

concessions prohibition and require that all U.S. carriers -- whether or not foreign-affiliated -- certify in their Section 214 applications that they have not agreed to accept special concessions and will not enter into such agreements in the future. Our authority to enforce these provisions against any U.S. carrier that violates our rules or makes a misrepresentation to the Commission, constitutes a sufficient deterrence mechanism.

2. Tariffing Requirements

260. We asked whether we should eliminate the requirement that dominant, foreign-affiliated carriers file tariffs on 45 days' notice with cost support and allow them instead to comply with current non-dominant carrier rules (*i.e.*, file their tariffs on 14 days' notice without cost support).³⁶⁸ The British Government and Cable & Wireless support the idea because they believe it will reduce administrative burdens and allow carriers to respond more quickly to changes in the marketplace. GTE supports a 14-day notice period if it applies equally to all dominant U.S. carriers.³⁶⁹ AT&T cautions that shortening the notice period would give foreign carriers a competitive advantage, and MCI argues that it would not give the Commission sufficient time to address possible ratemaking concerns.³⁷⁰

261. We adopt modified tariffing requirements for carriers regulated as dominant because of an affiliation or alliance with a foreign carrier. First, we eliminate the requirement that dominant, foreign-affiliated carriers file cost support with their tariffs. We find that the benefits derived from requiring the submission of such information are as a general rule outweighed by the burden imposed by this filing requirement. Moreover, we believe that competition in the market for international services is a better constraint on unreasonable prices than Commission review of a foreign carrier's cost support showing. We have due authority to request such information under the Act, and we will do so when necessary to review the lawfulness of particular tariff filings. As we concluded in Section III.C., *supra*, we are not convinced that foreign carriers can successfully engage in a sustained "price squeeze" harmful to U.S. consumers or carriers. We welcome the price competition that new entrants can bring to the U.S. international services market.

262. Second, we adopt the proposed 14-day notice period for the filing of international service tariffs by dominant, foreign-affiliated carriers. This notice period also will apply to carriers regulated as dominant because of an alliance with a foreign carrier

³⁶⁸ Notice ¶ 85. Since issuing our Notice in this proceeding, we have proposed to reduce to one day the notice period for the international service tariffs filed by non-dominant carriers. See *Streamlining the International Section 214 Authorization Process and Tariff Requirements*, Notice of Proposed Rulemaking, IB Docket No. 95-118, FCC 95-286, released July, 17, 1995 ¶ 52. This proposed change does not affect the rule we adopt here for dominant affiliated or allied carriers.

³⁶⁹ GTE Comments at 7-8; See *Petition of GTE Hawaiian Telephone Company Inc. for Reclassification as a Non-dominant International MTS carrier*, CC Docket No. 85-107 (May 22, 1995).

³⁷⁰ MCI Comments at 22; AT&T Comments at 45, note 56.

which does not involve an equity affiliation. A shortened notice period will provide these carriers with additional flexibility to respond to customer demand. Because we find no reason to continue to require cost support, as a general rule, we also find a 14 day notice period sufficient to permit interested parties and the Commission an opportunity to assess the lawfulness of these tariffs. While we adopt a shortened notice period, we will not accord the international service tariffs filed by these dominant carriers a presumption of lawfulness. The modified notice period that we are adopting for the filing of international service tariffs by dominant, foreign-affiliated or allied carriers does not change the notice period applied to certain U.S. carriers, such as GTE Hawaiian, that are regulated as dominant for the provision of certain international services. Because the regulatory status of these carriers is not based on a foreign carrier affiliation or alliance, this proceeding is not the proper forum for addressing changes in their regulatory treatment.

3. Facilities Authorization and Reporting Requirements

263. We proposed maintaining our requirements that a dominant, foreign-affiliated U.S. carrier obtain prior Section 214 approval before adding (or discontinuing) circuits on those routes for which the carrier is regulated as dominant and that the carrier file quarterly traffic and revenue reports for such routes.³⁷¹ Cable & Wireless argues that such a prior authorization requirement is superfluous and allows competitors to discern the business plans of their rivals with no corresponding benefit. It also contends that quarterly traffic and revenue reports provide adequate information for identifying discriminatory behavior.³⁷² AT&T and MCI, on the other hand, support our proposal to maintain our prior authorization requirement.

264. We do not agree with Cable & Wireless that the prior authorization requirement is superfluous. We must retain the ability to remedy promptly any abuses of foreign market power in the provision of U.S. international services, whether such abuses occur as a result of foreign carrier investment in a U.S. carrier (or vice versa) or as a result of a business alliance between a U.S. and a foreign carrier. Our prior authorization requirement provides us with the ability to monitor the addition of circuits on affiliated routes. Such additions can reveal deviations from expected traffic flows -- for example, in the flow of return traffic from an affiliated country. To the extent a U.S. carrier is engaged in collusive behavior with a foreign carrier, the prior authorization process allows the Commission to condition the grant of additional circuits or to otherwise deny them, rather than to engage in what could be a lengthy revocation process.

265. We recognize that prior authorization imposes costs on all dominant carriers, including AT&T, Comsat and U.S. carriers regulated as dominant for the provision of IMTS

³⁷¹ Notice ¶ 86.

³⁷² Cable & Wireless Comments at 11.

for noncontiguous domestic points.³⁷³ These costs include filing fees as well as delays in activating new capacity. We will endeavor to act on these applications as expeditiously as possible. We recently removed the requirement that the full Commission review Section 214 applications for international facilities filed by foreign-affiliated carriers, except to the extent particular applications raise matters reserved for Commission review under our general delegation of authority to the International Bureau.³⁷⁴ This action should help expedite the processing of these applications. We find that the prior authorization requirement for additions and deletions of international circuits by dominant carriers is necessary to limit the potential for anticompetitive conduct. For the same reason, we maintain the requirement that carriers regulated as dominant because of a relationship with a foreign carrier file quarterly traffic and revenue reports.

