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In the Matter of)
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Rules and Policies on Foreign Participation)
in the U.S. Telecommunications Market)

ORDER AND NOTICE OF PROPOSED RULEMAKING

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Appendix A: Rule Changes

I. Introduction

1. On February 15, 1997, the United States and 68 other countries concluded a historic agreement to open markets for basic telecommunications services. This agreement, negotiated under the auspices of the World Trade Organization (WTO), covers 95 percent of the global market for basic telecommunications services. Under the terms of the agreement, the President of the United States has agreed to allow foreign suppliers to provide a broad range of basic telecommunications services in the United States. The U.S. commitment covers local, long distance, and international telecommunications services, provided by wire or radio, on a facilities basis or through resale. In return, U.S. companies will be able to provide basic telecommunications services in 68 other countries, including virtually all major U.S. international trading partners.

2. The WTO Basic Telecom Agreement promises to alter fundamentally the competitive landscape for telecommunications services. Not only have 69 countries agreed to permit competition from foreign suppliers of basic telecommunications services, but 65 of these countries have committed to enforce fair rules of competition for basic telecommunications services. These rules, which cover interconnection of competing telecommunications service suppliers, competition safeguards, and transparent and independent regulation of telecommunications services, incorporate the principles that are at the heart of the Telecommunications Act of 1996.¹ As a result, most of the world's major trading nations have made binding commitments to transition rapidly from monopoly provision of basic telecommunications services to open entry and procompetitive regulation of these services.

3. Due to these changed circumstances, it is time to revisit the rules we adopted in 1995 to govern the entry of foreign-affiliated carriers into the U.S. market for basic telecommunications services. This Notice of Proposed Rulemaking (Notice) initiates a review of the effective competitive opportunities (ECO) test and related rules adopted in the *Foreign Carrier Entry Order*.² We also propose conforming changes to our recently adopted framework for permitting flexible settlement arrangements between U.S. and foreign carriers.

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

² Market Entry and Regulation of Foreign-Affiliated Entities, *Report and Order*, 11 FCC Red 3873 (1995) (*Foreign Carrier Entry Order*), *recon. pending*. In this Notice, we also discuss some of the issues raised in petitions for reconsideration of the *Foreign Carrier Entry Order*. Issues raised in these petitions for reconsideration may be rendered moot by the rules we adopt in this proceeding. We therefore hold these petitions in abeyance pending adoption of final rules in this proceeding.

4. Our objective in this proceeding is to craft rules that will fairly balance a variety of public interest considerations. Our *Foreign Carrier Entry Order* listed a number of such considerations, including competition, national security, foreign policy, law enforcement, and trade policy.³ When we adopted the ECO test, the United States had no relevant trade obligations in the telecommunications services sector. We noted in the *Foreign Carrier Entry Order*, however, that if the WTO negotiations concluded successfully, we would revisit our rules as appropriate.⁴ We propose now to consider all of these factors in reassessing our current rules.

5. In general, we believe that the benefits of the WTO Basic Telecom Agreement allow us to adopt an open entry policy for foreign-affiliated carriers. Open entry introduces new sources of competition, which will produce lower prices and greater service choice and innovation for American consumers. While we tentatively conclude that the public interest will be served by dispensing with detailed review of competitive conditions in foreign markets prior to foreign carrier entry into the U.S. market, we nevertheless will continue to exercise our authority to promote important public interest objectives. Among the most important of these is the commitment of the Telecommunications Act of 1996 to ensure open and fair competition in the U.S. telecommunications market.

6. Our new open entry policy as detailed below represents a major shift in our philosophy for regulation of the international telecommunications market. Prior to the conclusion of the WTO Basic Telecom Agreement, the overall lack of competition in the global telecommunications market convinced us that it was necessary to scrutinize and control entry into this market through our ECO test to promote and protect competition in the U.S. market.⁵ The fundamental marketplace changes that this Agreement will bring about allow us to lower this entry barrier while still promoting vital public interest objectives. We therefore will allow entry into the U.S. international services market, as we do in the domestic interexchange market, subject to safeguards designed to ensure that no competitor with market power can act in an anticompetitive manner. As we said in the *Foreign Carrier Entry Order*, we define market power as the ability to act anticompetitively against unaffiliated U.S. carriers through the control of bottleneck services or facilities on the route in question.⁶ To protect competition, we propose to continue to monitor behavior in the market and to take swift action to ensure that no carrier abuses its market power so as to distort competition in

³ *Foreign Carrier Entry Order* ¶ 62.

⁴ *Id.* ¶ 244.

⁵ See generally *Foreign Carrier Entry Order* ¶¶ 6.18.

⁶ See *Foreign Carrier Entry Order* ¶ 116.

the U.S. telecommunications market. In some cases, we will impose conditions on authorizations or impose conduct safeguards to prevent a carrier from abusing its market power. This approach also fulfills U.S. obligations, negotiated as part of the WTO Basic Telecom Agreement, to maintain measures to prevent anticompetitive conduct. Further, these rules are a "reasonable, objective and impartial" means of promoting public interest goals, as required by the GATS framework.⁷ We emphasize that the characteristics that can be expected to raise concerns of anticompetitive conduct will be not the carrier's foreign affiliation but factors that could result in competitive distortions.

7. This regulatory philosophy will take advantage of market forces, which are more effective at deterring anticompetitive conduct than our rules would be. First, the creation of a competitive market in many countries means that U.S.-licensed carriers have more options for innovative responses to anticompetitive initiatives. Thus, marketplace forces will function to prevent competitive distortions. In addition, by making foreign carrier entry into the U.S. market easier, we will also make it easier for both U.S. and foreign carriers to achieve global strategies that involve efficient and flexible routing of international traffic. Because the United States is the largest hub for international traffic, these strategies will not only benefit U.S. consumers, but will shape the dynamics of the global telecommunications market. In contrast, carriers that continue to rely on traditional strategies based on bilateral traffic routing and extremely high margins on international traffic will face severe competitive pressures in the coming years. Our *Flexibility Order*⁸ will give these marketplace trends further momentum by making economically rational routing of international traffic easier to achieve.

8. At the same time, the emergence of a more dynamic market requires new regulatory tools to address the remaining potential for anticompetitive behavior. In a primarily bilateral market with very limited competition and extraordinarily large margins, many conduct remedies, *i.e.*, post-entry safeguards, had little impact compared to the potential rewards of anticompetitive behavior. In the emerging market for international services, we believe that a flexible set of tools that generally will apply after an authorization has been granted will best serve to promote free and fair competition in the U.S. international telecommunications market. These tools may include our proposed benchmark safeguards⁹

⁷ See General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167, art. VI (1994); *see also infra* ¶ 22.

