1. WTO Member Countries

62. We now tentatively conclude that, in light of the WTO Basic Telecom Agreement, we need not apply an ECO test or any reciprocity criteria as part of our inquiry under Section 2 of the Cable Landing License Act for pending or future applications for cables between the United States and WTO Member countries. As in the context of Section 214 applications, we find that our concerns with respect to opening foreign markets and eliminating the opportunity for anticompetitive conduct have largely been satisfied. None of the 68 other countries that made commitments has reserved the right to deny cable landing licenses on the basis of reciprocity. We therefore anticipate that those countries will allow U.S. companies to land cables in their countries, greatly reducing our need to exercise our authority to deny an application on the grounds that denial would "assist in securing rights for the landing or operation of cables in foreign countries." Because 52 countries have committed to granting market access for international services, we tentatively conclude that, as in the Section 214 context, we do not have the same anticompetitive concerns that caused us to examine ECO criteria. In this new competitive environment, we believe the benefits of applying an ECO test are outweighed by the administrative burden on the Commission and by the burden on potential applicants. Instead, we expect to grant most applications for cable landing licenses unless the State Department disapproves or there is some other compelling public interest reason, consistent with our discretion under the Cable Landing License Act, for doing so.

63. Although we expect that cable landing licenses will routinely be granted for submarine cables between the United States and other WTO Member countries, we seek comment on whether there might be some circumstances in which grant of a cable landing license would pose such a high risk to competition that we should exercise our discretion to deny an application for a cable landing license. 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.

64. As required by Executive Order 10530,[57] we will continue to seek advice from the Executive Branch and, in particular, the approval of the State Department for every application for a cable landing license. We seek comment from the Executive Branch and other interested parties regarding what conditions should be placed on cable landing licenses subsequent to the effective date of the WTO Basic Telecom Agreement. For example, should

[57] Exec. Order No. 10,530, § 5(a), *reprinted as amended in* 3 U.S.C.A. § 301 at 1052 (1985).

ownership restrictions be imposed on the U.S. cable landing station?[58] We will defer to the State Department's authority if it advises us that it will condition its approval of cable landing licenses on the imposition of certain conditions.

2. Non WTO Member Countries

65. For countries that are not Members of the WTO, we tentatively conclude that we should continue our policy of applying an ECO test as part of our inquiry under Section 2 of the Cable Landing License Act. That provision gives us discretion to deny any application if to do so would assist in securing rights to land cables in other countries; we believe we should exercise that discretion in circumstances where a carrier that has market power in a non WTO Member country seeks to land and operate a cable between that country and the United States. As noted in Section III.A.2, *supra*, there are no changed circumstances with respect to non-WTO Member countries that would justify not imposing an ECO analysis under the reciprocity provision of the Cable Landing License Act. We find that granting a cable landing license to applicants from non-WTO Member countries may raise a risk of anticompetitive conduct similar to the harms we addressed in the *Foreign Carrier Entry Order* with respect to Section 214 authorizations.

66. We also find that use of our discretion to deny a license for a cable between the United States and a non-WTO Member country where a dominant foreign carrier seeks to operate both ends of the cable can further our statutory objective to secure landing rights for U.S. companies. Thus, when considering an application to land a cable that will connect to a non-WTO Member country, we would consider whether the applicant is affiliated with a carrier that is dominant in the destination market of the cable, and if so, we would consider whether that destination market offers effective opportunities for U.S. companies to land a cable on its shores. We would also continue to consider, in addition to the *de jure* and *de facto* ECO criteria, other factors consistent with our discretion under the Cable Landing License Act that may weigh in favor of or against grant of a license.

