that none of these contentions presents a persuasive reason why we cannot or should not adopt the public interest analysis set forth in this *Report and Order*. Rather, we conclude that this *Report and Order* is fully consistent, not only with our responsibility to promote the U.S. public interest, but also with the responsibility of the Executive Branch to formulate and execute U.S. international trade policy.

240. Some commenters assert that our proposed rules would interfere with the Executive Branch's exercise of authority to formulate and administer U.S. international trade policy.[333] As discussed above, we reject this contention. We also note that NTIA, in its comments on behalf of the Executive Branch, expresses its support of the proposed rules. No party has demonstrated that our decision to articulate clear standards under which we will authorize foreign entities to provide service in the United States would prevent the Executive Branch from negotiating multilateral or bilateral trade agreements. As a number of commenters have observed, such multilateral negotiations currently are underway under the auspices of the World Trade Organization (WTO). We fully support the objective of these negotiations to open world telecommunications markets. Their successful conclusion would benefit U.S. consumers and carriers by increasing opportunities for end-to-end competition in the provision of basic telecommunications services, thereby leading to lower prices and

330 NTIA Comments at 15.

331 AT&T Comments at 41-44; AT&T Reply at 6-9; MCI Reply at 5-7.

332 47 U.S.C. § 151 (1995).

333 *See e.g.*, TLD Comments at 7; TLD Reply at 32; Deutsche Telekom Comments at 14.

greater choice and innovation. If the Executive Branch succeeds in negotiating greater market access for U.S. carriers in exchange for still greater liberalization of the U.S. basic telecommunications market, then we would gladly amend the rules we adopt today as necessary. The ongoing negotiations, however, do not present a bar to the adoption of these rules now.

241. Some commenters similarly contend that our rules would be inconsistent with the so-called "standstill" commitment contained in the *Ministerial Decision on Negotiations on Basic Telecommunications (Ministerial Decision)*.[334] In that decision, each member of the WTO's Negotiating Group on Basic Telecommunications (NGBT) made a political commitment that, during the negotiation, it "shall not apply any measure affecting trade in basic telecommunications in such a manner as would improve its negotiating position and leverage."

242. Deutsche Telekom, for example, claims that the rules we proposed in the *Notice* would constitute measures that the Commission would apply in such a manner as would improve the negotiating position and leverage of the United States.[335] TLD contends merely *proposing* to adopt such rules constitutes applying a measure in such a manner as would improve the negotiating position and leverage of the United States.[336]

243. We find these contentions unpersuasive. Significantly NTIA, in its comments on behalf of the Executive Branch, did not suggest that the proposed rules would violate the standstill commitment of the *Ministerial Decision*. Moreover, it is not clear how our proposed rules improve the negotiating position or leverage of the United States. If the rules proposed to deny access to the U.S. market to foreign entities, this might be the case. The rules we adopt, however, establish standards for allowing foreign entities to enter the U.S. market. Foreign carriers now may not enter the U.S. market unless they file under Section 214 and/or Title III of the Act and demonstrate that their entry would serve the public interest. The rules we adopt today do not change this and, therefore, do not improve the negotiating position or leverage of the United States.

244. Finally, TLD asserts that our proposed rules would be inconsistent with the principle of Most Favored Nation (MFN) treatment established by Article II of the General Agreement on Trade in Services (GATS).[337] As TLD is aware, however, the United States currently has no MFN obligation for basic telecommunications services because neither the

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[334] *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, General Agreement on Trade in Services, Decision on Negotiations on Basic Telecommunications* (Marrakesh, 5 Apr. 1994).

[335] Deutsche Telekom Comments at 18.

[336] *See* TLD Comments at 22-23.

[337] *See* TLD Comments at 21-22.