⁸ Regulation of International Accounting Rates, CC Docket No. 90-337, *Phase II, Fourth Report and Order*, FCC 96-459 (Dec. 3, 1996) (*Flexibility Order*), *recon. pending*.

⁹ See International Settlement Rates, IB Docket No. 96-261, *Notice of Proposed Rulemaking*, FCC 96-484 (Dec. 19, 1996) (*Benchmarks Notice*).

and stricter reporting requirements. We believe that our settlement rate benchmark proposals would greatly reduce the opportunity and incentive for anticompetitive conduct by significantly reducing the extent to which settlement payments U.S. carriers pay their foreign correspondents exceed the cost the foreign carriers incur to terminate calls. In addition, in cases in which a carrier's control of bottleneck facilities presents more serious competitive risks, we propose to employ a new set of dominant carrier safeguards. Finally, when we find actual misconduct in the market, we propose to impose financial sanctions and various conduct remedies, including potentially the imposition of stricter structural remedies.

9. We accordingly propose a number of measures for detecting and deterring anticompetitive behavior that we believe reflect emerging market realities. This regulatory approach is consistent with the approach taken in the domestic context pursuant to the Telecommunications Act of 1996, under which Bell Operating Companies (BOCs) and other local exchange carriers are permitted to enter the long distance market if they satisfy detailed statutory and regulatory safeguards designed to ensure that incumbent local exchange carriers are unable to leverage their power in the local market to the detriment of their interexchange competitors.¹⁰ At the same time, we believe that these are precisely the kinds of measures envisioned by the Reference Paper on Pro-Competitive Regulatory Principles negotiated as part of the WTO Basic Telecom Agreement. The Reference Paper obligates the governments that have adopted it as part of their schedules of commitments to maintain measures to prevent anticompetitive conduct, to ensure fair, nondiscriminatory and cost-oriented interconnection, and to administer universal service obligations in a competitively neutral manner, among other things. The rules that we have adopted to implement the Telecommunications Act meet these requirements.

10. Consistent with this new regulatory philosophy, we tentatively conclude that, for Section 214 applications to enter the U.S. international market of carriers from WTO Member countries, it no longer will be necessary to undertake an effective competitive opportunities analysis to achieve the public interest objectives that our current rules were intended to serve. Instead, we tentatively conclude that the public interest will be best served

¹⁰ See Telecommunications Act of 1996, Pub. L. No. 104-104, secs. 101, 151, §§ 251, 271, 272 (to be codified at 47 U.S.C. §§ 251, 271, 272); see also Implementation of the Non-accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-489 (Dec. 23, 1996) (*Non-accounting Safeguards Order and NPRM*); Accounting Safeguards for Common Carriers Under the Telecommunications Act of 1996, CC Docket No. 96-150, *Report and Order*, 11 FCC Rcd 17,539 (1996); Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate Interexchange Marketplace, CC Docket Nos. 96-149 and 96-61, *Second Report and Order*, FCC 97-142 (Apr. 17, 1997) (*LEC Regulatory Treatment Order*). Under section 271 of the Act as added by the Telecommunications Act of 1996, regional Bell Operating Companies may provide most inter-LATA services only after obtaining Commission approval.

by granting streamlined processing of applications for international Section 214 authorization by these carriers except in those circumstances where foreign carrier entry would pose a very high risk to competition. Similarly, we conclude that it is no longer necessary to apply an equivalency analysis as the basis for authorizing all U.S. carriers to provide switched, basic services over facilities-based or resold private lines between the United States and WTO Member countries. In order to ensure that these revised rules will serve the public interest, we propose a number of measures that will safeguard competition and other vital public interest objectives. Likewise, we tentatively conclude that it is not necessary to apply an ECO test for cable landing licenses for cables between the United States and other WTO Member countries. Finally, we tentatively conclude that, pursuant to our discretion under Section 310(b)(4) of the Communications Act, indirect foreign ownership of common carrier radio licensees up to 100 percent should be presumed to be consistent with the public interest when the foreign investor is from a WTO Member country, absent compelling evidence to the contrary.

11. We seek comment on our tentative conclusions that the public interest will be served by revising our rules governing international Section 214, Title III common carrier, and cable landing license applications in this manner. We also seek comment on our tentative conclusion that the public interest will be best served by retaining the existing ECO test for Section 214, Title III common carrier, and cable landing license applications from entities from non-WTO Member countries. We specifically seek comment on the tentative legal and policy conclusions that underlie these and other rules proposed in this Notice.

12. We also believe it is appropriate to revisit the regulatory safeguards we should apply to foreign-affiliated carriers in the context of the new competitive environment that will prevail in the future. We tentatively conclude that we should modify our dominant carrier safeguards to lessen unnecessary regulatory burdens while at the same time improving our ability to detect, deter and remedy anticompetitive conduct. We also propose to adopt supplemental dominant carrier safeguards that would apply to U.S. carriers that are affiliated with foreign carriers that have market power in destination countries that have not issued licenses for the competitive provisioning of facilities-based international services. We request comment on new reporting requirements, the imposition of structural separation, and certain conduct remedies to address specific competitive concerns.

13. Our proposed regulatory framework also includes a commitment to expediting licensing of new entrants. As we have noted, the WTO Basic Telecom Agreement significantly lessens our concerns that foreign-affiliated carriers will be able to distort competition in the U.S. market. Under these circumstances, we propose to streamline processing of applications of foreign-affiliated carriers in order to speed new entry. This policy is a logical complement to our proposal to rely on market forces and post-entry safeguards to prevent anticompetitive conduct in most cases.

14. We recognize that some WTO Member countries have made no commitments, have committed to less than full market access, have not committed to enforcing fair rules of competition, or might not implement their commitments fully. Although these countries collectively represent a relatively small portion of the world telecommunications market, their carriers' participation in the U.S. market could result in competition problems. We seek comment on the appropriate regulatory responses to those potential problems.

15. Finally, we seek comment on our tentative conclusion that we should not conduct an ECO analysis for purposes of determining whether to permit a U.S. carrier to enter into an alternative settlement arrangement with carriers from WTO Member countries. We propose instead to adopt a rebuttable presumption in favor of permitting U.S. carriers to negotiate such arrangements with carriers from WTO Member countries. We again note the special issues posed by WTO Members who have made no or limited market access commitments.