4. Recordkeeping Requirement

266. We proposed a new requirement, imposed as a condition in our decision in *BT-MCI*,³⁷⁵ that a dominant, foreign-affiliated carrier maintain complete records of the provisioning and maintenance of network facilities and services it procures from its foreign carrier affiliate, including, but not limited to, those it procures on behalf of customers of joint ventures for the provision of U.S. basic or enhanced services. AT&T and MCI support this proposal because they find these measures necessary in order to deter discriminatory conduct by a foreign carrier in favor of its U.S. affiliate.³⁷⁶ Cable & Wireless opposes the proposal. It views such requirements as unnecessary in light of the prohibition on special concessions and other nondiscrimination safeguards.³⁷⁷ We find that this recordkeeping requirement would constitute a minor burden and that such information would be useful in guarding against improper discrimination. We believe this information is readily available and can be maintained without creating burdensome new procedures. We therefore find that requiring a dominant, foreign-affiliated or allied carrier to maintain such information with respect to network facilities or services it procures from its foreign carrier affiliate or ally would serve the goals of this proceeding and the public interest. We require that this information be available to the Commission upon request.

³⁷³ Although AT&T has recently been classified as non-dominant for its domestic service, *see Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, FCC 95-427, adopted October 12, 1995, we have not yet ruled on AT&T's status for international service.

³⁷⁴ *See Telefonica Larga Distancia de Puerto Rico*, FCC 95-375, released September 5, 1995.

³⁷⁵ 9 FCC Rcd 3960.

³⁷⁶ AT&T Comments at 47; MCI Comments at 23.

³⁷⁷ Cable & Wireless Comments at 12.

5. Disclosure of Accounting Rates

267. In our *Notice*,³⁷⁸ we proposed to require that any foreign-affiliated, facilities-based carrier regulated as dominant on any U.S. international route for the provision of switched service file with the Commission a complete list of the accounting rates that its foreign carrier affiliate maintains with all other countries. We further proposed to apply this transparency requirement to affiliated carriers that we regulate as dominant in their provision of switched basic services via resold private lines. The required list of accounting rates would cover, and specify, all traffic relations and services of the foreign affiliate. We proposed not to apply this requirement to foreign-affiliated carriers that provide switched services on a particular route solely through the resale of U.S. facilities-based carriers' switched services, and also not to apply it to carriers regulated as dominant solely for the provision of private line services.

268. Commenters supporting this proposal argue that such disclosure would be an important step in reducing foreign carriers' ability to discriminate and that such information will assist efforts to obtain lower, cost-based accounting rates.³⁷⁹ AT&T also argues that the reluctance of some of the commenting parties to file their accounting rates is in and of itself evidence as to why effective market access is needed and why cost-based accounting rates should be a condition of entry.³⁸⁰

269. Commenters opposing such a condition argue that the Commission is "overreaching," and lacks jurisdiction over the affiliated foreign carrier.³⁸¹ They also argue that it raises serious issues with respect to comity and sovereignty.³⁸² The British government further elaborates that it is problematic for the Commission to require non-U.S. companies to disclose sensitive commercial information which affects third companies outside of U.S. jurisdiction, that may have no interest in the U.S. market.³⁸³

270. Other opposing commenters argue that the requested information will be unavailable to U.S. carriers with only a very small amount of foreign investment, that we did not explain how it would be used, and that it is intrusive, burdensome, will add needless cost

³⁷⁸ *Notice* ¶ 87-89.

³⁷⁹ ACC Comments at 9; AT&T Comments at 48; SDN Comments at 1; ESI Comments at 4. ACC argues that this proposed requirement should apply to allied carriers.

³⁸⁰ AT&T Reply at 35 n.78. Cost-based accounting rates as a condition to entry is discussed *supra* ¶ 65.

³⁸¹ France Telecom Reply at 12,13; British Government Comments at 5-7; TLD Comments at 75.

³⁸² *Id.*

³⁸³ British Government Comments at 5; France Telecom Comments at 25, 26; TLD Comments at 75.

and delay, and raises questions of confidentiality and the proprietary nature of data.³⁸⁴ TLD also opposes this proposal on the additional grounds that the requested information is unrelated to foreign entry into the United States. It suggests that if the Commission considers the data essential, it should require this information not just from those U.S. carriers that are owned by foreign carriers but also from U.S. carriers that own foreign carriers.³⁸⁵ AmericaTel argues that such a precondition could become a significant barrier to entry, and may be used by foreign governments to exclude U.S. companies seeking a foothold abroad.³⁸⁶ Telex-Chile, likewise, opposes this proposal, arguing that current regulations are adequate to protect U.S. carriers and to promote international competition.³⁸⁷

271. We agree with AT&T, ESI and SDN that transparent accounting rates are a helpful competitive safeguard and would be an effective way of reducing discrimination. Indeed, we have consistently reiterated this message in every available international forum. We also recognize, however, that foreign carriers and governments may view this information as proprietary. We therefore decline to adopt our transparency proposal. We will instead consider the disclosure of the U.S. carrier's foreign affiliate's accounting rates as a factor in our general public interest analysis as to whether to grant applications for foreign carrier entry.³⁸⁸ The absence of such disclosure will not preclude entry into the U.S. market; however, a foreign carrier's disclosure of accounting rates will have a significant and favorable impact upon our analysis. There is evidence that disclosure of accounting rates is occurring. For example, Oftel, the U.K. telecommunications regulator, has decided to publish rates for traffic between the United Kingdom and other OECD countries.³⁸⁹ This is an encouraging sign that countries are moving in the direction of transparency on their own accord. Because we are adopting a policy of voluntary disclosure we need not address arguments that mandatory disclosure is outside our jurisdiction, overly intrusive and burdensome.