C. Section 310 Standard for Foreign Ownership of Radio Licenses

67. Section 310(b)(4) of the Communications Act allows the Commission to deny or revoke a common carrier, broadcast, or aeronautical radio license if more than 25 percent of the applicant or licensee is indirectly foreign owned and we find that denial or revocation

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[58] *See, e.g.*, Letter from Michael T.N. Fitch, Acting United States Coordinator and Director, Bureau of International Communications and Information Policy, U.S. Department of State, to George S. Li, Chief, International Facilities Division, Federal Communications Commission (Oct. 6, 1992) (approving the transfer of cable landing licenses to LD Acquisition Corporation, a wholly owned subsidiary of Telefonica de Espana, subject to a list of conditions) (available in the FCC International Bureau Reference Center).

would serve the public interest. Under the plain language of Section 310(b)(4), the Commission has the authority to allow indirect foreign ownership to exceed 25 percent, up to and including 100 percent.[59] In the *Foreign Carrier Entry Order*, we adopted an ECO test as part of our public interest analysis under Section 310(b)(4) for common carrier licenses. We found that opening the U.S. market to foreign investment to the extent foreign countries do so in their markets would best serve our goals of promoting competition, preventing anticompetitive conduct, and opening foreign markets.[60]

68. We now propose to eliminate the ECO test as part of our Section 310(b)(4) public interest analysis for common carrier radio licensees or applicants with foreign investment from WTO Member countries.[61] We tentatively conclude that the ECO test is no longer a necessary or desirable means of achieving our goals for the U.S. telecommunications market in light of the new global competitive conditions created by the WTO Basic Telecom Agreement. We stress that, as with all licensing decisions, our decision whether to grant a license to a carrier with foreign investment must continue to be based on a finding that grant of the license would serve the public interest. We thus retain the

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59 *See, e.g.*, *Sprint Corp.*, *Declaratory Ruling and Order*, 11 FCC Rcd 1850 (1996) (approving 28 percent foreign ownership of Sprint); *Cable & Wireless, Inc.*, 10 FCC Rcd 13,177 (1995) (approving controlling interest by aliens of parent corporation that controlled corporation applying for common carrier satellite licenses); *MCI Communications Corp. and British Telecommunications plc*, *Declaratory Ruling and Order*, 9 FCC Rcd 3960 (1994) (approving transaction that would result in a potential 28 percent foreign ownership of MCI); *CRC Cablevision, Inc.*, 47 FCC 2d 467 (1974) (approving controlling interest by aliens of parent corporation that controlled corporation applying for cable antenna radio service licenses when such licenses were covered by Section 310(b)); *Melbourne Int'l Communications, Ltd.*, DA 97-115, File Nos. 1940-DSE-TC-96(2), ITC-96-492(TC) (Int'l Bur. Jan. 21, 1997) (approving controlling interest by aliens of parent corporation that controlled corporation holding two common carrier satellite earth stations); *AmericaSky Corp.*, DA 96-2034, File No. 1821-DSE-TC-96(3) (Int'l Bur. Dec. 6, 1996) (approving controlling interest by aliens of parent corporation that controlled corporation holding three earth station facilities); *Shell Offshore Servs. Co.*, 11 FCC Rcd 10,119 (Int'l Bur. & Wireless Bur. 1996) (approving controlling interest by aliens of parent corporation that controlled corporation applying for authority to operate a digital point-to-point microwave network on a common carrier basis); *MCI Communications Corp.*, *Declaratory Ruling*, 10 FCC Rcd 8697 (Int'l Bur. 1995) (granting MCI's petition for an increase in its foreign ownership from 28 percent to 35 percent); *Teleport Transmission Holdings, Inc.*, 9 FCC Rcd 6430 (Int'l Bur., Telecom. Div., 1994) (approving acquisition of controlling interest by aliens of parent corporation that controlled corporate common carrier satellite earth station licensee).

60 *See Foreign Carrier Entry Order* ¶ 186.

61 We do not address in this proceeding applications by users in the United States for Title III licenses to access non-U.S. satellites. Those are being addressed in the matter of Amendment of the Commission's Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, IB Docket No. 96-111, *Notice of Proposed Rulemaking*, FCC 96-210 (May 14, 1996) (*DISCO II*).

authority to deny an application based on a finding that a grant would not serve the public interest or to condition the license to address specific concerns.[62]

69. We propose not to change our approach to Section 310(b)(4) common carrier applications with respect to applicants with investors from non WTO Member countries. We tentatively conclude that our goals will continue to be served by application of the ECO test as part of our public interest analysis for those markets. As we noted in Section III.A.2, *supra*, these goals have not yet been achieved with respect to non WTO Member countries.