II. Background

A. *Foreign Carrier Entry Order*

16. In November 1995, the Commission adopted rules governing entry of foreign-affiliated carriers into the U.S. market.¹¹ These rules deal both with applications for authorizations to provide international telecommunications services pursuant to Section 214 of the Communications Act of 1934¹² and with applications for common carrier radio licenses under Title III of the Act.¹³ The *Foreign Carrier Entry Order* stated three goals of our rules:¹⁴

- to promote effective competition in the U.S. telecommunications services market, particularly the market for international telecommunications services;
- to prevent anticompetitive conduct in the provision of international services or facilities; and
- to encourage foreign governments to open their communications markets.

¹¹ *Foreign Carrier Entry Order*, *supra* note 2.

¹² 47 U.S.C. § 214.

¹³ 47 U.S.C. §§ 301-399B.

¹⁴ See *Foreign Carrier Entry Order* ¶¶ 6, 8, 17.

17. To achieve these goals, we adopted an effective competitive opportunities test as part of our overall public interest analysis for both categories of authorizations — international Section 214 authorizations and Title III licenses. We apply the ECO test to applications for international facilities-based, switched resale, and non-interconnected private line resale under Section 214 only in circumstances where an applicant seeks authority to provide the service between the United States and a destination market in which an affiliated foreign carrier has market power.¹⁵ In the Title III context, we apply the ECO test to common carrier radio applicants or licensees that seek to exceed the 25 percent indirect foreign ownership benchmark contained in Section 310(b)(4) of the Act.

18. In applying our effective competitive opportunities test, we examine first the legal, or *de jure*, ability of U.S. carriers to enter the foreign destination market and provide the relevant service. If there are no legal barriers to entry, we consider the practical ability for U.S. carriers to compete in those markets. This analysis focuses on the actual conditions of entry, *i.e.*, terms and conditions of interconnection, competitive safeguards, and the regulatory framework.¹⁶

19. The *Foreign Carrier Entry Order* also delineated additional public interest factors that we consider in determining whether to grant a foreign-affiliated carrier's application. These include the general significance of the proposed entry on competition in the U.S. communications services market, the presence of cost-based accounting rates (under Section 214), as well as national security, law enforcement issues, foreign policy and trade concerns brought to our attention by the Executive Branch.¹⁷ We stated in the *Foreign Carrier Entry Order* that we would accord deference to the views of the Executive Branch on

¹⁵ In general, for purposes of applying our ECO test under Section 214 of the Act, we consider an applicant to be affiliated with a foreign carrier when a foreign carrier owns a greater than 25 percent interest in, or controls, the applicant. 47 C.F.R. § 63.18(h)(1)(i); *Foreign Carrier Entry Order* ¶¶ 73-77, 245-51; *see also id.* ¶¶ 78-87 (scrutiny of foreign carrier investments of 25 percent or less; aggregation of multiple carrier interests).

¹⁶ *Foreign Carrier Entry Order* ¶¶ 3, 42-55; *see also id.* ¶ 49 (we examine "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 . . . [and whether there are] adequate means to monitor and enforce these conditions"); *id.* ¶ 51 (competitive safeguards we examine include: "(1) existence of cost allocation rules to prevent cross subsidization; (2) timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities; and (3) protection of carrier and customer proprietary information"); *id.* ¶ 54 (in examining the regulatory framework in the destination country, our focus is on "whether there is separation between the foreign regulator and the operator of international facilities based services, and whether there are fair and transparent regulatory procedures in the destination market").

¹⁷ *Foreign Carrier Entry Order* ¶¶ 3, 61-72.

issues uniquely within its competence.¹⁸ Finally, we said that we would amend our rules if the Executive Branch were to succeed in negotiating greater market access for U.S. carriers in exchange for still greater liberalization in the U.S. basic telecommunications market.¹⁹

B. WTO Basic Telecom Agreement

20. The WTO Basic Telecom Agreement was concluded under the framework established by the General Agreement on Trade in Services (GATS).²⁰ The GATS was concluded as part of the Uruguay Round of multilateral trade negotiations in December 1993. For the first time, the GATS brought trade in services within the international trading regime established for trade in goods by the General Agreement on Tariffs and Trade after the Second World War.

21. The GATS applies to all service sectors. At the conclusion of the Uruguay Round, the United States and other WTO Members made commitments to allow market access for a broad range of services — including such diverse industries as construction services, professional services (such as legal and medical services), distribution services, and value added (or enhanced) telecommunications services. Basic telecommunications, however, was one of a limited number of service sectors in which no Member was willing to make binding trade commitments. Nevertheless, because WTO Members recognized the economic importance of basic telecommunications services, the WTO established a separate, sector-specific negotiation for basic telecommunications services. These negotiations were scheduled to conclude by April 30, 1996. Because the negotiation had made insufficient progress by that date, the WTO agreed to extend the deadline for concluding the negotiations to February 15, 1997.

22. The GATS imposes a number of obligations on WTO Members. First, all WTO Members are required to accord to services and service suppliers of all other WTO Members "Most Favored Nation" (MFN) treatment.²¹ Essentially, MFN is a nondiscrimination rule that requires each WTO Member to treat all other WTO Members similarly. All WTO Members are required to extend MFN treatment to all other WTO

¹⁸ *Foreign Carrier Entry Order* ¶ 219.

¹⁹ *Foreign Carrier Entry Order* ¶ 240.

²⁰ General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167 (1994) [hereinafter GATS].

²¹ *See* GATS art. II. The MFN obligation, like other provisions of the GATS, applies to "measures" that affect trade in services. "Measures" are essentially actions taken by a national or subnational government. *See* GATS art. I para. 3(a).

Members, even if they have not made specific market access commitments.²² A related GATS obligation is National Treatment, which is a nondiscrimination rule that requires a WTO Member to treat companies from other WTO Members as it treats its own companies.²³ In addition, a Member is obligated to grant other Members' companies access to its market on the terms that it specifies in its schedule of commitments.²⁴ Like National Treatment, Market Access may be limited, but only in ways specifically enumerated in the GATS. Finally, the GATS requires measures related to domestic regulation to be reasonable, objective, impartial, and transparent.²⁵

23. The commitments of the 69 countries that participated in the WTO Basic Telecom Agreement, including the United States, are binding in that they can be enforced through WTO dispute settlement. If a foreign government fails to grant market access to a U.S. carrier, the U.S. Government may take a trade dispute against the foreign government to the WTO. The remedies available if the plaintiff prevails do not include specific performance (*i.e.*, a requirement that the defendant fulfill its trade commitment). Rather, the plaintiff may take trade retaliation against the defendant in any goods or services sector. Thus, if a country that has committed to allow market access to provide international service granted a license to a French company but denied a license to a similarly situated U.S. company, the U.S. Government would have the right to take a dispute against that government in the WTO. While companies from the defendant country might not be interested in entering the U.S. telecommunications market, its industry would likely have substantial volumes of trade with the United States in a variety of other goods and services sectors. If the U.S. Government prevailed in a dispute, it could choose to retaliate against the defendant in appropriate sectors.