³⁸⁴ AmericaTel Comments at 9-11; France Telecom Comments at 25,26; Telex-Chile Comments at 1.

³⁸⁵ TLD Comments at 75-76.

³⁸⁶ AmericaTel Comments at 9-11.

³⁸⁷ Telex-Chile Comments at 1, 2.

³⁸⁸ *See supra*, ¶ 65.

³⁸⁹ *See Statement Issued by the Director General of Telecommunications, Oftel*, released October 3, 1995, p. 3. The Organization for Economic Cooperation and Development (OECD) currently includes the 24 most developed countries.

D. Codification of Proportionate Return

272. In our *Notice*, we proposed to codify our proportionate return policy as a rule of general applicability to all facilities-based carriers.³⁹⁰ This would mean that all facilities-based carriers, whether affiliated or not, must accept only their proportionate return of traffic from foreign correspondents. We also proposed, however, to grant waiver requests in the public interest.

273. Commenters supporting codification argue that such a requirement is essential in order to keep foreign carriers from discriminating in favor of their U.S. affiliates.³⁹¹ They also argue that some carriers have the incentive and the opportunity to command, and in some instances have received, more than their proportionate share of return traffic.³⁹² Commenters opposing this argue that proportionate return confers a competitive advantage to established international correspondents by encouraging the entrenchment of existing market arrangements.³⁹³ Further, they believe that codification could contravene the spirit of fostering competition and reducing international accounting rates, and may eliminate the flexibility the Commission now has.³⁹⁴

274. Due to the importance of this issue we have decided to defer action on it and transfer its corresponding record to a separate proceeding focused on accounting rate issues.³⁹⁵ We believe that this issue would better be addressed in the context of a proceeding which considers a comprehensive approach to accounting rates and related issues such as proportionate return.

E. Refore

275. We requested comment in the *Notice* on AT&T's proposal to prohibit expressly a foreign carrier or its U.S. affiliate from refileing U.S. originating or terminating traffic. AT&T and MCI urge the Commission to prohibit the refileing of international traffic

³⁹⁰ See, e.g., *Telefonica Larga Distancia de Puerto Rico*, 8 FCC Rcd 106,112 (1992); *FTC Communications, Inc.*, 4 FCC Rcd 5633, 5637, n.25 (Com. Car. Bur. 1988); *U.S. Sprint*, 3 FCC Rcd 1484, 1487 (Com. Car. Bur. 1989) *American Tel. & Tel. Co.* 2 FCC Rcd 6409, 6410 (Com. Car. Bur. 1987).

³⁹¹ MCI Comments at 24; see generally, AT&T Comments at 15-16; AT&T Reply at 21-22.

³⁹² Sprint Comments at 166, 31; TLD Reply at 9, 16.

³⁹³ GTE Comments at 9.

³⁹⁴ *Id.*; see also SCT Comments at 16.

³⁹⁵ See, e.g., *Regulation of International Accounting Rates, Phase II, Second Report and Order and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 8040 (1992).

without the consent of both the originating and terminating administrations. AT&T and MCI allege this practice violates ITU regulations and the Commission's proportionate return policy and also injures U.S. carriers and customers.³⁹⁶ Sprint and Cable & Wireless urge us to defer this issue to a separate proceeding addressing refile.³⁹⁷ In light of the pending petition for declaratory ruling filed by MCI regarding Sprint's reorigination practices,³⁹⁸ we will transfer the record in this rulemaking and defer consideration of this issue to that proceeding.

VIII. CONCLUSIONS

276. In this Order, we conclude that the public interest requires that we modify our public interest standard for considering foreign carrier applications to enter the U.S. market to provide international services. We establish three Commission goals that we seek to promote when reviewing such applications: (1) effective competition in the U.S. international telecommunications services market; (2) the prevention of anticompetitive conduct in the provision of international services or facilities; and (3) opening of foreign communications markets. Towards this end, we adopt as an important element of the Section 214 public interest standard consideration of whether there are, currently or in the near term, effective competitive opportunities for U.S. carriers seeking to provide basic, international telecommunications services in the destination markets of the foreign carrier desiring entry. We will continue to consider other factors under our public interest analysis.

277. We also adopt an effective competitive opportunities test as an important element of the Section 310(b)(4) public interest analysis applicable to foreign entity seeking to acquire an indirect ownership interest in U.S. radio common carrier licenses. Thus, when a foreign entity seeks to acquire an indirect ownership interest of more than 25 percent in a common carrier wireless licensee, we will find that an important element of the public interest requirement of Section 310(b)(4) has been met if the home market of the foreign entity offers effective competitive opportunities to U.S. entities to provide the same type of radio-based services as requested in the United States.

IX. PROCEDURAL MATTERS; ORDERING CLAUSES

278. The analysis pursuant to the Regulatory Flexibility Act of 1980³⁹⁹ is contained in Appendix C.

³⁹⁶ AT&T Comments at 52; MCI Comments at 24, Reply at 23; *see also* GTE Comments at 9.

³⁹⁷ Cable & Wireless Comments at 12 n. 22; Sprint Comments at 40, 41.

³⁹⁸ MCI Petition for Declaratory Ruling, ISP-95-004, filed January 27, 1995.

³⁹⁹ 5 U.S.C. § 608(1995).

279. Accordingly, **IT IS ORDERED** that the policies, rules, and requirements adopted herein, except those needing OMB approval, **WILL BECOME EFFECTIVE** thirty days after publication in the Federal Register.

280. Matters subject to OMB approval, pursuant to the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, **WILL BECOME EFFECTIVE** upon such approval.

281. This action is taken pursuant to Sections 4, 214, 219, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154, 214, 219, 303(r) and 403.