70. We also propose not to change the *ad hoc* approach that we reaffirmed in the *Foreign Carrier Entry Order* for aeronautical licenses. There, we concluded that we would not apply the ECO test to applications for aeronautical licenses. We stated that aeronautical services play a key role in aviation safety and national security and that we had not had sufficient historical guidance in this context to establish a general rule.[63] We tentatively conclude that experience has shown that an *ad hoc* approach is appropriate for these licenses, and we see no reason to change our case-by-case approach now. We seek comment on this tentative conclusion.

71. Finally, we do not propose to amend our rules for broadcast licenses, which are not covered by the WTO Basic Telecom Agreement. In the *Foreign Carrier Entry Order*, we did not adopt an ECO analysis for broadcast licenses because we found that they present different issues than common carrier licenses.[64] We do not propose to disturb that finding here.

1. WTO Member Countries

72. In the *Foreign Carrier Entry Order*, we adopted a separate ECO test as part of our public interest analysis of applications under Section 310(b)(4) for common carrier licenses. Under this test, we first determine the applicant's "home market(s)" by using a "principal place of business" approach. Next, we look at the particular wireless service in which the foreign investor seeks to participate in the U.S. market and determine whether the applicant's home market (or markets) offers effective competitive opportunities for U.S. investors in that service. Our analysis of the home market's effective competitive opportunities focuses first on the *de jure* restrictions imposed by the foreign government and also considers *de facto* limitations on U.S. participation in the foreign market. We also

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62 *See* 47 U.S.C. §§ 307(a), 309(a).

63 *See Foreign Carrier Entry Order* ¶ 196.

64 *See Foreign Carrier Entry Order* ¶¶ 190-194.

decided that, if a foreign market allowed U.S. investors to hold only a less than controlling interest in providers of the relevant service, then we would allow an applicant with investment from that country to exceed the 25 percent benchmark only up to the level of ownership permitted to U.S. investors.[65]

73. We tentatively conclude that we can now further open the U.S. market to competition by eliminating this ECO test for pending as well as future applications as part of our public interest analysis under Section 310(b)(4). We believe that the WTO Basic Telecom Agreement substantially achieves our goal of opening foreign markets, particularly for common carrier wireless services. Twenty-seven other countries, including virtually all of the world's major markets, have agreed to open their markets to 100 percent foreign investment in wireless services as of January 1, 1998, and 17 others will phase in full openness beginning in 1999. Others will permit lesser degrees of foreign ownership. We also note that 65 of these countries have committed to enforce fair rules of competition. In this new environment, we believe that facilitating foreign investment in U.S. wireless markets will significantly enhance competition in these markets. Moreover, we see little concern with anticompetitive conduct as a result of foreign investment in these markets, which, for the most part, consist of wholly domestic services. They therefore do not implicate the same kinds of anticompetitive dangers as in the international Section 214 context.[66] Finally, we believe that eliminating the ECO test will speed foreign investment into U.S. wireless markets and relieve applicants and this Commission of unnecessary regulatory burdens.

74. We therefore propose to eliminate the ECO test as a component of the Section 310(b)(4) public interest analysis for common carrier applicants with investment by entities from WTO countries. Instead, we propose to simplify our review of such foreign investment. If an applicant's foreign investor has its home market in a WTO Member country, there would be a strong presumption that denial of the application would not serve the public interest. We would, of course, continue to consider public interest factors in determining whether to grant or deny a common carrier application under Section 310(b)(4), including any national security, law enforcement, foreign policy, or trade concerns brought to our attention by the Executive Branch.[67] 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.

75. We do not anticipate that we would easily be persuaded that the public interest would be served by denying a license based on Section 310(b)(4) concerns, absent

[65] *See Foreign Carrier Entry Order* ¶¶ 199.214.

[66] *See infra* ¶ 90.

[67] *See supra* Section III.A.1.a.

serious concerns raised by the Executive Branch. Nevertheless, some applications may pose a very high risk to competition. In these circumstances, we would deny an application even if the applicant's foreign investment is from a WTO Member country. A party petitioning to deny an application would have 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 license. We request comment on this tentative conclusion and ask whether other specific criteria may be relevant under Section 310(b)(4). In particular, we ask whether we need to review an increase in foreign ownership by a licensee that already has more than 25 percent foreign ownership. It is clear that we will need to review applications that involve a transfer of control of a licensee, but we solicit comment here on whether we need to review additional investments that do not effect a transfer of control. 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.