24. Similarly, if a foreign government fails to comply with the regulatory principles to which it has committed itself, the U.S. Government may enforce that

²² In other words, even if a country has not specifically agreed to allow U.S. carriers to enter its market, it must treat U.S. carriers no less favorably than any other foreign carrier if it does allow foreign entry into its market.

²³ *See* GATS art. XVII. An important distinction between MFN and National Treatment is that a WTO Member may expressly limit National Treatment by stating in its schedule of commitments the ways in which it intends to treat non-national companies differently from national companies. MFN treatment, in contrast, cannot be limited in this way, although a Member may take exemptions from the GATS MFN requirement.

²⁴ *See* GATS art. XVI.

²⁵ *See* GATS arts. III, VI.

commitment.²⁶ These principles are essentially the same as the requirements of the Communications Act and the Telecommunications Act of 1996 that this Commission has implemented over the past 16 months. Sixty-five governments have undertaken enforceable obligations to ensure that dominant carriers provide nondiscriminatory and timely interconnection to their competitors at cost-oriented rates. If a dominant carrier provided interconnection to U.S. carriers on less favorable terms than it provides to its own nationals or to carriers from a third country, the U.S. Government could take a dispute against the dominant carrier's government for failing to maintain measures to ensure nondiscriminatory interconnection. These governments have also bound themselves to take measures to prevent other forms of anticompetitive conduct, and to regulate the telecommunications industry in a transparent manner. As a result, if a government that committed to prevent anticompetitive conduct failed to adopt measures to prevent its dominant carrier from cross-subsidizing competitive services with monopoly services, the U.S. Government could take a dispute against that government.

III. Discussion

25. In this Notice, we reaffirm the three goals of our regulation of the U.S. international telecommunications market. Our primary goal is to advance the public interest by promoting effective competition in the U.S. telecommunications services market, particularly the market for international services. Effective competition in the U.S. international services market promotes opportunities for U.S. consumers to choose among multiple suppliers based on innovative offerings, service quality and efficiencies, and price competitiveness. In a competitive environment, market forces can replace burdensome regulation and more effectively achieve our public interest objectives of ensuring consumers access to reasonable rates and high quality services.²⁷

26. Our second goal is to prevent anticompetitive conduct in the provision of international services or facilities. As we found in the *Foreign Carrier Entry Order*, regulation that precludes discriminatory and exclusionary behavior is a necessary precondition to effective competition. Such anticompetitive conduct can deny consumers the benefits of greater innovation and lower prices that competition would normally produce. Our regulatory policies have long addressed the ability of carriers to abuse their market power on the foreign

²⁶ These regulatory principles are embodied in the Reference Paper discussed in para. 9, *supra* which was multilaterally negotiated during the WTO negotiations on basic telecommunications.

²⁷ *Foreign Carrier Entry Order* ¶¶ 8-9, 17; see also *id.* ¶ 10 ("Effective competition directly advances the public interest and the Commission's paramount goal of making available a rapid, efficient, worldwide wire and radio communication service with adequate facilities at reasonable charges.").

end of U.S. international routes by engaging in discriminatory and exclusionary behavior to the detriment of U.S. consumers.²⁸

27. Our third goal is to encourage foreign governments to open their communications markets. Effective competition requires that carriers have the ability to compete through forming new organizations and new means of providing service. If there is no opportunity for U.S. participation in competitive markets abroad, the benefits of providing international service on an end-to-end basis will flow solely to a dominant foreign carrier and its U.S. affiliate rather than to all competitors on this route. In such circumstances, U.S. consumers of international services are denied the maximum benefits of reduced rates, increased quality, and innovation.²⁹

A. Entry Standard under Section 214

28. In November 1995, when the Commission adopted the *Foreign Carrier Entry Order*, more than 95 percent of the world's telecommunications revenues (excluding U.S. telecommunications revenues) went to monopoly or dominant carriers.³⁰ Almost all major telecommunications markets were closed to competition. Now, the WTO commitments of 69 nations, including virtually all of the largest U.S. international trading partners, dramatically change the competitive environment in the global telecommunications market. These 69 countries (including the United States), representing 95 percent of global telecom revenues, have agreed to permit competition from foreign suppliers of basic telecommunications services. Further, 65 of these countries have committed to enforce fair rules of competition for basic telecommunications services that are embodied both in the Reference Paper on Procompetitive Regulatory Principles and in U.S. law and regulations. Fifty-two of these countries, which account for approximately 90 percent of telecommunications revenues in WTO Member countries, have granted market access for international services. Thus, most of the world's major trading nations have made binding commitments to transition rapidly from monopoly provision of basic telecommunications services to open entry and procompetitive regulation of these services. The WTO commitments enter into force on January 1, 1998.

²⁸ *Foreign Carrier Entry Order* ¶ 13; see also *id.* ("Our regulation of discriminatory and exclusionary behavior . . . has sought to control the potential misuse of monopoly power while maintaining the benefits of competitive entry.").

²⁹ *Foreign Carrier Entry Order* ¶¶ 14-15, 17; see also *id.* ¶ 16 ("Only with effective opportunities to compete on the foreign end can both the benefits of foreign carrier affiliation and the prevention of anticompetitive conduct actually be achieved."); *id.* ¶ 29 ("Safeguards by themselves are not as effective in achieving meaningful competition in the provision of U.S. international services as a market structure supported by competitive entry and safeguards on both ends of a particular international route.").

³⁰ Gregory C. Staple ed., *Telegeography 1995*

1. WTO Member Countries

a. Facilities-Based, Resold Switched and Resold Non-Interconnected Private Line Services

29. We tentatively conclude that the WTO commitments made by 68 other governments will, when fulfilled, substantially achieve the paramount goal of our *Foreign Carrier Entry Order*, promoting effective competition in the U.S. international services market. We base this tentative conclusion in part on our findings that the Agreement will substantially open foreign markets and will greatly reduce foreign carriers' ability to engage in anticompetitive conduct in the provision of U.S. international services and facilities.