282. **IT IS FURTHER ORDERED** that this proceeding **IS HEREBY TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A
List of Parties Filing Comments

ACC Global Corp. (ACC)
Aeronautical Radio, Inc. (AIRINC)
Airtouch Communications (Airtouch)
AmericaTel Corporation (AmericaTel)
Ameritech
Arch Communications Group (Arch)
Aronson, Professor Jonathan D., Annenberg School for Communication, USC
AT&T Corporation (AT&T)
Australian Government
British Government
BT North America Inc. (BTNA)
Cable & Wireless, Inc. (CWI)
Cellular Telecommunications Industry Association (CTIA)
Citicorp
Columbia Communications Corporation (Columbia)
Communication TeleSystems International (CTS)
Cruisephone, Inc.
Deutsche Telekom AG
DOMTEL Communications, Inc. (DOMTEL)
Economic Strategy Institute (ESI)
E.F. Johnson Company
fONOROLA Corp. (fONOROLA)
Fox Television Stations Inc. (FTS)
France - Directorate General for Posts and Telecommunications
France Telecom
German Government - Bundesministerium Für Post und Telekommunikation
GTE Service Corporation (GTE)
IDB Mobile Communications, Inc. (IDB Mobile)
IDB Communications, Inc. (IDB)
K&S International Communications, Inc.
Korean Government (South)
LDDS Communications, Inc. (LDDS)
Loral/QUALCOMM Partnership, L.P.
MCI Telecommunications Corporation (MCI)
Melillio, Joseph
Mexico Government - Secretary of Communications and Transportation
MFS International, Inc. (MFSI)
Minority Media and Telecommunications Council
Motion Picture Association of America, Inc (MPAA).
Motorola, Inc. (Motorola)
National Telecommunications and Information Administration (NTIA)
National Broadcasting Company, Inc.

NYNEX Corporation (NYNEX)
Organization for International Investment
Orion Atlantic
PanAmSat Corporation (PanAmSat)
Roamer One, Inc. (Roamer)
Sidak, J. Gregory
SDN Users Association, Inc.
Sprint Communications Company L.P. (Sprint)
Swidler & Berlin, Chartered (S & B)
Telecommunications Resellers Association (TRA)
Telefonica Larga Distancia de Puerto Rico, Inc. (TLD)
Teleglobe Inc. (Teleglobe)
Telex-Chile, S.A.
Transworld Communications (U.S.A.), Inc. (Transworld)
TRW, Inc. (TRW)
Univisa, Inc. (Univisa)

List of Parties Filing Reply Comments

ACC Global Corp.
AmericaTel
AT&T
BTNA
Cable & Wireless, Inc.
Canadian Government
Citicorp
Columbia Communications Corporation
Communications Telesystems International
COMSAT
Cook Inlet Region, Inc.
Deutsche Telekom
DOMTEL
European Union
France Telecom
GE American Communications, Inc.
German Government
GTE
Heftel Broadcasting Corporation
Department of Justice (Justice)
MCI
Mexican Government
MFS International
NTIA

Sidak, J. Gregory
Sprint
Teleglobe
TLD
Transworld Communications (USA), Inc.
Univisa, Inc.
US West, Inc.

APPENDIX B

FINAL RULES

Part 63 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 63 -- EXTENSION OF LINES AND DISCONTINUANCE OF SERVICE BY CARRIERS AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. The authority citation for Part 63 continues to read as follows:

AUTHORITY: --- Sections 1, 4(i), 4(j), 201-205, 218, and 403 of the Communications Act of 1934, as amended; and Section 613 of the Cable Communications Policy Act of 1984, 47 U.S.C. secs. 151, 154(i), 15(j), 201-205, 218, 403, and 533 unless otherwise noted.

2. Section 63.01 is amended by revising paragraphs (k)(5) and (r), redesignating paragraph (k)(6) as paragraph (k)(7), and adding new paragraphs (k)(6), (s) and Notes 1-4 to read as follows:

§ 63.01 Contents of applications.

(k) ***

(5) The procedures set forth in this subsection are subject to Commission policies on resale of international private lines in CC Docket No. 90-337 as amended in IB Docket No. 95-22. If proposed facilities are to be acquired through the resale of private lines for the purpose of providing international switched basic services, applicant shall demonstrate for each country to which it seeks to provide such services that that country affords resale opportunities equivalent to those available under U.S. law. In this regard, applicant shall:

(i) State whether the Commission has previously determined that equivalent resale opportunities exist between the United States and the subject country; or

(ii) Include other evidence demonstrating that equivalent resale opportunities exist between the United States and the subject country, including any relevant bilateral agreements between the administrations involved. Parties must demonstrate that the foreign country at the other end of the private line provides U.S. carriers with:

(A) The legal right to resell international private lines, interconnected at both ends, for the provision of switched services;

(B) Nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carrier facilities for termination and origination of international services, with adequate means of enforcement;

(C) Competitive safeguards to protect against anticompetitive and discriminatory practices affecting private line resale; and

(D) Fair and transparent regulatory procedures, including separation between the regulator and operator of international facilities-based services.

(6) Except as otherwise provided in this paragraph, any carrier authorized under this part to acquire and operate international private line facilities other than through resale shall, for each country for which it seeks to provide switched basic service over its authorized private lines facilities, request such authority by formal application. Such application shall be accompanied by a demonstration that that country affords resale opportunities equivalent to those available under U.S. law. In this regard, applicant shall include the information required by paragraph (5) of this subsection.

(i) No formal application is required under this paragraph in circumstances where the carrier's previously authorized private line facility is interconnected to the public switched network only on one end -- either the U.S. or the foreign end -- and where the carrier is not operating the facility in correspondence with a carrier that directly or indirectly owns the private line facility in the foreign country at the other end of the private line.