76. We tentatively conclude that we will continue to determine a foreign investor's home market by applying the "principal place of business" test that we set out in the *Foreign Carrier Entry Order*.[68] We note that under the GATS, a corporation formed under the laws of a Member and doing substantive business in the territory of that or another Member is a "service supplier" of a WTO Member.[69] Thus, a "service supplier" of one country could, in some instances, have its "principal place of business" in another country. It has been our experience that equating a foreign entity's home market to its principal place of business has been a workable definition that has reliably determined the market with which it is fairest to associate the foreign entity. We accordingly tentatively conclude that we should retain this approach. We nevertheless request comment on whether this GATS concept should affect our analysis of a foreign investor's home market.

2. Non-WTO Member Countries

77. If a common carrier applicant is unable to show that its foreign investor is from a WTO Member country, we propose to retain the existing ECO test as a component of our public interest analysis under Section 310(b)(4). We would continue to examine whether the foreign investor's principal place of business offers effective competitive opportunities to U.S. investors in the particular service sector in which the applicant seeks to compete in the U.S. market. We tentatively find that our goals of increasing competition and opening foreign markets would continue to be served by opening the U.S. market to foreign investors only to the extent that the foreign investors' home markets are open to U.S. investors. We

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68 *See Foreign Carrier Entry Order* ¶ 207.

69 *See* GATS art. XXVIII.

continue to believe that the incentive of being allowed to participate in the U.S. market will encourage the governments of non-WTO Member countries to lift *de jure* and *de facto* barriers to U.S. investment.[70] We seek comment on these tentative conclusions and on ways that the existing ECO test might be revised to be less administratively burdensome.

D. Regulatory Issues

78. We believe it is appropriate to revisit in this proceeding the regulatory safeguards that we apply to U.S. carriers in their provision of U.S. international common carrier services. We have attempted in recent proceedings[71] to focus our regulatory safeguards on our primary goal of promoting effective competition and on the necessary corollary of preventing anticompetitive conduct in the provision of U.S. international services and facilities. We are particularly concerned that our regulations be effective but no more burdensome than necessary to prevent such conduct. Our intention in this proceeding is to ensure that each of the regulations we impose on U.S. international carriers serves a necessary function that is not duplicated by some other regulation or statute.

79. Our review of our regulatory safeguards is also prompted by the GATS obligation, under Article VI, that Member countries' domestic regulation be administered in a reasonable, objective and impartial manner. The GATS also requires that any regulatory safeguards that we impose on carriers from WTO Member countries are consistent with our commitments under the WTO Basic Telecom Agreement, including our MFN and National Treatment obligations. Moreover, the safeguards that we propose in this Notice serve to fulfill the U.S. obligations, negotiated as part of the WTO Basic Telecom Agreement, to maintain measures to prevent anticompetitive conduct. The Reference Paper on Pro-Competitive Regulatory Principles not only allows, but requires, countries to maintain appropriate measures to prevent anticompetitive practices in the basic telecommunications market. We believe that the rules that we propose in this section not only will be effective in fulfilling these regulatory commitments made by the U.S. Government but will be consistent with other relevant provisions of the GATS in that they are a reasonable, objective, and impartial means of attaining legitimate public interest goals.[72]

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[70] *See Foreign Carrier Entry Order* ¶ 186.

[71] *See, e.g., Foreign Carrier Entry Order* ¶¶ 256-271 (modifying dominant carrier and other operating safeguards); 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* (adopting rules permitting flexible settlement arrangements); Rules for Filing of International Circuit Status Reports, CC Docket No. 93-157, *Report and Order*, 10 FCC Rcd 8605 (1995); *Benchmarks Notice*, *supra* note 9; *infra* ¶¶ 119-121.

[72] *See* GATS art. VI.

