STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

1330 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036-1795

PHOENIX, ARIZONA
TWO RENAISSANCE SQUARE

(202) 429-3000
FACSIMILE: (202) 429-3902
TELEX: 89-2503

STEPTOE & JOHNSON INTERNATIONAL
AFFILIATE IN MOSCOW, RUSSIA

TELEPHONE: (602) 257-5200
FACSIMILE: (602) 257-5299

TELEPHONE: (011-7-501) 258-5250
FACSIMILE: (011-7-501) 258-5251

ALFRED M. MAMLET
(202) 429-6205

January 29, 1996

VIA HAND DELIVERY

Mr. William Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: Telefónica Larga Distancia de Puerto Rico, Inc.'s Comments
IB Docket No. 95-22; RM-8355; RM-8392

Dear Mr. Caton:

Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD"), by its attorneys, hereby submits for filing an original and eleven copies of their Petition For Reconsideration in connection with the above-captioned matter.

Also enclosed is an additional copy of TLD's Petition For Reconsideration which we ask you to date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Alfred M. Mamlet /srhw

Alfred M. Mamlet
Counsel for Telefónica Larga Distancia
de Puerto Rico, Inc.

/srh-m
Enclosures

No. of Copies rec'd 0+12
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

JAN 29 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

DOCKET FILE COPY ORIGINAL

PETITION FOR RECONSIDERATION

TELEFÓNICA LARGA DISTANCIA DE PUERTO RICO, INC.

Of Counsel:

Encarnita Catalán-Marchán
María Pizarro-Figueroa
Telefónica Larga Distancia de Puerto Rico, Inc.
Metro Office Park
Building No. 8, Street No. 1
Guaynabo, PR 00922

Alfred M. Mamlet
Stewart A. Baker
Philip L. Malet
Marc A. Paul
Colleen A. Sechrest
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036
(202) 429-3000

Counsel for Telefónica Larga Distancia de Puerto Rico, Inc.

Dated: January 29, 1996

SUMMARY

Telefónica Larga Distancia de Puerto Rico Inc. ("TLD") petitions the Commission to reconsider the unjustifiable double standard created by the Foreign Carrier Entry Order for review of Section 214 applications. The new rule applies the Effective Competitive Opportunities ("ECO") analysis on routes beyond the "home market" of a foreign-affiliated carrier. The Foreign Carrier Entry Order extends the ECO analysis to third countries where the foreign carrier has no equity investment in the U.S. foreign-affiliated carrier applicant. For example, the rule may require an ECO analysis on TLD's applications to serve Argentina, Chile and Peru because Telefónica Internacional (TI"), which owns 79% of TLD, may be found to control carriers in those countries. However, the new rule does not apply the ECO analysis to U.S. firms that control foreign carriers. This double standard is poor communications policy and a violation of the Fifth Amendment's Due Process Clause.

As a policy matter, the Commission should encourage the privatization and development of telecommunications systems in developing countries. However, the new rule would penalize companies that actively participate in the privatization and development of telecommunications systems in Latin America and elsewhere. The Commission, and other U.S. policy-makers, have frequently praised the privatization, development and liberalization of the telecommunications system in Chile. It was TI's investments that made all this possible. Today, similar TI participation in the privatization and development of telecommunications systems in Argentina and Peru is improving the national economies in those countries, and will lead to liberalization at a "date certain."

However, the process of privatization, development and liberalization of telecommunications systems in developing countries has always included a significant

period of exclusivity for the newly privatized operator in return for substantial commitments to upgrade the national telecommunications system. This exclusivity period is necessary in order to allow the privatized carrier a period of time to recover the substantial investment required to upgrade the telecommunications system. For the national government, the promise of a rapidly developing telecommunications system is often the driving force behind the privatization. For example, in Peru, telephone penetration has increased by more than 65% in less than two years following privatization.

Chairman Hundt recognized these realities in a recent speech where he set out these fundamental GII principles:

> 1. Separate telecoms regulators from telecoms operators and privatize the operators as soon [as] possible. Let private foreign investment help that process.
>
> 2. Introduce competition in the provision of telecoms services and facilities on a "date certain" basis.[1/]

Countries like Peru and Argentina have met this test. They have privatized and established independent regulators. They have also established a date certain for facilities-based competition.

It is not realistic to expect developing countries to privatize without offering a period of exclusivity. It is not fair for the new rule to penalize the winner of a privatization tender by foreclosing part of the U.S. market, particularly when the same action would not be taken against a U.S. company.