United States nor any other country has scheduled any commitments in basic telecommunications. If the United States schedules commitments for market access and national treatment at the conclusion of the work of the Negotiating Group on Basic Telecommunication, then we may be obliged to revisit these rules at that time. At present, however, we conclude that Article II of the GATS presents no bar to adoption of these rules.[338]

VII. REGULATORY ISSUES

245. After determining that entry of a foreign carrier is in the public interest, we must then determine the carrier's regulatory status. Whether any U.S. carrier is to be regulated as dominant or non-dominant is in part based on whether that carrier is "affiliated" with a foreign carrier, a determination currently governed by our findings in *International Services*.[339] In that proceeding, we defined a U.S. carrier as an affiliate of a foreign carrier when the U.S. carrier is under common control with a foreign carrier. We use this definition to classify a carrier as dominant or non-dominant on a particular international route based on the market power of its foreign affiliate.[340] In our *Notice*, we requested comment on whether we should revise the definition of affiliation adopted in *International Services* to conform to the one proposed for entry purposes.[341] We adopt that proposal here and, therefore, will consider foreign-affiliated any U.S. carrier with a greater than 25 percent interest (or controlling interest at any level) held by a foreign carrier and any U.S. carrier with a greater than 25 percent interest in, or control of, a foreign carrier.

246. We also proposed in the *Notice* to maintain the basic framework set forth in Section 63.10 of our rules for determining the regulatory status of U.S. international carriers that are affiliated with foreign carriers.[342] We conclude that the regulatory framework set forth in Section 63.10 of our rules has served us well and should be maintained.

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338 Similarly, the North American Free Trade Agreement (NAFTA) does not contain market access commitments for basic telecommunications services, and thus is irrelevant to our authority to adopt these rules.

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

340 Under the framework adopted in *International Services*, we regulate a U.S. international carrier, whether U.S.- or foreign-owned, as dominant only on those routes where a foreign affiliate of the U.S. carrier has the ability to discriminate in favor of its U.S. affiliate in the provision of services or facilities used to terminate U.S. international traffic. 7 FCC Rcd at 7332-3 ¶ 10.

341 *Notice* ¶ 66.

342 *Notice* ¶ 84, note 65 (describing and citing to our current rules for classifying and regulating a carrier as dominant under our decision in *International Services*, 7 FCC Rcd 7331).

247. We additionally sought comment in the *Notice* on whether we should modify the nondiscrimination safeguards that we traditionally apply to carriers regulated as dominant under our *International Services* decision. We adopt several of those proposals as set forth below. Finally, we also will apply our dominant carrier safeguards (which we codify in this order) to U.S. carriers on routes for which they have formed a non-exclusive co-marketing arrangement or similar joint venture with a dominant foreign carrier that presents a substantial risk of anticompetitive effects in the U.S. international basic services market.[343]

A. Definition of Affiliation for the Purpose of Post-entry Regulation

Positions of the Parties

248. AT&T supports modification of the dominant carrier affiliation standard to conform with the standard we adopt for entry purposes. It finds such action necessary because carriers with affiliations that would trigger the proposed test also possess incentives to discriminate which may require regulatory oversight under our dominant carrier regulatory regime.[344] LDDS advocates a ten percent threshold, as it finds incentives to discriminate exist at this level.[345] MCI and Sprint object to our proposal to conform our two standards. They each assert that lowering the dominant carrier affiliation threshold would serve no purpose other than to conform the two standards for the sake of symmetry. Incentives to discriminate and other anticompetitive concerns could be addressed by conditions placed on the authorization, as was done in the BT/MCI authorization.[346] BTNA asserts that dominant carrier regulation of foreign-affiliated carriers is unnecessary and, similar to MCI and Sprint, maintains that conditions placed on Section 214 authorizations are adequate to address potential anticompetitive concerns.

Discussion

249. As discussed above,[347] we find it necessary to revise our assessment of the potential for anticompetitive incentives created by telecommunications carriers that hold less-than-controlling interests in other carriers. In *International Services*, we found that such incentives required us to impose dominant carrier regulation only on carriers that control, are controlled by, or are under common control with a foreign carrier with market power. In light of recent developments in the market, we now find that the affiliation standard adopted in *International Services* is no longer adequate for the reasons set out in ¶ 78, justifying the

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343 *See infra*, ¶¶ 253-255.

344 AT&T Comments at 46.

345 LDDS Comments at 11.

346 Sprint Comments at 38-39; MCI Comments at 17.

347 *See supra* ¶ 78.