30. These market access commitments and regulatory commitments greatly advance our goal of opening foreign communications markets. U.S. carriers now will be able to provide international service on an end-to-end basis to and from the United States and among foreign countries. U.S. carriers will also be able to make important strategic investments in critical foreign telecommunications markets. These opportunities will help ensure that international carriers serving the United States compete on the basis of "superior business acumen, responsiveness to customers, [and] . . . technological innovation."³¹ As a result, U.S. consumers of international services will receive the maximum benefits of reduced rates and increased quality, choice, and innovation.³² Moreover, the increased competitive opportunities for U.S. carriers should directly promote effective competition in the U.S. international services market by lowering the costs of U.S. carriers.

31. The commitments also represent significant progress towards achieving our goal of preventing anticompetitive conduct. Prior to this Agreement, only four percent of the international telecommunications markets in the world, outside of the United States, were subject to competition. After this Agreement, countries representing over 95 percent of the world's telecommunications revenues will be open to competition by U.S. carriers. As a result, most foreign carriers with monopoly positions today should have far less market power as a result of the WTO commitments, not only because they would be newly subject to competition but because they would be subject to meaningful disciplines to prevent abuse of market power in the form of interconnection obligations and other competitive safeguards to which their governments have committed. In particular, we are considerably less concerned that incumbent foreign carriers will be able to abuse the market power they enjoy in their home markets when they provide U.S. international facilities-based and resold non-

³¹ *Foreign Carrier Entry Order* ¶ 15.

³² *Foreign Carrier Entry Order* ¶ 14.

interconnected private line services.³³ The market access and regulatory commitments that their governments have made should provide a meaningful check on their exercise of market power. As discussed below, however, where international facilities-based competition does not exist in the destination market of a foreign-affiliated U.S. carrier, we propose to impose specific safeguards to ensure that a foreign-affiliated carrier is unable to leverage its foreign market power into the U.S. market.³⁴ Finally, we also continue to believe that the resale of international switched services by a U.S. carrier whose foreign affiliate has market power in the destination country does not present a substantial possibility of anticompetitive conduct in the U.S. international services market.³⁵

32. In light of the new competitive environment created by the WTO Basic Telecom Agreement, we tentatively conclude that we should eliminate the ECO test as part of our public interest analysis of pending and future Section 214 applications filed by foreign carriers from WTO Member countries that seek to provide facilities-based, resold switched, and resold non-interconnected private line services. We tentatively conclude that we should instead establish a rebuttable presumption in favor of granting a Section 214 application filed by a carrier from a WTO Member country to provide international facilities-based, resold switched, or resold non-interconnected private line services. In order to rebut the presumption in favor of granting such a Section 214 application, a petitioner would be required to show that grant of the application would pose a very high risk to competition in the U.S. telecommunications market that could not be addressed by conditions that we could impose on the authorization.

33. Several factors weigh in favor of our eliminating the ECO test for facilities-based, resold switched, and resold non-interconnected private line services and establishing a rebuttable presumption in favor of granting Section 214 applications to provide such services. We believe that the WTO commitments will soon result in a dramatically changed global competitive environment in which almost all of the major traffic routes will be open to competition. Further, for the first time our major trading partners have committed to regulatory principles and a dispute resolution process which assure their markets will be open in fact, not just in theory. We also believe that adoption of our settlement rate benchmarks proposals would provide an effective regulatory tool in preventing anticompetitive behavior in

³³ When a U.S. carrier provides these services in correspondence with an affiliated foreign carrier that has market power in the destination market, discriminatory conduct can occur in the routing and settlement of traffic (for facilities-based switched services); pricing, provisioning and maintenance of essential facilities; and use of information (*e.g.*, technical information; carrier and customer proprietary information). See *infra* ¶ 90.

³⁴ See *infra* Section III.D.1.c.

³⁵ See *Foreign Carrier Entry Order* ¶ 143.

the U.S. international services market. In these circumstances, we believe we can and should rely on competitive market forces rather than our ECO test as a means of achieving the maximum benefits for U.S. consumers.

34. Eliminating the ECO test will ensure that foreign carriers will more easily be able to enter our market, providing price and service quality competition to U.S. carriers. Eliminating the ECO test will also significantly reduce the time and regulatory burden associated with foreign carrier entry into the U.S. market in today's regime. The market power and ECO analyses that this Commission has undertaken since the *Foreign Carrier Entry Order* have been fact-specific, detailed reviews of competitive conditions on particular bilateral international telecommunications routes. They require substantial commitments of time and resources by both private parties and the Commission that may no longer be necessary in the competitive environment that will exist once the WTO commitments take effect.

35. Although 69 WTO Member countries have made commitments to open their basic telecommunications markets, approximately 60 other WTO Members — representing 3 percent of the total basic telecom services revenues for WTO Member countries — have made no such commitments. Moreover, of the 69 countries that have made binding commitments, 17 have not committed to open their international services markets. For carriers from these countries, the WTO Basic Telecom Agreement will be less effective in preventing anticompetitive conduct. Nevertheless, a number of reasons justify eliminating the ECO test as applied to carriers from these countries as well.

36. First, petitioners will have the opportunity to rebut the presumption in favor of granting a Section 214 application filed by carrier from a WTO Member country to provide international facilities-based, resold switched, or resold non-interconnected private line services. Moreover, although some WTO countries have not, to date, made commitments to open their markets to competition from U.S. and other foreign carriers, two facts lead us to believe that the likelihood of liberalization is higher in these markets than in non-WTO countries. The GATS is part of the multilateral framework of rules for the progressive liberalization of trade. Therefore, it is reasonable to expect that WTO Members will make market access commitments for basic telecommunications services either on their own motion or as part of a subsequent trade negotiation. Further, even WTO countries that have not made specific commitments of market access for basic telecommunications services are subject to the general obligations of the GATS — for example, that they grant Most Favored Nation treatment and that their domestic regulations be reasonable, objective, and impartial.³⁶ As a consequence, when these WTO countries begin to liberalize their markets, they will be

³⁶ See GATS art. VI.

obliged to treat U.S. carriers no differently than they treat other foreign carriers. Although this is not a guarantee that U.S. carriers will be allowed to provide service in these countries, it does create enforceable rights when a foreign government takes actions that affect the rights of U.S. carriers.

37. The WTO dispute resolution procedure will also allow the U.S. Government to enforce these obligations as well as specific commitments made by the WTO Members. Thus, for example, if a WTO Member that has made no market access commitments unilaterally decides to liberalize its market, the GATS protects U.S. carriers from discriminatory treatment. Finally, we tentatively conclude that applying the same rules to all WTO Members would be most consistent with U.S. international trade obligations under the GATS. We believe that honoring the U.S. Government's international obligations will serve the public interest and the U.S. national interest. In addition, given that countries that account for the vast majority of international telecommunications services revenues have made good market access and regulatory commitments, the burden of continuing to apply the ECO test to dominant carriers from other WTO countries is not justified by the limited possibility that this will prevent significant anticompetitive conduct.