As a legal matter, the Commission's rule is unconstitutional. The rule creates an alienage-based classification that must be justified by a compelling governmental interest which cannot be met by a less restrictive alternative.

[1/] *Remarks of Reed E. Hundt, American Chamber of Commerce, In* Warsaw, Poland, 5 (Jan. 23, 1996).

Classifications established by Congress, pursuant to its immigration power, or the Executive Branch, pursuant to its foreign policy power, can sidestep this strict review. However, the Commission does not exercise immigration or foreign policy powers under Section 214. Similarly, under Section 214, the Commission does not have a clear delegation from a Congressional exercise of immigration power as it does under Section 310.

The rationales offered by the Commission cannot justify this discriminatory standard. The Commission's principal reason for establishing this double standard is to develop a "policy in favor of U.S. investment abroad." However, this justification for alienage-based classifications has been consistently rejected by the Supreme Court.

The other purported justifications are not even rational. The Commission has the same jurisdiction over TLD's "licenses and authorizations" on affiliated routes that it has over MCI and GTE. Similarly, the Commission's jurisdiction over a foreign carrier with bottleneck control is the same regardless of whether that carrier is controlled by TI or MCI. Finally, the objectives of the rulemaking are furthered to the same extent by applying the ECO analysis to U.S. carriers with controlling investments in foreign carriers as they are by applying the ECO analysis to TLD's third country affiliates.

The Commission should reconsider its initial decision to apply the ECO analysis to routes to third countries where the foreign carrier is under common control but does not have a 25% equity investment in the applicant. In the alternative, the Commission should apply the ECO analysis to U.S. carriers with control over foreign carriers.

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

PETITION FOR RECONSIDERATION

I. INTRODUCTION

Telefónica Larga Distancia de Puerto Rico, Inc. ("TLD") petitions the Commission to reconsider its rule established in the above-captioned proceeding to apply the Effective Competitive Opportunities ("ECO") analysis to routes beyond the route to a foreign-affiliated carrier's home market.

In the alternative, TLD petitions the Commission to reconsider its decision not to apply the ECO analysis to U.S. carriers with controlling interests in foreign carriers that own bottleneck facilities.[1/]

It is the combination of the Commission's decisions to apply the ECO analysis to a foreign carrier's affiliations in third countries, and to not apply the ECO analysis to a U.S. carrier's affiliations in third countries that creates a hypocritical double standard. This double standard cannot be justified by the stated goals of the

[1/] While this Petition for Reconsideration is devoted to these two issues, TLD preserves all of the arguments made in its Comments and Reply Comments (which are incorporated by reference), particularly its claim that the Commission lacks the jurisdiction to adopt the rule or to apply the ECO analysis.

proceeding, or by U.S. telecommunications policy. Applying the ECO analysis to routes between the United States and developing countries will impede important efforts to privatize, develop and liberalize telecommunications systems in these countries.

Foreign countries will correctly perceive the Commission's policy as a cynical double standard and discount other laudable U.S. efforts to encourage telecommunications privatization, development and liberalization programs. U.S. courts will apply a strict scrutiny standard to the Commission's alienage-based classification, which will require invalidation of the Commission's policy under the Fifth Amendment to the Constitution.

II. THE COMMISSION SHOULD NOT APPLY THE ECO ANALYSIS TO A FOREIGN-AFFILIATED CARRIER'S INVESTMENTS IN THIRD COUNTRIES

The Foreign Carrier Entry Order applies the ECO analysis not only to destination markets where a foreign carrier has a 25% or more investment in the U.S. carrier (i.e., Spain for TLD), but also to routes to third countries (i.e., Argentina, Chile and Peru for TLD) where there is a carrier under the common control of the investing carrier (i.e., Telefónica Internacional ("TI")).[2/] The Commission should reconsider its decision to apply the ECO analysis to third country routes (i.e., Argentina, Chile and Peru) where the foreign carrier in those third countries does not have an investment of at least 25% in the U.S. carrier applicant.[3/]

2/ Foreign Carrier Entry Order at ¶ 87; 47 C.F.R. § 63.01(r)(1)(i)(B). The examples of "affiliation" used throughout this Petition for TLD (and other carriers), such as Argentina, Chile and Peru, are for illustrative purposes only, and do not constitute concessions (or contentions) that any carriers are indeed affiliated.

3/ TLD raised this issue in its Comments at 65-70.

Extending the Commission's ECO analysis to these third countries: (1) would retard the privatization and development of telecommunications systems around the world; (2) would not "encourage foreign governments to open their communications markets";[4] and (3) would seriously harm U.S. companies investing in foreign carriers if other countries simply copied the U.S. rule. Therefore, the Commission should limit application of the ECO analysis to the route(s) where there is a foreign carrier with a 25% or greater investment in the U.S. foreign-affiliated carrier.