25 percent affiliation standard for entry purposes.[348] We reject the lower ten percent standard for the same reasons as set out in ¶ 85. We will therefore consider foreign-affiliated those U.S. carriers with a greater than 25 percent interest or a controlling interest at any level held by a foreign carrier, as well as those U.S. carriers with interests of more than 25 percent in, or control of, a foreign carrier.[349] Under our *International Services* decision, a carrier may be regulated as dominant where it is affiliated with a foreign carrier that possesses market power in the destination market.[350] In order to implement our modified definition of affiliation, we adopt the *Notice*'s proposal to require that U.S. carriers notify the Commission within 30 days of the acquisition of an affiliation with a foreign carrier. This notification period will apply except in those cases where prior approval of the affiliation or ten percent investment interest is required.[351]

250. We note that a U.S. carrier is presumed non-dominant under Section 63.10(a)(1)[352] of our rules where it is not affiliated with a foreign carrier within the above definition. We may, however, find that a U.S. carrier should be regulated as dominant where it has a foreign carrier investment that falls below our 25 percent affiliation threshold but which nonetheless presents a significant potential impact on competition. This approach corresponds with that which we adopt in the entry context.[353] We find it may be necessary to apply dominant carrier regulation to such carriers because an investment that presents a significant potential impact on competition may require application of safeguards to ensure that foreign carriers are unable to leverage their market power into the U.S. market for international services through an investment in a U.S. carrier.

251. We do not lower our foreign affiliation threshold merely for the purpose of keeping our dominant carrier regulations symmetrical with our effective competitive opportunities analysis. Although adoption of a dominant carrier affiliation standard at the same level as our new entry standard provides greater administrative feasibility and certainty, the level of both standards is determined by our assessment of the potential for anticompetitive effects. The same anticompetitive dangers that require application of the effective competitive opportunities analysis to foreign carrier investments of greater than 25

348 *See International Services*, 7 FCC Rcd 7331.

349 *See also supra* ¶ 92 describing the aggregation of multiple foreign carrier interests for purposes of our affiliation rules and ¶ 87 describing the application of our affiliation rules to foreign carriers that are under common ownership and control.

350 *Id.* at 7334.

351 *See supra* Section III.D.1.e. (specifying the circumstances where prior approval is required). *See also*, Appendix B, Section 63.11, as amended.

352 47 C.F.R. § 63.10(a)(1)

353 *See supra* ¶ 34.

percent in U.S. carriers require that we evaluate such carriers under our dominant carrier regulatory regime. Further, even if this were not the case, we find that it would not be in the public interest to adopt a control standard for application of dominant carrier safeguards and then apply a different set of safeguards, similar to those imposed in the *BT/MCI* transaction,[354] to carriers with less-than-controlling foreign interests, as suggested by MCI and Sprint. Such a two-tiered approach would create a needlessly complicated regulatory regime. We therefore do not find practical the approach advocated by Sprint and MCI. We discuss in Section VII.C., *infra*, the operating safeguards we will codify and apply to U.S. carriers regulated as dominant under our *International Services* decision.[355]

B. Application of Dominant Carrier Regulation to Non-Equity Business Relationships

252. As outlined above, in Section III.D.1.d, we proposed in the *Notice* not to apply the effective competitive opportunities analysis to non-equity business relationships. In response, several commenters voiced serious concern with these arrangements. Many opposed our proposal not to apply the effective competitive opportunities analysis to these agreements and suggested that anticompetitive incentives require that we closely regulate participants in these arrangements.[356] Justice states that the Commission should retain the ability to impose reporting requirements and safeguards. Justice found that it is possible for a relationship closely related to the core monopoly activities of a foreign carrier to give rise to anticompetitive problems even without an equity stake.[357]

253. We conclude, based on the comments submitted for the record, that non-equity business relationships between a U.S. and a dominant foreign carrier that affect the provision of U.S. basic international services could potentially create a risk of anticompetitive conduct that requires regulatory scrutiny. We will therefore impose dominant carrier regulation on a U.S. carrier for its provision of international basic service on particular routes where a co-marketing or other arrangement with a dominant foreign carrier presents a substantial risk of anticompetitive effects in the U.S. international services market. We will apply the guidelines set forth in Section 63.01(r) of our rules for purposes of determining the scope or degree of an allied foreign carrier's market power.[358] We recognize that scrutiny of certain agreements

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354 *See BT/MCI*, 9 FCC Rcd 3960.

355 *See International Services*, 7 FCC Rcd 7331.