(7) If proposed facilities are to be acquired through the resale of the international switched or private line services of another U.S. carrier for the purpose of providing international communications services,

(i) The specific service and the type of service (switched or private line) that the applicant seeks authority to resell; and

(ii) The name(s) of the U.S. carrier(s) and the specific FCC tariffs(s) to be resold.

(r) A certification as to whether or not the applicant is, or has an affiliation with, a foreign carrier.

(1) The certification shall state with specificity each foreign country in which the applicant is, or has an affiliation with, a foreign carrier. For purposes of this certification:

(i) Affiliation is defined to include:

(A) A greater than 25% ownership of capital stock, or controlling interest at any level, by the applicant, or by any entity that directly or indirectly controls or is controlled by it, or that is under direct or indirect common control with it, in a foreign carrier or in any entity that directly or indirectly controls a foreign carrier; or

(B) A greater than 25% ownership of capital stock, or controlling interest at any level, in the applicant by a foreign carrier, or by any entity that directly or indirectly controls or is controlled by a foreign carrier, or that is under direct or indirect common control with a foreign carrier; or by two or more foreign carriers investing in the applicant in the same manner in circumstances where the foreign carriers are parties to, or the beneficiaries of, a contractual relation (*e.g.*, a joint venture or market alliance) affecting the provision or marketing of basic international telecommunications services in the United States. A U.S. carrier also will be considered to be affiliated with a foreign carrier where the foreign carrier controls, is controlled by, or is under common control with a second foreign carrier already found to be affiliated with that U.S. carrier under this section.

(ii) Foreign carrier is defined as any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, see Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art. 1.

(2) In support of the required certification, each applicant shall also provide the name, address, citizenship and principal businesses of its 10 percent or greater direct and indirect shareholders or other equity holders and identify any interlocking directorates.

(3) Each applicant that proposes to acquire facilities through the resale of the international switched or private line services of another U.S. carrier shall additionally certify as to whether or not the applicant has an affiliation with the U.S. carrier(s) whose facilities-based service(s) the applicant proposes to resell (either directly or indirectly through the resale of another reseller's service). For purposes of this paragraph, affiliation is defined as in paragraph (r)(1)(i) of this section, except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(4) Each applicant that certifies under this section that it has an affiliation with a foreign carrier and that proposes to acquire facilities through the resale of the international private line services of another U.S. carrier shall additionally certify as to whether or not the affiliated foreign carrier owns or controls telecommunications facilities in the particular country(ies) to which the applicant proposes to provide service (i.e., the destination country(ies)). For purposes of this paragraph, telecommunications facilities are defined as the underlying telecommunications transport means, including intercity and local access facilities, used by a foreign carrier to provide international telecommunications services offered to the public.

(5) Each applicant and carrier authorized to provide international communications service under this part is responsible for the continuing accuracy of the certifications required by paragraphs (r)(3) and (4) of this section. Whenever the substance of any such certification is no longer accurate, the applicant/carrier shall as promptly as possible and in any event within 30 days file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided. This information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

(6) Each applicant that certifies that it is, or that it has an affiliation with, a foreign carrier, as defined in paragraph (r)(1)(i)(B) and (ii), respectively, in a named foreign country and that desires to operate as a U.S. facilities-based international carrier to that country from the United States shall provide information in its application filed under this part to demonstrate that either:

(i) The named foreign country (*i.e.*, the destination foreign country) provides effective competitive opportunities to U.S. carriers to compete in that country's international facilities-based market; or

(ii) Its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the destination country.

(A) The demonstration specified by paragraph (6)(i) of this subsection should address the following factors:

(1) The legal, or *de jure*, ability of U.S. carriers to enter the foreign market and provide facilities-based international services, in particular, international message telephone service (IMTS);

(2) Whether there exist reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services;

(3) Whether competitive safeguards exist in the foreign country to protect against anticompetitive practices, including safeguards such as:

(i) Existence of cost-allocation rules in the foreign country to prevent cross-subsidization;

(ii) Timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities;

(iii) Protection of carrier and customer proprietary information; and

(4) Whether there is an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other safeguards; and

(5) Any other factors the applicant deems relevant to its demonstration.

(B) The demonstration specified in paragraph (6)(ii) of this subsection should include the same information requested by paragraph (8) of this subsection.

(7) Each applicant that certifies that it is, or that it has an affiliation with, a foreign carrier, as defined in paragraph (r)(1)(i)(B) and (ii), respectively, in a named foreign country and that desires to resell the international switched or non-interconnected private line services, respectively, of another U.S. carrier for the purpose of providing international communications services to the named foreign country from the United States shall provide information in its application filed under this part to demonstrate that either:

(i) The named foreign country (*i.e.*, the destination foreign country) provides effective competitive opportunities to U.S. carriers to resell international switched or non-interconnected private line services, respectively; or

(ii) Its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the destination country.

(A) The demonstration specified by paragraph (7)(i) of this subsection should address the following factors:

(1) The legal, or *de jure*, ability of U.S. carriers to enter the foreign market and provide resold international switched services (for switched resale applications) or non-interconnected private line services (for non-interconnected private line resale applications);

(2) Whether there exist reasonable and nondiscriminatory charges, terms and conditions for the provision of the relevant resale service;

(3) Whether competitive safeguards exist in the foreign country to protect against anticompetitive practices, including safeguards such as:

(i) Existence of cost-allocation rules in the foreign country to prevent cross-subsidization;

(ii) Timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities;

(iii) Protection of carrier and customer proprietary information; and

(4) Whether there is an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other safeguards; and

(5) Any other factors the applicant deems relevant to its demonstration.

(B) The demonstration specified in paragraph (7)(ii) of this subsection should include the same information requested by paragraph (8) of this subsection.

(8) Each applicant that certifies that it has an affiliation with a foreign carrier in a named foreign country and that desires to be regulated as non-dominant for the provision of international communications service to that country may provide information in its application filed under this part to demonstrate that its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the named foreign country. See § 63.10, Regulatory Classification of U.S. International Carriers.