A. Application Of The ECO Analysis To Third Countries Will Harm Privatization And Telecommunications Development Efforts

Perhaps the most unfortunate aspect of the Foreign Carrier Entry Order is that it would harm telecommunications privatization and development efforts by applying the ECO analysis to third countries. For example, the Commission might conclude that TLD is affiliated with carriers in Argentina, Chile and Peru, and apply the ECO analysis to TLD applications to serve those countries.[5] Any effort to condition TLD's U.S. operations on the market conditions in Argentina, Chile or Peru would be particularly unfortunate because Telefónica Internacional ("TI") has taken substantial efforts and risks to develop the telecommunications markets in those countries.

In Chile, Compañia de Telefónos de Chile ("CTC") investments of $2.1 billion led to a 90% increase in the number of telephone lines, from 811,811 in 1990 to 1,545,074 in 1994.[6] The switches in the CTC network are now 100% digital.

The advances in Chile's telecommunications market have stimulated its national economy and serve as a laudable model for the rest of the world. Having

---

4/ Foreign Carrier Entry Order at ¶ 6.

5/ These examples are used for illustrative purposes only.

6/ *Chile's CTC to invest $1.3 billion 1996-2000*, Reuters Newswire (May 11, 1995).

passed through its important development phase, Chile now has one of the most competitive telecommunications markets in the world. There are now more than ten carriers authorized to provide facilities-based international services in Chile, including one carrier owned by Bell South, and another carrier partially owned by Bell Atlantic. Chile is one of the very few countries in the world that has no barriers to facilities-based entry for either international or local services.[7/] While Chile might pass the Commission's ECO analysis today, it certainly would not have passed when it initially began its development process with the privatization.

In Argentina, Telefónica de Argentina has also developed the system significantly since the November 1990 privatization. The number of installed lines increased nearly 50%, from 1,915,000 in November 1990 to 2,846,000 in June 1994.[8/]

The significant problem posed by the Commission's rule for developing countries is perhaps best illustrated by TI's recent investment in Peru. In 1993, Peru

---

7/ In 1994, the Commission approved Entel Chile's acquisition of 60% of Northland. See AmericaTel Order, 9 FCC Rcd 3993 (1994). In approving the transaction, the Commission noted Chile's open and competitive telecommunications market by stating: "[W]e find that there are no relevant legal restrictions on the ability of U.S. and other foreign entities to invest in the Chilean international long distance telecommunications marketplace or to obtain licenses to operate as international facilities-based long distance carriers. In addition, we do not find any provisions in Chile's laws or regulations that give Chilean-owned carriers preferential treatment vis-a-vis U.S. or foreign-owned telecommunication companies." Id. at 3999 (footnote omitted). See also, NACS Communications, Inc., DA 95-2365 at ¶ 4 (1995) ("Chile's markets for domestic long distance and international services are becoming more competitive and open to U.S. investment and participation"); AmericaTel Corporation, 10 FCC Rcd 12,157 (1995) (granting AmericaTel's Section 214 Application to acquire facilities for service between the U.S. and Canada and Mexico because of Chile's liberalized telecommunications market); AmericaTel Corporation, 10 FCC Rcd 2901 (1995) (granting AmericaTel's Section 214 application to supplement existing facilities between the U.S. and various foreign countries because of Chile's progress in liberalizing its telecommunications market).

8/ *Telefónica de Argentina: Progress Since Privatization*, 3 Latin America Telecom Reports 8 (Nov. 15, 1994).

had only 2.9 lines per 100 people, one of the lowest penetration rates in Latin America. In 1994, TI bid $1.8 billion to obtain a 31.5% share of the telephone company.[9/] TI's bid was approximately $1 billion higher than the competing bids of two different consortia led by Southwestern Bell and GTE.

The value of the Peru telephone company to TI was not the existing assets it purchased in 1994. Rather, the value was the right to develop a new modern telephone system that would serve hundreds of thousands of additional customers. In addition to the $1.8 billion investment, the privatized carrier, Telefónica del Peru ("TDP") is obligated to make substantial investments to improve and modernize Peru's telephone system. By 1998, TDP is required to install 519,060 new lines, replace 200,000 existing lines and provide 19,000 public pay telephones.