38. For these reasons, we tentatively conclude that we can and should rely on regulatory mechanisms instead of our existing ECO framework to address our remaining concerns regarding possible anticompetitive behavior. These mechanisms include the general requirements imposed on all U.S. international carriers pursuant to our existing rules and the revised dominant carrier safeguards described below.³⁷ In addition, we have the ability to impose fines and forfeitures for violations of our rules and to impose additional conditions on the Section 214 authorizations of particular carriers where necessary to ensure compliance with our rules and policies.³⁸ In extreme cases, we have authority to revoke authorizations. Enforcement of the antitrust laws is also available to remedy anticompetitive conduct or effects. Finally, we believe that the rules we have proposed in the *Benchmarks* proceeding would largely eliminate the ability and incentive of foreign carriers to engage in anticompetitive conduct.³⁹ For example, we have proposed to condition the facilities-based switched and private line authorizations of U.S. carriers to serve affiliated markets on the

³⁷ See *infra* Section III.D.

³⁸ See 47 U.S.C. §§ 214, 502, 503.

³⁹ See *Benchmarks Notice* ¶ 75 ("[I]f a foreign carrier is collecting cost-based settlement rates, or if its ability to collect above-cost settlement rates is constrained by the existence of effective competition in its home market, concerns about anticompetitive behavior will be significantly diminished."); *id.* ¶ 83.

affiliated foreign carrier's offering authorized U.S. international carriers a settlement rate that is within the benchmark range proposed in that proceeding.⁴⁰

39. In general, we believe that the WTO Basic Telecom Agreement sufficiently reduces the risk of anticompetitive effects, including anticompetitive conduct, that these post-entry safeguards will be adequate to protect competition in the U.S. telecommunications market. Nevertheless, some applications may pose a very high risk to competition. In these circumstances, we would deny an application for a Section 214 authorization even if the applicant is from a WTO Member country. We believe that foreign carrier entry that is likely to harm U.S. consumers in a substantial way, such as through increased rates or decreased service options, would justify denial of an authorization.

40. For example, it is unlikely that we would find it in the public interest to grant the Section 214 application of a foreign carrier in circumstances where the carrier would have the ability, upon entry or shortly thereafter, to raise the price of U.S. international service by restricting its output. In particular, a Section 214 applicant that is affiliated with multiple foreign carriers that control bottleneck facilities on the foreign end of major international traffic routes may be uniquely positioned to exclude competition in particular geographic and product markets. Such an entity may, by virtue of its affiliations, possess unique combined resources. These resources could consist of extensive facilities, including scarce orbital locations and spectrum, a large foreign customer base, extensive proprietary network information, and insufficient separation from, or close ties to, foreign government entities.

41. We believe that conduct warranting denial of an authorization may include adjudicated violations of U.S. antitrust law or other laws protecting competition. Similarly, a demonstration that a foreign carrier has engaged in a pattern of anticompetitive or fraudulent conduct in a foreign market may also constitute grounds for denying an application. Additional circumstances that may justify denying Section 214 (or Title III) applications include adjudicated (a) fraudulent representations to U.S. governmental units and (b) criminal misconduct involving false statements or dishonesty.⁴¹

42. We also observe that the Clayton Act empowers the Commission to disapprove anticompetitive acquisitions of "common carriers engaged in wire or radio communication or

⁴⁰ We discuss the proposed safeguard below in Section III.D.1.e.ii.

⁴¹ See Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1195-97, 1200-03 (1986) (*Character Qualifications*), modified 5 FCC Red 3252, 3252 (1990) (*Character Qualifications Modification*); *MCI Telecommunications Corp.*, 3 FCC Red 509, 515 n.14 (1988) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context).

radio transmission of energy."⁴² The courts have construed these statutory authorizations to mean that the Commission has discharged its statutory responsibilities "when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."⁴³

43. Other public interest factors may also justify denying an application for authorization under Section 214 or Title III of the Communications Act. In particular, as we observed in the *Foreign Carrier Entry Order*, national security, law enforcement, foreign policy, or trade concerns brought to our attention by the Executive branch may also require that we deny a particular application.⁴⁴

44. We request comment on our tentative conclusion that, when presented with international Section 214 applications of carriers from countries that are Members of the WTO to provide international facilities-based, resold switched, and resold non-interconnected private line services, it is no longer necessary to undertake an ECO analysis to achieve the public interest objectives that our current rules were intended to serve. We propose to apply this new policy to all proceedings pending before the Commission in any procedural status at the time our new rules become effective. We seek comment on the legal and policy considerations that underlie this tentative conclusion.

45. We also request comment on our tentative conclusion that we should establish a rebuttable presumption in favor of granting a Section 214 application filed by carrier from a WTO Member country to provide international facilities-based, resold switched, or resold non-interconnected private line services. We specifically request comment on our tentative conclusion that, in order to rebut the presumption in favor of granting such a Section 214 application, a petitioner would be required to show that grant of the application would pose a very high risk to competition in the U.S. telecommunications market that could not be addressed by conditions that we could impose on the authorization. We seek comment on the legal and policy considerations that underlie these tentative conclusions.

46. We also request comment on our tentative conclusion that regulatory safeguards can effectively guard against and redress the possibility of anticompetitive

⁴² Clayton Act § 11, 15 U.S.C. § 21(a). Section 7 of the Clayton Act proscribes the acquisition of stock or assets of a company by another company "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18.

⁴³ *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc).

⁴⁴ *Foreign Carrier Entry Order* ¶3, 61-72.

behavior, instead of our existing ECO analysis. Commenters should also address whether, in light of the WTO Basic Telecom Agreement, we should be concerned that the efficiencies and potential innovations generated by end-to-end operations might flow solely to a particular U.S. carrier and its foreign affiliate.