(i) Such a demonstration should address the factors that relate to the scope or degree of the foreign affiliate's bottleneck control, such as:

(A) The monopoly, oligopoly or duopoly status of the destination country; and

(B) Whether the foreign affiliate has the potential to discriminate against unaffiliated U.S. international carriers through such means as preferential operating agreements, preferential routing of traffic, exclusive or more favorable transiting agreements, or preferential domestic access and interconnection arrangements.

(ii) Such a demonstration may also address other factors the applicant deems relevant to its demonstration, such as the effectiveness of public regulation in the destination country.

(s) Each applicant shall certify that the applicant has not agreed to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the U.S. and any foreign country which the applicant may serve under the authority granted under this part and will not enter into such agreements in the future.

(1) For purposes of this paragraph, and of §§ 63.11(c)(2)(iii), 63.13(a)(4), and 63.14, special concession is defined as any arrangement that affects traffic or revenue flows to or from the U.S. 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.

(2) The special concessions certification required by this paragraph and by §§ 63.11(c)(2)(iii) and 63.13(a)(4) shall be viewed as an ongoing representation to the Commission, and applicants/carriers shall immediately inform the Commission if at any time the representations in their certifications are no longer true. Failure to so inform the Commission will be deemed a material misrepresentation to the Commission.

Note 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2: The term "U.S. facilities-based international carrier" means one that holds an ownership, indefeasible-right-of-user, or leasehold interest in bare capacity 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.

Note 3: The assessment of "capital stock" ownership will be made under the standards developed in Commission case law for determining such ownership. *See, e.g., Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995). "Capital stock" includes all forms of equity ownership, including partnership interests.

Note 4: In applying the provisions of this section, ownership and other interests in U.S. and foreign carriers will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Attribution of ownership interests in a carrier that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. [For example, if A owns 30% of company X, which owns 60% of company Y, which owns 26% of "carrier," then X's interest in "carrier" would be 26% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in "carrier" would be 7.8% (0.30x0.26). Under the 25% attribution benchmark, X's interest in "carrier" would be cognizable, while A's interest would not be cognizable.]

3. Section 63.10 is amended by revising paragraph (a)(1)-(3), and adding paragraph (c) to read as follows:

§ 63.10 Regulatory classification of U.S. international carriers.

(a) ***

(1) A U.S. carrier that has no affiliation with, and that itself is not, a foreign carrier in a particular country to which it provides service (i.e., a destination country) will presumptively be considered non-dominant for the provision of international communications services on that route;

(2) A U.S. carrier that is, or that has or acquires an affiliation with a foreign carrier that is a monopoly in a destination country will presumptively be classified as dominant for the provision of international communications services on that route; and

(3) A U.S. carrier that is, or that has or acquires an affiliation with a foreign carrier that is not a monopoly in a destination country and that seeks to be regulated as non-dominant on that route bears the burden of submitting information to the Commission sufficient to demonstrate that its foreign affiliate lacks the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck services or facilities in the destination country. Such a demonstration should address the factors that relate to the scope or degree of the foreign affiliate's bottleneck control, including those listed in § 63.01(r)(8).

(c) Any carrier classified as dominant for the provision of particular services on particular routes under this section shall comply with the following requirements in its provision of such services on each such route:

- (1) File international service tariffs on 14-days notice without cost support;
- (2) Maintain complete records of the provisioning and maintenance of basic network facilities and services procured from its foreign carrier affiliate or from an allied foreign carrier, including, but not limited to, those it procures on behalf of customers of any joint venture for the provision of U.S. basic or enhanced services in which the U.S. and foreign carrier participate, which information shall be made available to the Commission upon request;
- (3) Obtain Commission approval pursuant to § 63.01 before adding or discontinuing circuits; and
- (4) File quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic within 90 days from the end of each calendar quarter.

4. Section 63.11 is amended in its entirety to read as follows:

§ 63.11 Notification by and prior approval for U.S. international carriers that have or propose to acquire ten percent investments by, and/or an affiliation with, a foreign carrier.

(a) Any carrier authorized to provide international communications service under this part that, as of the effective date of this rule as amended in IB Docket No. 95-22, is, or has an affiliation with, a foreign carrier within the meaning of Section 63.01(r)(1)(i)(A) or (r)(1)(i)(B), or that as of such date knows of an existing ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier by a foreign carrier, or that after the effective date of this rule becomes affiliated with a foreign carrier within the meaning of Section 63.01(r)(1)(i)(A), shall notify the Commission within thirty days of the effective date of this rule or within thirty days of the acquisition of the affiliation, whichever occurs later. For purposes of this section, "foreign carrier" is defined as set forth in § 63.01(r)(1)(ii).

(1) The notification shall certify to the information specified in paragraph (c) of this section.

(2) Any carrier that has previously notified the Commission of an affiliation with a foreign carrier, as defined by Section 63.01(r)(1) immediately prior to the rule's amendment in IB Docket No. 95-22, need not notify the Commission again of the same affiliation.

(b) Any carrier authorized to provide international communications service under this part that knows of a planned investment by a foreign carrier of a ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier shall notify the Commission within sixty days prior to the acquisition of such interest. The notification shall certify to the information specified in paragraph (c) of this section.

(c) The notification required under paragraphs (a) and (b) of this section shall contain a list of all affiliated foreign carriers and shall state individually the country or

countries in which the foreign carriers named in paragraphs (a) and (b) of this section are authorized to provide telecommunications services offered to the public. It shall additionally specify which, if any, of these countries the U.S. carrier is authorized to serve under this part; what services it is authorized to provide to each such country; and the FCC File No. under which each such authorization was granted.