Indeed, the reason that TI's bid was so much larger than the bids of its competitors was that it had a vision of building out a new phone system much faster than was required. By the end of 1995 -- after less than two full years of privatization -- telephone penetration increased by more than 65%, to 4.8 lines per 100 people.[10/]

According to Morgan Grenfell, an adviser to Copri, the Peruvian privatization commission, "'[b]y all accounts, the targets that were set for installation of lines have been met and in fact have been exceeded . . . [t]hey are now pumping more lines into Peru than had been anticipated.'"[11/] For example, while TDP was

---

9/ Initially, TI acquired a 35% interest in both the local and long distance international companies. Since that time, the two companies have merged, and TI has sold 10% of its interest to local private investors.

10/ *Telefónica del Peru: an Update*, 5 Latin American Telecom Report 3 (1996).

11/ Lisa Sedelnik, *CPT/Entel privatization opens lines of communication in Peru*, 64 Latin Finance 18, 20 (1994).

contractually obligated to install 174,000 new lines in 1995, it installed approximately 440,000 lines, or about 250% of its requirement.[12]

The Peru government is extremely pleased with the privatization to date. According to Carlos Montoya, the Executive Director of Copri, "'[w]e are very happy with the Telefónica group and we are witnesses that the service has improved and that the companies are much more efficient . . . . We believe that this constitutes a greater advantage for Peru.'"[13] Encouraged by the successful privatization and accelerated pace of development, the Peru government intends to sell its remaining 28% interest in TDP this year.[14]

When the Peru government established the terms of the bidding for the privatization, it offered the purchasing party a five-year exclusivity period to develop the Peru telecommunications system. Otherwise, there would have been little incentive for TI, Southwestern Bell or GTE to bid because the existing assets of the Peru telephone company did not hold much value.

During this five-year period, TI will develop the Peru telecommunications system to honor its commitments with the Peru government, extend telephone service to the Peruvian people and maximize the value of its investment. The Peru government has announced that, after the five-year exclusivity period terminates in 1999, it will permit competing carriers to enter the Peru market. Competition in the Peruvian telecommunications sector may flourish one day just as it does today in neighboring Chile.

12/ *Telefónica del Peru: an Update*, 5 Latin American Telecom Report at 3.

13/ Lisa Sedelnik, *CPT/Entel privatization opens lines of communication in Peru*, 64 Latin Finance at 20.

14/ *Telefónica del Peru: an Update*, 5 Latin American Telecom Report at 3.

Meanwhile, the new rule may penalize TI for leading the privatization and development of the telecommunications system in Peru. The U.S. government may prevent TI's U.S. affiliate from providing service on U.S.-Peru route, perhaps Peru's most important international route.

The Commission's rule would also provide U.S. carriers with an unfair advantage over TI and other foreign carriers by imposing significant penalties for winning the next privatization bid. Indeed, had the Commission's rule been in effect in 1994, TI might have rationally discounted its bid to account for the inability to provide service on the U.S.-Peru route, or even elected not to bid at all. On the other hand, the rule would not impose any penalty on the competing U.S. companies for making an exclusive investment in Peru or the next country to privatize.

The Peru government also would have faced difficult choices under the Commission's rule. The Peru government would have no interest in modifying its privatization effort in order to permit the winning bidder to provide service on the U.S.-Peru route. If TI had refused to participate in the privatization, then the high bid would have been $1 billion less. The Peru telecommunications infrastructure would have developed much more slowly. The exclusivity provision was necessary to attract sufficient capital to build its telecommunications infrastructure. Of course, the Peru government would have been extremely concerned that the rule would have given U.S. bidders an unfair advantage over other competitors, and might have taken remedial action.

This direct consequence of the rule to hinder privatizations and expansion of telecommunications systems in developing countries runs directly counter to express U.S. international telecommunications policy. Vice President Gore's ITU Buenos Aires address established privatization as the first principle of the U.S. Global

Information Infrastructure policy. Indeed, the Vice President specifically praised the privatizations in "Argentina, Venezuela [and] Chile" that TI has participated in.[15] Privatizations that TI and TLD could be punished for under the Commission's rule.

It is true that Vice President Gore also said that privatization is not enough without competition. However, no developing country has ever introduced telecommunications competition at the same time as privatization. A developing country must attract foreign capital to upgrade its telecommunications system. In order to attract foreign capital, developing countries need to promise the winner of a privatization a period of exclusivity in order to recapture their investments from upgrading the telecommunications system, as was done in Argentina, Peru, and Venezuela.

Chairman Hundt recognized these realities in a recent speech where he set out these fundamental GII principles:

> 1. Separate telecoms regulators from telecoms operators and privatize the operators as soon [as] possible. Let private foreign investment help that process.
>
> 2. Introduce competition in the provision of telecoms services and facilities on a "date certain" basis.[16]

Countries like Peru and Argentina have met this test They have privatized. They have established a date certain for facilities-based competition.