356 *See* ACC Comments at 8-12; BTNA Reply at 9; Deutsche Telekom Reply at 32-34; MFSI Comments at 3-4, 9.

357 DOJ Reply at 16-17.

358 *See* 47 C.F.R. 63.01(r)(7) (to be renumbered as paragraph (r)(8)). This section requires a carrier seeking to be regulated as non-dominant for a particular route to show that its foreign affiliate does not have the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck services or

may be necessary in order to determine whether a carrier should be regulated as dominant as well as to determine whether a co-marketing agreement violates our prohibition on exclusive arrangements. To the extent such agreements are not required to be filed with the Commission under Section 43.51 of our rules, we have ample authority to require that such agreements be filed under Section 211 of the Communications Act in cases where we believe such a review is appropriate.

254. We decline to adopt in this proceeding other specific conditions on U.S. carrier participation in co-marketing or other non-equity arrangements. MFSI proposes a condition that would require an allied (but unaffiliated) foreign carrier to make correspondent agreements freely available "without substantial entry barriers" to U.S. carriers with which it is not allied.[359] We do not find that the record on this issue is sufficiently developed to support such a requirement. We do note, however, that our "no special concessions" requirement prohibits a U.S. carrier from entering into an agreement with any foreign carrier that would preclude the foreign carrier from granting an operating agreement to another U.S. carrier. We also will not adopt MFSI's proposed condition that would require an allied foreign carrier to make available to all U.S. carriers on a simultaneous basis any accounting rate reductions negotiated with its U.S. partner. We previously rejected, in CC Docket No. 90-337, Phase I, a requirement of simultaneity as an unsatisfactory means of addressing discriminatory treatment of U.S. carriers in the settlements process.[360] We adopted other specific measures in that proceeding to address potential discrimination, and there is not sufficient evidence in the record that these measures would fail to protect unaffiliated carriers from discrimination in this context.

255. As a final matter, we see no evidence in this record to contradict the conclusion that *exclusive* co-marketing or other agreements affecting the provision of U.S. basic international services pose an unacceptable risk of anticompetitive harm where the agreement is between a U.S. carrier and a dominant foreign carrier. We view such exclusive agreements as within the scope of the "no exclusive arrangements" condition we have placed on numerous Section 214 authorizations and cable landing licenses stating that: "[the] carrier shall not acquire or enjoy any right for the purpose of handling or interchanging traffic. . . that is denied to any other U.S. carrier."[361] We also view such exclusive agreements as prohibited by the special concessions prohibition applied to foreign-affiliated U.S. carriers under Section 63.14 of our rules.[362] We will continue to enforce these provisions to prohibit any exclusive co-marketing agreement or joint venture between a U.S. and a dominant foreign

facilities in the foreign country.

359 MFSI Reply, at 4.

360 *Regulation of International Accounting Rates*, 7 FCC Rcd 8049 (1992).

361 *See e.g., MFS International, Inc.*, 9 FCC Rcd 2275 (1994).

362 *See infra*, note 363.

carrier that, either on its face or in practice, grants exclusive rights to the U.S. carrier for the provision of basic telecommunications services originating or terminating in the United States. We will look favorably on requests to waive these provisions where the U.S. carrier can demonstrate that its allied foreign carrier lacks market power, *i.e.*, the ability to discriminate among U.S. international carriers in the provision of bottleneck services or facilities used to terminate U.S. international traffic. We discuss further in the next section our special concessions prohibition and our traditional "no exclusive arrangements" condition.

C. Operating Safeguards

1. "No Special Concessions" Requirement

256. The *Notice* did not propose modifying our rule that prohibits affiliated U.S. carriers from agreeing to accept special concessions[363] from any foreign carrier or administration regardless of the U.S. carrier's regulatory status as dominant or non-dominant. BTNA requests that we amend and standardize the special concessions prohibition and the "no exclusive arrangements" condition discussed in Section VII. B., *supra*. It also asks that we clarify that the special concessions prohibition is not intended to apply to those carriers that are affiliated with the reseller on the foreign end of a private line. BTNA argues that we have recognized that such affiliations should not pose a threat of discrimination, citing *International Services.*[364]