(1) The carrier should also specify, where applicable, those countries named in paragraph (c) for which it provides a specified international communications service solely through the resale of the international switched or private line services of U.S. facilities-based carriers with which the resale carrier does not have an affiliation. Such an affiliation is defined as in § 63.01(r)(1)(i), except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(2) The carrier shall also submit with its notification:

(i) The ownership information as required to be submitted pursuant to § 63.01(r)(2);

(ii) Where the carrier is authorized as a private line reseller on a particular route for which it has an affiliation with a foreign carrier, as defined in Section 63.01(r)(1)(i), a certification as required to be submitted pursuant to § 63.01(r)(4); and

(iii) A "special concessions" certification as required to be submitted pursuant to § 63.01(s).

(3) The carrier is responsible for the continuing accuracy of the certifications provided under this section. Whenever the substance of any certification provided under this section is no longer accurate, the carrier shall as promptly as possible, and in any event within 30 days, file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided, except that the carrier shall immediately inform the Commission if at any time the representations in the "special concessions" certification provided under paragraph (c)(2)(iii) of this section are no longer true. *See* § 63.01(s)(2). This information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

(d) Unless the carrier notifying the Commission of a foreign carrier affiliation under paragraph (a) of this section qualifies for the presumption of non-dominant regulation pursuant to § 63.10(a)(4), it should submit the information specified in § 63.01(r)(8) to retain its non-dominant status on any affiliated route.

(e) The Commission will issue public notice of the submissions made under this section for 14 days.

(1) In the case of a notification filed under paragraph (a) of this section, the Commission, if it deems it necessary, will by written order at any time before or after the submission of public comments impose dominant carrier regulation on the carrier for the affiliated routes based on the provisions of § 63.10.

(2) In the case of a planned investment by a foreign carrier of a ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier, the Commission will, unless it notifies the carrier in writing within 30 days of issuance of the public notice that the investment raises a substantial and material question of fact as to whether the investment serves the public interest, convenience and necessity, presume the investment to be in the public interest. If notified that the acquisition raises a substantial and

material question, then the carrier shall not consummate the planned investment until it has filed an application under §63.01 and submitted the information specified under paragraphs (r)(6) or (7), as applicable, and (8) of that section, and the Commission has approved the application by formal written order.

5. Section 63.12 is amended by revising paragraph (c)(1) to read as follows:

§ 63.12 Streamlined processing of certain international resale applications.

(c) ***

(1) The applicant has an affiliation within the meaning of § 63.01(r)(3), with the U.S. facilities-based carrier whose international switched or private line services the applicant seeks authority to resell (either directly or indirectly through the resale of another reseller's services); or

6. Section 63.13 is amended by revising the last sentence of paragraphs (a)(3), (a)(4), and (a)(5), to read as follows:

§ 63.13 Streamlined procedures for modifying regulatory classification of U.S. international carriers from dominant to nondominant.

(a) ***

(3) *** For purposes of this paragraph, "telecommunications facilities" are defined as in § 63.01(r)(4).

(4) Any carrier filing a certified list pursuant to paragraph (a)(2) of this section must also provide the "special concessions" certification as required to be submitted pursuant to § 63.01(r)(3).

(5) *** See § 63.01(s)(2).

7. Section 63.14 is amended to read as follows:

§ 63.14 Prohibition on agreeing to accept special concessions.

Any carrier authorized to provide international communications service under this part shall be prohibited 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 served under the authority of this part and from agreeing to enter into such agreements in the future. For purposes of this section, foreign carrier is defined as in § 63.01(r)(1)(ii); and special concession is defined as in § 63.01(s).

8. A new Section 63.16 is added to read as follows:

§ 63.16 Special Provisions For U.S. International Common Carriers

(a) Unless otherwise prohibited by the terms of its Section 214 certificate, a U.S. common carrier authorized under this part to provide international private line service, whether as a reseller or facilities-based carrier, may interconnect its authorized private lines to the public switched network on behalf of an end user customer for the end user customer's own use.

(b) Except as provided in paragraph (b)(5) of this section, a U.S. common carrier, whether a reseller or facilities-based, may engage in "switched hubbing" to countries not found to offer equivalent resale opportunities under Section 63.01(k)(5) and (6) under the following conditions:

(1) U.S.-outbound switched traffic shall be routed over the carrier's authorized U.S. international private lines to an equivalent country, and then forwarded to a third, non-equivalent country only by taking at published rates and reselling the International Message Telephone Service (IMTS) of a carrier in the equivalent country;

(2) U.S.-inbound switched traffic shall be carried to an equivalent country as part of the IMTS traffic flow from a non-equivalent third country and then terminated in the United States over U.S. international private lines from the equivalent hub country;

(3) U.S. common 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.

(4) No U.S. common carrier may engage in switched hubbing under this section to a country for which it has an affiliation with a foreign carrier unless and until it receives specific authority to do so under Section 63.01. For purposes of this paragraph, "affiliation" and "foreign carrier" are defined as set forth in Section 63.01(r)(1)(i)(B) and (ii), respectively.

APPENDIX C FINAL REGULATORY FLEXIBILITY ANALYSIS

Pursuant to Section 603 of Title 5, United States Code, 5 U.S.C. § 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rule Making in CC Docket No. 95-22. Written comments on the proposals in the Notice, including the Regulatory Flexibility Analysis, were requested.

A. NEED AND PURPOSE OF RULES.

This rulemaking proceeding establishes an effective competitive opportunities analysis as an important public interest factor in the Commission's overall public interest analysis of applications filed by foreign carriers to enter the U.S. international telecommunications market pursuant to Section 214 of the Communications Act. It also adopts a similar analysis for determining whether the public interest would be disserved by permitting indirect foreign investment in common carrier licensees in excess of the benchmarks contained in Section 310(b)(4) of the Act. In addition, this proceeding modifies existing rules and policies relating to the definition of a U.S. international facilities-based carrier, the regulation of dominant carriers in the provision of international service, and other rules governing the provision of switched services over international private lines.