47. We also request comment on whether the pro-competitive benefits of eliminating the effective competitive opportunities test for WTO Member countries (including WTO Member countries that have made no, poor, or unfulfilled commitments towards opening their markets to effective competition) outweigh the pro-competitive benefits of retaining the test for these countries. Commenters should address whether we should examine the extent of a WTO Member's commitment or its implementation of its commitment in determining whether a particular application presents competition problems that must be addressed.

b. Switched Services Provided over Facilities-Based and Resold Private Lines

48. We have applied an "equivalency" test since 1992 to applications from all carriers that seek to provide switched, basic telecommunications services using resold international private lines.⁴⁵ The equivalency test requires that, before any U.S. carrier provides switched, basic services over resold, U.S. international private lines, the Commission must make a finding that the country at the foreign end of the private line affords U.S. carriers resale opportunities equivalent to those available under U.S. law. The *Foreign Carrier Entry Order* extended this test, with limited exception, to carriers using their

⁴⁵ See Regulation of International Accounting Rates, Phase II, CC Docket No. 90-337, *First Report and Order*, 7 FCC Rcd 559, 561 (1991) (*International Resale Order*); *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992); *Third Report and Order and Order on Reconsideration*, 11 FCC Rcd 12,498 (1996).

authorized facilities-based private lines.⁴⁶ The *Foreign Carrier Entry Order* also restated the equivalency test in the same manner as the ECO test.⁴⁷

49. We adopted the equivalency test to prevent "one-way bypass" of the accounting rate system, where private lines are used only for inbound switched traffic into the United States while outbound switched traffic from the United States remains subject to the accounting rate system. In the *International Resale Order*, we stated that such one-way bypass was not in the public interest because it would exacerbate the U.S. net settlements deficit and ultimately increase the burden on U.S. ratepayers through, for example, higher rates for international message telephone service (IMTS). We have also noted that there is a great potential for distortion of competition in the U.S. IMTS market when a foreign carrier collecting above-cost settlement rates is able to send its switched traffic over resold private lines into the United States, but U.S. carriers are unable to send their traffic over private lines in the reverse direction, and must continue to pay a relatively high settlement rate.⁴⁸ This type of distortion could impede our goal of creating greater competition in the U.S. IMTS market.

50. We believe that, for purposes of WTO Member countries, the WTO agreement substantially reduces the threat of one-way bypass. U.S. carriers will have the opportunity to

⁴⁶ Authorized U.S. carriers may use their facilities-based private lines to carry switched traffic without demonstrating equivalency for the country at the foreign end of the private line provided: (1) the carrier's private line is interconnected to the public switched network only on one end - either the U.S. end or the foreign end; and (2) 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. See 47 C.F.R. § 63.18(e)(4)(ii); *Foreign Carrier Entry Order* ¶¶ 157-161. We have received two petitions for reconsideration of this rule. WorldCom requests that we extend the rule to permit a U.S. facilities-based private line carrier to correspond with a non-dominant, U.S.-affiliated carrier that owns a foreign half-circuit. BT North America, Inc. (BTNA) requests that we permit U.S. private line resellers to engage in one-ended interconnection on the same basis allowed facilities-based private line carriers. These requests for reconsideration may become moot with respect to the provision of switched, basic services over private lines between the United States and WTO Member countries in the event we adopt our proposal to eliminate the equivalency test as the standard for authorizing such services. See *infra* ¶ 50.52.

⁴⁷ *Foreign Carrier Entry Order* ¶¶ 136-138. We noted, however, two practical distinctions between the equivalency and ECO tests. First, the equivalency test applies to applications from *any* entity seeking to provide switched services via international private lines - regardless of any foreign carrier affiliation in the destination market. Second, the equivalency test requires that the *de jure* and *de facto* criteria be met at the time we make an equivalency finding, while the ECO test requires that these criteria be satisfied in the near future. *Id.* ¶ 138.

⁴⁸ We noted in the *Benchmarks Notice* that the average foreign settlement rate for U.S. traffic (weighted by minutes of U.S. outgoing traffic) is approximately \$0.36 per minute. This is potentially as much as four to six times our estimate of the incremental cost of terminating international traffic. *Benchmarks Notice* ¶ 34.

send U.S. outbound switched traffic over private lines to 52 countries, which represent approximately 90 percent of total telecommunications revenues of WTO Member countries. Moreover, by opening these foreign markets to competition in international services, the WTO Basic Telecom Agreement will exert considerable pressure for reform of the international accounting rate system. These competitive pressures should also lead to lower prices and greater alternatives for terminating U.S. international traffic. We have also proposed to adopt a benchmark settlement rate condition as a condition for authorizing U.S. carriers to resell private lines for the provision of switched, basic services in the *Benchmarks* proceeding. As discussed *infra* in Section III.D, we propose to modify that condition to cover U.S. facilities-based carriers' use of their authorized private lines for the provision of switched, basic services.⁴⁹ We therefore tentatively conclude that, for the same reasons articulated above for other international services, it is no longer necessary, or desirable from an administrative standpoint, to continue to apply the equivalency test to pending or future Section 214 applications to provide switched, basic services over private lines between the United States and WTO Member countries.

51. We nonetheless remain concerned about the potential for one-way bypass in the U.S. IMTS market for those WTO countries that have made no or poor quality commitments to open their markets to international services competition and for those WTO countries that do not implement their commitments in a timely manner. We believe, however, that this concern can be addressed by less burdensome regulatory mechanisms than our ECO test. These mechanisms would consist of the post-entry safeguards discussed in Section III.D *infra*, including, in particular, the proposed benchmark settlement rate conditions.

52. We request comment on our tentative conclusion that, with the WTO Basic Telecom Agreement and our proposed benchmark settlement rate conditions, it is no longer necessary or desirable to use the equivalency test as the standard for permitting the use of private lines between the United States and WTO Member countries for the provision of switched services. Commenters should address specifically whether the proposed benchmark settlement rate conditions are sufficient to address our concerns that one-way bypass of the accounting rate system could create market distortions in the U.S. IMTS market and inflate the U.S. net settlements deficit. Commenters that believe these proposed conditions are not sufficient should address whether other measures can be implemented to eliminate these concerns. Commenters should also address whether we should examine the extent of a WTO Member's commitment or its implementation of its commitment in determining whether a particular application presents competition problems that must be addressed.

⁴⁹ We review the proposed benchmark settlement rate condition for facilities-based carriers' use of their authorized private lines for the provision of switched, basic services *infra* in Section III.D.1.e.ii.

2. Non-WTO Member Countries

53. We next consider whether it remains necessary to conduct an effective competitive opportunities analysis to achieve the public interest goals that our rules were intended to achieve for purposes of Section 214 applications to provide facilities-based, resold switched, and resold non-interconnected private line services filed by carriers from countries that are *not* WTO Members. None of these countries has made commitments under the GATS to open its international services market to effective competition or to enforce rules of fair competition for telecommunications services. We have no evidence before us that would suggest that these countries have taken any significant steps to open their international services markets to effective competition.