80. We conclude above that opening our markets to carriers from WTO countries is in the public interest. We believe, however, that even in this new competitive environment, we must maintain safeguards against the potential for a foreign-affiliated U.S. carrier to leverage the market power of its foreign carrier affiliate to the detriment of unaffiliated U.S. carriers. We also believe that foreign carriers that have market power in a destination country *and* that are not subject to competition in that country have a heightened ability to discriminate in favor of their U.S. affiliate. Lacking competitive choices, unaffiliated carriers would be forced to use termination facilities provided by the foreign incumbent, who could use such monopoly control to discriminate in favor of its affiliate. Monopoly control could extend over a variety of network elements essential to the termination of international service, such as international half-circuits, cable head-ends, and digital access cross-connection switches. Foreign monopolists would also have an unfair advantage in providing service to customers who have a presence in both the U.S. and foreign markets and who wish to be served by the same international carrier on both ends. Such customers would have no option but to rely on the foreign monopolist for service. Our concern extends beyond the potential for harm caused to unaffiliated carriers. Premiums extracted through monopoly control could ultimately result in higher rates to U.S. consumers.

81. We therefore tentatively conclude that we should strengthen our rules aimed at detecting and deterring anticompetitive conduct by foreign carriers with market power, particularly carriers that do not face international facilities-based competition on the foreign end of a U.S. international route. This approach allows the Commission to maintain oversight while limiting the regulatory burden imposed generally on foreign-affiliated carriers. Finally, in order to deter anticompetitive conduct further, we make clear here our intention to impose specific and significant sanctions on foreign-affiliated carriers that engage in anticompetitive conduct in the U.S. market.[73] This approach is consistent with the approach taken under the Telecommunications Act of 1996, which allows Bell Operating Companies to enter the domestic and international long distance marketplace, but places significant competitive safeguards on such entry.[74]

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[73] Such sanctions would apply equally to all U.S. carriers with foreign affiliates that have market power in the foreign market, regardless of whether the carriers' primary ownership is U.S. or foreign.

[74] *See* 47 U.S.C. § 272 (b)-(e); *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 FNPRM*). In both the domestic and international services contexts, we believe that competition does not remove the need for regulatory constraints on carriers that have the ability to leverage their existing market power into new markets. *See also* 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 (April 17, 1997) (*LEC Regulatory Treatment Order*).

1. Modification of Dominant Carrier and Other Operating Safeguards

82. Our international regulations traditionally have distinguished between "dominant" and "non-dominant" carriers. We have classified carriers operating in the U.S. market, whether U.S.- or foreign-owned, as dominant in their provision of U.S. international services on particular routes in two circumstances: (1) where we have determined that a U.S. carrier can exercise market power on the U.S. end of a particular route[75] and (2) where we have determined that a foreign carrier affiliate of the U.S. carrier has market power on the foreign end of a particular route that can adversely affect competition in the U.S. international services market (*e.g.*, a carrier has the ability to act anticompetitively against unaffiliated U.S. carriers through the control of services or facilities on the foreign end that are essential to terminate U.S. international traffic).[76] Carriers regulated as dominant on a particular route due to an affiliation with a carrier on the foreign end of the route are subject to specific safeguards set forth in our rules.[77] These safeguards are to a great extent different from the safeguards the Commission traditionally has imposed on U.S. carriers regulated as dominant due to market power of the U.S. carrier on the U.S. end of a route.[78] Our focus in this

[75] *See generally* International Competitive Carrier Policies, *Report and Order*, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986).

[76] *See* Regulation of International Common Carrier Services, *Report and Order*, 7 FCC Rcd 7331, 7334 ¶ 19 (1992) (*International Services*); *see also Foreign Carrier Entry Order* ¶ 116. In general, for purposes of determining a U.S. international carrier's regulatory status, we consider the U.S. carrier to be affiliated with a foreign carrier when the foreign carrier owns a greater than 25 percent interest in, or controls, the U.S. carrier or when the U.S. carrier owns a greater than 25 percent interest in, or controls, the foreign carrier. *See* 47 C.F.R. § 63.18(h)(1)(i)(A).(B). We then apply the following presumptions: (1) carriers without a foreign affiliation on the route at issue are presumed non-dominant; (2) carriers affiliated with a carrier that is a monopoly in the destination market are presumptively classified as dominant for that route; and (3) carriers affiliated with a foreign carrier that is not a monopoly on that route receive closer scrutiny by the Commission. Carriers that provide service on a route solely through the resale of an unaffiliated U.S. facilities-based carrier's international switched services are presumed nondominant regardless of any foreign carrier affiliation on the route. *See International Services* ¶¶ 19, 31; *see also* 47 C.F.R. § 63.10(a).