It is not realistic to expect developing countries to privatize without offering a period of exclusivity. It is not fair for the new rule to penalize the winner of a

---

[15] Vice President Al Gore, Remarks at the International Telecommunications Union Meeting In Buenos Aires, Argentina (Mar. 21, 1994), in BNA Regulation, Economics and Law at M-3 (Mar. 22, 1994).

[16] *Remarks of Reed E. Hundt, American Chamber of Commerce, In* Warsaw, Poland, 5 (Jan. 23, 1996).

privatization tender by foreclosing part of the U.S. market, particularly when the same action would not be taken against a U.S. company.

B. Application Of The ECO Analysis To Third Countries Will Not "Encourage Foreign Governments To Open Their Communications Markets"

One of the Commission's three stated goals in this proceeding was to "encourage foreign governments to open their communications markets."[17] While application of the new rule to a foreign-affiliated carrier's home market might possibly provide some encouragement to a foreign government to open its communications market, application of the new rule to third countries will not.

The recent Sprint Declaratory Ruling illustrates this important point.[18] In that proceeding, the Commission considered the proposed investments of France Telecom ("FT") and Deutsche Telekom ("DT") in Sprint. While the Commission concluded that neither France nor Germany passed the ECO analysis, the Commission granted Sprint's petition based in part on the representations of the French and German governments that important liberalization steps were planned.[19] While the Commission's rule might possibly have encouraged the French and German governments to open up their telecommunications markets,[20] it is very unlikely that the

---

[17] Foreign Carrier Entry Order at ¶ 6.

[18] Sprint Corporation, FCC 95-498, (ISP 95-002, rel. Jan. 11, 1996) ("Sprint Declaratory Ruling").

[19] Sprint Declaratory Ruling at ¶ 61.

[20] Of course, there are other important factors pushing France and Germany toward greater liberalization including: (1) the national economic interests of France and Germany; (2) the European Union liberalization efforts; and (3) the World Trade Organization negotiations.

Commission's rule will encourage the governments of third countries where FT and DT have investments in carriers to open up their markets.

The Commission did not even consider the investments of FT and DT in third countries in the Sprint Declaratory Ruling. Instead, the Commission required Sprint to disclose those investments within 30 days.[21]

Since the French and German governments have 100% ownership of FT and DT, it is reasonable to assume that those companies have significant influence over the national telecommunications policies in their countries. FT and DT may well have been instrumental in obtaining the letters from their respective governments with the commitments for liberalization. Certainly, their governments would be inclined to assist companies they wholly own (or perhaps even companies owned by citizens of their nations) expand overseas.

The same cannot be said of the carriers in other countries where FT and DT have investments. For example, despite FT's ownership in Telecom Argentina, the Argentina government is unlikely to change its telecommunications policy because Sprint/FT/DT wants to provide service on the U.S.-Argentina route.[22] Neither the Argentina government (nor the Argentina people) has any ownership interest in FT or Sprint. Therefore, they have no incentive to change their telecommunications policies to permit FT and Sprint to provide service on the U.S.-Argentina route. Indeed, they may be contractually prohibited from doing so.[23]

---

[21] Sprint Declaratory Ruling at ¶ 40.

[22] As stated above, this illustration is not a contention that Sprint or FT is "affiliated" with Telecom Argentina, or that Argentina could not pass the Commission's ECO analysis.

[23] Even if FT were willing to modify the terms of the contract, other investors (from Italy and Argentina) in Telecom Argentina might not be. TI's investment is in Telefónica de Argentina, not Telecom Argentina.

C. Application Of The ECO Analysis To Third Countries Will Harm U.S. Carriers Making Investments In Foreign Countries

The Commission must also consider the effect of its rule on U.S. companies seeking to make investments abroad. U.S. carriers that were more interested in making investments abroad than in restricting foreign entry at home opposed adoption of the rule. As NYNEX pointed out:

> Implementation of the proposed effective market access standard would create the risk that foreign administrations will retaliate by imposing new restrictions or retarding the removal of existing restrictions on U.S. entry and investments in their markets. The unintended result could adversely affect NYNEX's and other U.S. carriers' ability to invest abroad.[24/]

A number of countries have already copied the 25% foreign ownership benchmark established by the United States in Section 310(b). If other countries simply copied the Commission's new rule, it would retard efforts by U.S. carriers to make foreign investments. For example, if Canada were to copy the U.S. ECO rule as part of its planned 1997 restructuring of the telecommunications regime, GTE could be prohibited from providing service to the Dominican Republic and Venezuela.