54. We therefore conclude that we have not fully achieved the goals of the *Foreign Carrier Entry Order* because, as far as non-WTO countries are concerned, we have made little if any progress toward promoting competition on bilateral routes nor have we succeeded in encouraging the opening of these markets. Moreover, the same potential for anticompetitive conduct continues to exist in the provision of international facilities-based, resold switched, and resold non-interconnected private line services between the United States and non-WTO countries after the WTO Basic Telecom Agreement as before. Further, unlike the WTO Member countries that have not made specific commitments of market access for basic telecommunications services, non-WTO Member countries are not subject to the general obligations of the GATS. Therefore, to the extent the non-WTO Member countries liberalize their markets, they are not obliged under the GATS to refrain from discriminating against U.S. carriers. Also, U.S. carriers have no enforceable rights under the GATS and the U.S. government has no resort to the WTO resolution procedure in the event non-WTO countries engage in discriminatory conduct.

55. We tentatively conclude that, for purposes of Section 214 applications to provide facilities-based, resold switched, and resold non-interconnected private line services filed by carriers that are not from WTO Member countries, it remains necessary to conduct an effective competitive opportunities analysis to achieve the public interest goals that our rules were intended to achieve. We seek comment on this tentative conclusion.

56. Commenters on this issue should discuss whether we should modify our ECO test for non-WTO countries. We note that a petition for reconsideration of the *Foreign Carrier Entry Order* requests that the Commission modify application of the ECO analysis.⁵⁰

⁵⁰ See Telefonica Larga Distancia de Puerto Rico Petition for Reconsideration of the *Foreign Carrier Entry Order* (filed Jan. 29, 1996) (TLD Petition); TLD Reply to Oppositions to Petition for Reconsideration (filed Mar. 11, 1996) (TLD Reply).

57. We also request comment on whether, for purposes of countries that are not WTO Members, we should modify our effective competitive opportunities test to include U.S. carriers that own a greater than 25 percent interest in, or control, a foreign carrier from a non-WTO country.⁵¹ We note that, in a petition for reconsideration of the *Foreign Carrier Entry Order*, Telefonica Larga Distancia de Puerto Rico (TLD) asserts that the Commission's decision not to apply the effective competitive opportunities test to U.S. carriers that own a greater than 25 percent interest in, or control, a foreign carrier violates the Due Process and Equal Protection Clauses of the Constitution. TLD also argues that the Commission's assertion that it lacks similar jurisdiction over foreign carriers that own or control U.S. carriers as compared to U.S. carriers that own or control foreign carriers is incorrect and does not support its discriminatory application of the ECO test.⁵²

58. We must also consider whether, for purposes of Section 214 applications to provide switched, basic services over private lines between the United States and countries that are not WTO Members, the equivalency test continues to serve a necessary role in achieving our public interest goals. For these countries, we continue to have the same concerns regarding one-way bypass of the accounting rate system that prompted adoption of the equivalency test. There is no evidence before us that would suggest that these countries allow or have made commitments to allow U.S. carriers opportunities to provide international switched, basic services over private lines equivalent to those available under U.S. law. Further, to the extent the non-WTO Member countries liberalize their markets to allow equivalent opportunities to provide switched services over private lines, they are not obliged under the GATS to refrain from discriminating against U.S. carriers. U.S. carriers have no enforceable rights under the GATS and the U.S. government has no recourse to the WTO resolution process in the event non-WTO countries engage in discriminatory conduct.

⁵¹ Commenters who advocate retaining the ECO analysis for purposes of countries that *are* WTO Members may also discuss whether we should modify our effective competitive opportunities test to include U.S. carriers that own a greater than 25 percent interest in, or control, a foreign carrier from a WTO country.

⁵² See TLD Petition at 13-18; *see also id.* at 11-12 (the Commission should "apply the ECO analysis to controlling investments held by U.S. carriers [in foreign carriers that own bottleneck facilities]"); *id.* at 3 (in the alternative, noting that the ECO analysis applies not only to "destination markets where a foreign carrier has a 25 percent or more investment in the U.S. carrier. . . but also to routes to third countries . . . where there is a carrier under the common control of the investing carrier[.]" and requesting that the Commission should "reconsider its decision to apply the ECO analysis to [such] third country routes . . . where the foreign carrier in those third countries does not have an investment of at least 25 percent in the U.S. carrier applicant"); *see also* TLD Reply at 2-4 and 8-9; *see also* BT North America Petition for Reconsideration (filed Jan. 29, 1997) (BTNA Petition) at 3-5 (potential for anticompetitive conduct exists when a U.S. based carrier has an ownership interest in foreign carriers having market power in the destination market); AT&T Opposition to Petitions for Reconsideration (filed Feb. 29, 1996) (AT&T Opposition) at 2, 10-11 (supporting Commission's decision).

59. Liberalization of the international services markets of WTO Member countries may increase pressure on non-WTO Member countries to reform their basic telecom markets and their accounting rates. We are not confident, however, that reform will come quickly or broadly enough to outweigh the need at this time to maintain our equivalency standard. We therefore tentatively conclude that this standard continues to be necessary to protect U.S. consumers against increases in net settlement payments by U.S. carriers and to prevent anticompetitive distortions in the IMTS market created by one-way bypass of the settlements process by carriers from non-WTO Member countries. We seek comment on this tentative conclusion.

B. Standard for Foreign Ownership under the Cable Landing License Act

60. The Cable Landing License Act⁵³ allows us to deny an application for a cable landing license if to do so would "assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States."⁵⁴ We may also impose such terms on a license "as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed."⁵⁵ We did not address the exercise of this jurisdiction in the *Foreign Carrier Entry Order*.

61. In *Telefonica Larga Distancia de Puerto Rico, Inc. (TLD)*, we for the first time denied a cable landing license by explicitly applying an ECO analysis as part of the discretion given to us under the Cable Landing License Act.⁵⁶ As we stated in that order, similar to Section 214 applications, one of the purposes of the Cable Landing License Act is to encourage foreign governments to allow U.S. companies to have ownership and operation rights in cables landing on their shores. Thus, we said, we have in essence applied an ECO-type analysis to applications for cable landing licenses historically on a case-by-case basis.

⁵³ 47 U.S.C. §§ 35.39 (1994).

⁵⁴ 47 U.S.C. § 35. The powers granted to the President by the Cable Landing License Act have been delegated to the Commission by Executive Order No. 10,530, *reprinted as amended in* 3 U.S.C.A. § 301 at 1052 (1985).

⁵⁵ 47 U.S.C. § 35.

⁵⁶ *Telefonica Larga Distancia de Puerto Rico, Inc.*, File Nos. ITC-92-116-AL, SCL-93-001, ITC-93-029 (May 2, 1997).