257. We agree with BTNA that we should conform our special concessions prohibition and our "no exclusive arrangements" condition that we regularly place in our facilities-based and private line resale Section 214 authorizations. We view these provisions as coextensive. We also consider it just as important to our goal of promoting competition to forbid unaffiliated U.S. carriers, as we do affiliated carriers, from accepting special deals from carriers with market power. It is for this reason that we have regularly placed the no exclusive arrangements condition in the above Section 214 authorizations. It is also for this reason that we proposed in the *Notice* to require that any co-marketing arrangement be nonexclusive, or if not, then to be subject to the market entry standard we adopt. Although we have not in the past applied our no special concessions prohibition to all switched resale Section 214 authorizations, any exclusive arrangement or special concession granted to a particular U.S. carrier by a foreign carrier with market power poses an unacceptable risk of anticompetitive harm in the U.S. international services market. The record in this proceeding

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[363] Section 63.14 prohibits affiliated U.S. carriers from agreeing to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any foreign country for which the U.S. carrier is authorized to provide service. *See* 47 C.F.R. § 63.14. Section 63.01(r)(3)(i) of the rules, 47 C.F.R. 63.01(r)(3)(i), defines a "special concession" as any arrangement that affects traffic or revenue flows to or from the United States that is offered exclusively by a foreign carrier or administration to a particular U.S. international carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route.

[364] BTNA Comments at 12, n. 22.

confirms this conclusion.[365] Rather than continue to recite the "no exclusive arrangements" language in Section 214 authorizations, we amend Section 63.14 to apply to *all* U.S. international carriers. We will entertain requests to waive this provision where the U.S. carrier can demonstrate that the foreign carrier granting the concession lacks the ability to discriminate against U.S. international carriers in the provision of facilities or services used to terminate U.S.-originated international traffic. We find that a waiver process is necessary in order to assess the market power of the foreign carrier granting the concession. We will revisit our approach to regulating exclusive arrangements as foreign markets eliminate restrictions to entry and adopt competitive safeguards.

258. We thus will continue to prohibit all U.S. carriers, regardless of their regulatory status or whether they have a foreign affiliate, from agreeing to accept special concessions from any foreign carrier. We believe this general rule is necessary because, as we found in *International Services*, in certain cases a foreign carrier may have sufficient market power to discriminate among U.S. carriers in provisioning and pricing of facilities and services.[366] We recognize BTNA's concern that, on its face, this rule prohibits a U.S. carrier from entering into an exclusive arrangement for the exchange of traffic with a foreign reseller. We also agree that, where a foreign reseller has no market power on the foreign end of a U.S. international route, it may not be necessary to prohibit the U.S. affiliate from entering into an exclusive arrangement with its foreign correspondent. Indeed, there may be no harm in permitting the foreign reseller to exchange its resold traffic on an exclusive basis with its U.S. counterpart where, for example, we have made an equivalency determination. We will look favorably upon requests to waive our special concessions prohibition in such circumstances or in other circumstances where the U.S. carrier can demonstrate that the foreign carrier granting the concession lacks the ability to leverage control over bottleneck services or facilities into the U.S. international services market. We believe it remains necessary, however, to maintain our general rule prohibiting foreign-affiliated U.S. carriers from agreeing to accept special concessions from a foreign carrier or administration.

259. We also proposed in the *Notice* to require that a dominant, foreign-affiliated U.S. carrier obtain a written commitment from its foreign carrier affiliate not to offer or provide, with respect to the provision of basic services, any special concessions to any joint venture for the provision of U.S. basic or enhanced international services in which they both participate. AT&T and MCI support this proposal for the reasons stated in the *Notice*.[367] We conclude, however, that such a requirement is unnecessary. We shall maintain our special

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365 *See e.g.*, Deutsche Telekom Reply at 32-34; BTNA Reply at 9; Teleglobe Comments at 30.

366 *See International Services*, 7 FCC Rcd at 7336. Contrary to BTNA's characterization of our findings in *International Services*, we stated there that: "[W]hile the U.S. carrier's foreign [resale] counterpart may fall within our definition of an affiliated foreign carrier, there appears to be no substantial risk of discrimination against unaffiliated U.S. carriers *where the foreign carrier-affiliate does not own any telecommunications facilities in the foreign market*." *Id.* at 7334. *(emphasis added).*

367 AT&T Comments at 47; MCI comments at 23.