III. IN THE ALTERNATIVE, THE ECO ANALYSIS SHOULD BE APPLIED TO U.S. CARRIERS

If the Commission decides to retain its application of the ECO analysis to third countries, then it must also apply the ECO analysis to controlling investments held

---

24/ NYNEX Comments at 5. See also U.S. West Reply Comments at 9 ("We are concerned that . . . imposition of the [effective market access] standard might be seen as a unilateral strike in a global market area -- fodder for allegations and inaccurate perceptions about the United States' genuine openness to international competition. A misperception in this critical area could well lead to foreign government retaliation") (footnote omitted).

by U.S. carriers.[25] The new rule would apply the ECO analysis to TI's investments in Argentina, Chile and Peru, but not to MCI's investment in Belize or GTE's investments in the Dominican Republic or Venezuela.[26]

The perverse implications of the Commission's rule can also be seen by its treatment of FT's investment in Sprint. If FT has a controlling interest in Telecom Argentina, then the Commission would apply the ECO analysis to a **Sprint** Section 214 application on the U.S.-Argentina route.[27] However, it Sprint held a controlling interest in Telecom Argentina, then the Commission would not apply the ECO analysis to a Sprint application.

25/ While the Commission acknowledged that two carriers suggested application of any heightened entry standard to U.S. carrier investments, Foreign Carrier Entry Order at ¶ 104 (acknowledging comments of TLD and Tricom), the Commission did not acknowledge the similar comments of at least six other parties. See, e.g., Sprint Rulemaking Comments at 33 (it "makes little sense for the Commission to look only at foreign equity investments in U.S. carriers and to ignore the possibility of such conduct where there is a U.S. investment in the foreign carrier"); Teleglobe Rulemaking Reply Comments at 20 ("[t]he Commission's proposed effective market access test, if adopted, should apply equally to U.S. entities with interests in foreign operators."); AmericaTel Corp. Rulemaking Comments at 13 ("[I]t is necessary for the Commission to apply to U.S. carrier investment . . . in foreign carriers the same standard that it adopts for application to foreign carrier investment in U.S. carriers"); ACC Global Corp. Rulemaking Comments at 11 (stating that "the Commission must subject AT&T to, at a minimum, the same scrutiny as foreign carriers seeking to enter or expand their presence in the U.S. market"); LDDS Rulemaking Comments at 7 (safeguards should be applied to U.S. carriers "with interests in overseas telecommunications carriers with market power"); MFS International, Inc. Rulemaking Reply Comments at 2 ("MFSI therefore joins a number of commenters in urging the Commission to ensure that its review of foreign carrier affiliations include a thorough review of the activities of U.S. carriers. . .").

26/ Again, all examples are for illustrative purposes only. They do not constitute concessions or contentions of any "affiliations" under the Commission's rule.

27/ Sprint Declaratory Ruling at ¶ 40.

The Commission's double standard is poor communications policy and a clear violation of the Due Process Clause of the Fifth Amendment.[28/]

A. The Commission's Alienage-Based Classification Must Be The Least Restrictive Alternative To Achieve A Compelling Governmental Interest

The Supreme Court has long held that classifications based on alienage are subject to strict scrutiny. In order to survive, they must constitute the least restrictive means available of advancing a compelling governmental interest.[29/] This is an extremely difficult standard to meet. The Court itself has pointed out: "Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is "strict" in theory but usually "fatal" in fact."[30/]

The Supreme Court's jurisprudence has repeatedly recognized that aliens constitute a suspect class inadequately protected from governmental prejudice. A seminal case, Graham v. Richardson, explained that:

> the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority . . .for whom such heightened judicial solicitude is appropriate.[31/]

[28/] The Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." A carrier's right to enter a market on an international route is a cognizable liberty interest. See generally In Re Griffiths, 413 U.S. 717, 720 (1973); Takahashi v. Fish and Game Commission et al., 334 U.S. 410, 415--416 (1948); Truax v. Raich, 239 U.S. 33, 41-42 (1915).

[29/] Bernal v. Fainter, 467 U.S. 216, 219 (1984); Graham v. Richardson, 403 U.S. 365, 371-72 (1971); Sugarman v. Dougall, 413 U.S. 634, 642-43 (1973).

[30/] Bernal v. Fainter, 467 U.S. 216, 219, n. 6 (1984) (citing, Gunther, *The Supreme Court, 1971 Term -- Foreword: In Search of Evolving Doctrine On A Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972)).