B. ISSUES RAISED BY THE PUBLIC IN RESPONSE TO THE INITIAL ANALYSIS.

This rulemaking imposes new regulatory obligations on applicants for international Section 214 authority and authorized U.S. carriers that may have, or seek to have, foreign carrier equity participation. It also imposes new regulatory obligations on U.S. carriers that have significant ownership interests in foreign carriers, and may result in increased regulation of U.S. carriers involved in certain joint venture arrangements with foreign carriers.

We initially proposed to apply an effective market access test to the primary markets of a foreign carrier seeking to operate as a U.S. international facilities-based carrier on any route, whether directly or through an investment in a U.S. carrier. A number of parties raised issues about this approach and offered alternative proposals. These parties argued that such an approach was overly broad, and would be burdensome on applicants and the Commission. As a result of these comments, we have significantly modified our proposed market entry standard, and adopted some of the suggested alternatives. Our more focussed approach will add clarity and certainty to applicants seeking to enter the U.S. market to offer international services. We have adopted a similarly more focussed approach for the effective competitive opportunities analysis under Section 310(b)(4).

C. SIGNIFICANT ALTERNATIVES CONSIDERED.

We have attempted to balance all the commenters' concerns with our public interest mandate under the Act in order to adopt a clear and administratively feasible approach to market entry by foreign carriers. Instead of examining whether effective competitive opportunities exist for U.S. carriers in every primary market where a foreign carrier operates, regardless of whether the foreign carrier seeks to serve such market, we will focus our analysis under Section 214 only on destination countries where the foreign carrier holds market power. Our route-by-route approach reduces the regulatory burden on all U.S. carriers seeking an affiliation with a foreign carrier. We have not adopted the suggestion of some parties to exempt small U.S. carriers from the market entry rules. Whether a dominant foreign carrier makes a significant investment in a small U.S. carrier or a large one, there is a substantial risk of anticompetitive effects. Therefore, we decline to exempt small U.S. carriers from these rules.

We proposed to modify our standard for determining when a U.S. carrier is affiliated with a foreign carrier for purposes of both the market entry analysis and post-entry regulation. We considered investment levels ranging from greater than ten percent to controlling interests at any level. We also considered adopting an affiliation standard based on: the dollar amount of the investment; the percentage of the investment; or the amount of traffic carried by the U.S. carrier in correspondence with the foreign carrier. We additionally considered adopting a reciprocal affiliation standard. Based on the record, we have modified our definition of affiliation and will now consider affiliated any U.S. carrier with either: (i) a greater than 25 percent interest (or a controlling interest at any level) held by a foreign carrier; and (2) any U.S. carrier with a greater than 25 percent interest in, or control of, a foreign carrier.

We will apply our effective competitive opportunities analysis to the first category of affiliated U.S. carriers on routes where the affiliated foreign carrier has market power in the destination country. We will apply our dominant carrier safeguards to all affiliated U.S. carriers on routes where the affiliated foreign carrier has market power. These safeguards will also now apply to U.S. carriers on routes for which they have formed a non-exclusive co-marketing arrangement or other joint venture with a dominant foreign carrier, where such arrangements present a substantial risk of anticompetitive effects.

We have eliminated the requirement that dominant, foreign-affiliated carriers file cost support with their tariffs. This will reduce burdensome filing requirements. We also adopt our proposed 14-day notice period (currently 45 days) for the filing of international service tariffs by dominant, foreign-affiliated carriers. We adopt a new recordkeeping requirement that a dominant, foreign-affiliated carrier maintain complete records of the provisioning and maintenance of network facilities and services it procures from its foreign affiliate or ally. We find that although this requirement is a minor burden, its benefit in preventing anticompetitive conduct outweighs such a burden. We adopt new rules related to the provision of switched services using international private lines. These rules will enhance opportunities for U.S. carriers to serve U.S. consumers more efficiently. We also adopt a

definition of "U.S. international facilities-based carrier" that may facilitate the ability of smaller U.S. carriers to obtain operating agreements.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

Re: Market Entry and Regulation of Foreign-affiliated Entities

By today's action, the Commission adopts standards for regulating the entry of foreign carriers into the United States market for international telecommunications services. Until now, the Commission has acted on foreign carriers' applications to provide such service on an ad hoc, case by case basis. Some have argued that this form of review fails to give foreign entities clear guidance on the Commission's criteria in this area. The Commission has now established a clear standard of review by establishing an effective competitive opportunities ("ECO") analysis for foreign carriers seeking to provide facilities-based or resale services in the United States. In addition, the Commission will apply the ECO analysis to foreign investors who wish to invest in excess of the benchmarks contained in Section 310(b)(4) of the Communications Act.

I write separately to emphasize my belief that the Commission's Order achieves the underlying goals of: (1) promoting effective competition in the global market for communications services; (2) preventing anticompetitive conduct in the provision of international services or facilities and (3) encouraging foreign governments to open their telecommunications markets. I join my colleagues in their belief that effective competition directly advances the public interest and the Commission's paramount goal should be to make available a rapid, efficient, worldwide wire and radio communication service with adequate facilities at reasonable charges.

We are certainly witnessing a period of transition within the international telecommunications market. Foreign markets are undergoing increased privatization and liberalization, which ultimately will lend itself to increased competition in the global telecommunications marketplace. For there truly to be effective competition, I believe that U.S. carriers must be able to participate in competitive overseas markets. As a result, I think that the factors which the Commission will review in conducting its ECO analysis will ensure that we adequately address issues relating to foreign markets that are either closed or have erected barriers for U.S. carriers.

While I support the objectives of this Order, I cannot help but wonder whether the application of the ECO analysis to switched resale and the resale of non-interconnected private