[31/] Graham v. Richardson, 403 U.S. at 371-72 (citation omitted).

The Commission's new rule makes such a "suspect" alienage-based classification. The classification at issue here blatantly discriminates against not only potential alien investors, but existing alien investors, many of whom have been participating in (and contributing to) the U.S. telecommunications market for years. Such aliens are certainly entitled to fundamental constitutional protections.[32]

Moreover, the FCC's alienage-based classification creates double discrimination. Not only does it injure alien investors in U.S. firms, but it also injures the U.S. firms themselves. Firms like TLD will be operationally hampered by imposition of the Commission's new rule (because it will be more difficult and more costly for them to obtain Section 214 authorizations to enter new markets), and will also find it more difficult to attract investors. The net result is that such U.S. foreign-affiliated firms will be less competitive in both the U.S. and international telecommunications markets. The Supreme Court has recognized that when invidious discrimination injures more than just the class discriminated against, that the resulting injuries are cognizable within the meaning of the "case or controversy" requirement of the Constitution.[33] That this double injury harms those who are not members of the suspect class does not

---

[32] That the Commission discriminates against foreign corporations does not shield the rule from the Fifth Amendment. First, corporations are "persons" within the meaning of the Fifth Amendment and are thus entitled to the full measure of constitutional protection. Grosjean v. American Press Co., Inc., et al., 297 U.S. 233 (1936). See also Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (sustaining Fourteenth Amendment equal protection challenge by life insurance company to tax that discriminated against out-of-state alien corporations). Second, while constitutional protections do not always extend to non-resident aliens, they have never been denied to those aliens who have significant contacts with the United States. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with the country").

[33] See, e.g., Craig v. Boren, 429 U.S. 190, 196-97 (1976); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972).

detract from the heightened level of judicial examination;[34] indeed, the wide-spread nature of the injury should increase the need for strict judicial scrutiny.

The Commission's discrimination does not escape strict review just because the FCC is a federal agency. Federal classifications are subject to the same level of scrutiny as state classifications under the Due Process Clause of the Fifth Amendment.[35] Thus, federal alienage-based classifications are subject to strict scrutiny. There is only one exception to this strict scrutiny test where the federal government is concerned: classifications created by Congress or the Executive Branch pursuant to their Constitutional authority over immigration and foreign affairs. The Supreme Court itself summed up the nature of these exceptions as follows:

> In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. . . .
>
> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal government. "Any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. . . ."[36]

Clearly, this exception does not cover the FCC's discriminatory application of its ECO analysis. As TLD pointed out in its Comments, the Commission

---

[34] See Craig v. Boren, 429 U.S. 190, 197-98 (1976); Truax v. Raich, 239 U.S. 33, 38-39 & 42 (1915).

[35] U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Shapiro v. Thompson, 394 U.S. 618, 627 (1969); Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment").

[36] Matthews v. Diaz, 426 U.S. 67, 79-80 & 81, n. 17 (1975) (citing Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952)).

is not a political department of government, but rather an independent agency.[37] As such, it derives its authority solely from Congressional authorization: it has no ability to ascribe to itself additional powers. This is particularly true with respect to functions, such as immigration and foreign policy, that the Constitution has delegated exclusively to Congress and the Executive.

The Supreme Court's decision in Hampton v. Mow Sun Wong et al., illustrates the limits of the immigration-foreign policy exception to heightened scrutiny.[38] In Hampton, the Court struck down a Civil Service Commission regulation barring aliens from serving as civil servants. The Court noted that, while Congress or the President might be able to justify such a regulation in the exercise of their foreign relations and immigration powers, the Civil Service Commission could not:

> That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies.[39]

Similarly, the FCC has no responsibility for these matters. The FCC must look no further than its statutory (or presidential) mandate -- here Section 214 -- for its authority. Section 214 permits the FCC to consider the "public interest and necessity" in making its determinations. Nothing in this public interest standard remotely authorizes the Commission to apply a different standard to foreign companies than it does to U.S. companies. The Supreme Court's conclusion in Hampton applies with equal force here: "[i]t is perfectly clear that neither the Congress nor the President has

---

37/ Comments of TLD at 5.

38/ 426 U.S. 88 (1976).

39/ Hampton, 426 U.S. at 114.

ever **required** the . . . Commission to adopt the citizenship requirement"[40] as part of its public interest test under Section 214.

The Hampton Court explained that an authorization to an agency to consider citizenship:

> require[s] a much more explicit directive from either Congress or the President before accepting the conclusion that the political branches of Government would consciously adopt a policy raising the constitutional questions presented by this rule.[41]

The sharp contrast between Section 214 and Section 310 demonstrates this point. In Section 310, Congress clearly delineated the extent to which aliens can invest and participate in certain sectors of the U.S. telecommunications market.[42] However, once the Congressional standard in Section 310 is met, the Commission must treat alien investors on an equal footing with their U.S. counterparts. Where Congress has not expressly exercised its power, as it clearly has not in Section 214, the FCC's alienage-based classifications must be strictly scrutinized.

The Commission's rule impermissibly increases the burdens and restrictions placed on aliens doing business within the United States beyond those placed on their U.S. competitors. Such a test, which Congress has not authorized, is subject to strict scrutiny and therefore must be supported by a compelling justification that cannot be achieved by a less restrictive alternative.

40/ Hampton, 426 U.S. at 105 (emphasis in original).

41/ Hampton, 426 U.S. at 113 n.46 (citations omitted).

42/ Section 310(b)(4) allows the Commission to consider the public interest in determining whether to permit foreign investments which exceed the statutory benchmark.

B. The Failure To Apply The ECO Analysis To U.S. Companies Creates An Unjustifiable Double Standard That Violates The Due Process Clause

The Foreign Carrier Entry Order offers three reasons for exempting U.S. carriers' foreign investments from the ECO analysis. None of these arguments can justify this disparate treatment under a rational basis inquiry, much less a strict scrutiny standard. Further, the Commission did not explain why less restrictive alternatives would not satisfy the Commission's legitimate concerns.

1. Promotion Of U.S. Foreign Investment Is An Unconstitutional Justification For An Alienage-Based Classification

The Commission's primary reason for its discriminatory rule is that:

> we do not want unnecessarily to impede the flow of U.S. communications carriers' investment and entry into foreign markets. The presence of U.S. carriers not only benefits those carriers' U.S. customers, but also may foster liberalization efforts. Finally, such a restriction on U.S. investment in foreign carriers would be tantamount to an export control and would be directly contrary to long-standing U.S. policy in favor of U.S. investment abroad.[43/]

There are a number of difficulties with this argument. **First**, the Commission's candid justification that this clear double standard is a "policy in favor of U.S. investment abroad" reveals the real reason for the new rule. But it is an unconstitutional rationale. The Supreme Court has consistently rejected governmental contentions that an alienage-based classification is justified by a "special interest in the advancement and profit of its own citizens."[44/]

43/ Foreign Carrier Entry Order at ¶ 105.

44/ Hampton v. Mow Sun Wong, 426 U.S. at 96 (citation omitted). See also, Sugarman v. Dougall, 411 U.S. 634, 643-45 (1973); Graham, 403 U.S. at 374; Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 882-83 (1985) (invalidating discriminatory tax on out-of-state alien corporations on equal protection grounds).

Second, as shown above, it is equally unnecessary "to impede the flow of [foreign-affiliated] carriers' investment and entry into foreign markets."

Third, "[t]he presence of U.S. **[or foreign-affiliated]** carriers not only benefits those carriers' U.S. customers, but also may foster liberalization efforts." The Commission did not explain how MCI's U.S. customers would benefit more than TLD's U.S. customers from their affiliates' operations abroad. Further, as shown above, TI's participation in the privatization and development of Latin American carriers has led to liberalization in Chile and will do so in Peru and elsewhere.

2. The Commission's Jurisdiction Over Foreign-Affiliated Carriers Is The Same As Over U.S. Carriers

The Commission also asserts that its double standard is needed because it "ha[s] jurisdiction over the U.S. carrier, through its licenses and authorizations in the United States, to redress its behavior."[45] This rationale cannot possible justify such discriminatory treatment because the Commission also "has jurisdiction over the **[foreign-affiliated]** carrier, through its licenses and authorizations in the United States, to redress its behavior." For example, if TLD engaged in anticompetitive behavior on the U.S.-Argentina route, the Commission could take the same remedial action against its licenses and authorizations that it could take against any other U.S. carrier.[46] That remedial action could include severing TLD's authority to provide service on the U.S.-Argentina route.

In addition, the Commission contends that it would "not have jurisdiction over the foreign carrier that has bottleneck control and that may leverage that control to

---

[45] Foreign Carrier Entry Order at ¶ 106.

[46] See Telefónica Larga Distancia de Puerto Rico and LD Acquisition Corporation, 8 FCC Rcd. 106, 116-17 (1992). The Commission and U.S. courts also have jurisdiction over TLD (and probably TI by virtue of its investment in TLD) for violations of the antitrust laws. Foreign Carrier Entry Order at ¶ 105.