[77] A foreign-affiliated carrier regulated as dominant on a particular route is required to: "(1) file international service tariffs on 14-days notice without cost support; (2) maintain complete records of the provisioning and maintenance of basic network facilities and services procured from its foreign carrier affiliate . . . ; (3) obtain Commission approval pursuant to § 63.18 before adding or discontinuing circuits; and (4) file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic . . . ." 47 C.F.R. § 63.10(c).

[78] Regulations associated with dominant carrier classification due to market power of the U.S. carrier on the U.S. end of a route include rate of return or price cap regulation to ensure that rates are reasonable, *see* (continued...)

proceeding is the safeguards that we impose due to a U.S. carrier's affiliation with a carrier that has market power on the foreign end of a U.S. international route.

83. We tentatively conclude that the general requirements imposed on all U.S. international carriers by our rules[79] should permit us to scale back some of our current basic dominant carrier safeguards without compromising in any meaningful way our ability to monitor and prevent anticompetitive conduct. Reducing these unnecessary regulations will have the beneficial effect of lowering carrier costs. They will also help minimize tacit coordination of prices and facilitate carriers' ability to make rapid, efficient responses to changes in demand and cost. We also anticipate that reduced regulatory burdens will have a beneficial impact on consumers by allowing carriers to respond more rapidly to competitive pressures to lower prices and improve the quality of service.

[78](...continued)
47 C.F.R. § 61.41(a)(1), and more stringent section 214 requirements to prevent investment in unnecessary new plant and to bar service discontinuances in areas served by a single carrier. *See generally LEC Regulatory Treatment Order* ¶¶ 85-86; *Motion of AT&T Corp. to Be Declared Non Dominant for International Services*, Order, FCC 96-209 (May 14, 1996) ¶¶ 26-28; *Petition of GTE Hawaiian Telephone Co., Inc. for Reclassification as a Non-Dominant IMTS Carrier*, DA 96-1748, ¶ 8 (Int'l Bur. Oct. 22, 1996). In the *LEC Regulatory Treatment Order*, we recently concluded that the Bell Operating Companies' (BOCs) and independent local exchange carriers' (ILECs) market power in the provision of local exchange and exchange access service did not warrant imposing these traditional dominant carrier safeguards on the BOCs' and ILECs' provision of in-region and out-of-region domestic and international long distance services. We concluded that these safeguards generally were designed to prevent a carrier from raising prices by restricting its own output and that the BOCs and ILECs could not leverage their local bottlenecks to this extent in the long distance marketplace. We also concluded that the benefits of these safeguards would be outweighed by the burdens that would be imposed on competition and that other statutory safeguards and regulations applicable to these carriers would address such concerns in a less burdensome and more effective manner. We noted in the *LEC Regulatory Treatment Order* the separate issue of whether a BOC, or ILEC, or any other U.S. carrier should be regulated as dominant in the provision of international service because of the market power of an affiliated foreign carrier in a foreign destination market. *Id.* ¶ 8 n.22.

[79] *See* 47 U.S.C. §§ 201.203; 47 C.F.R. § 43.51(a).(d) (requiring common carriers engaged in foreign communications to file with the Commission certain contracts, agreements, and other arrangements); 47 C.F.R. § 43.51(e) (International Settlements Policy); 47 C.F.R. § 43.61 (requiring common carriers engaged in the provision of international telecommunications service between the United States and foreign destinations to file reports containing annual traffic and revenue data); 47 C.F.R. § 43.82 (requiring facilities-based carriers engaged in the provision of international service to file annual international circuit status reports); 47 C.F.R. § 63.14 (prohibiting U.S carriers authorized to provide international communications service from agreeing to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any foreign country for which the U.S. carrier is authorized to provide service); 47 C.F.R. § 63.15 (requiring private line resellers to file annual circuit addition reports).

84. We also recognize, however, that foreign carriers with market power that are not subject to competition in their markets have the incentive and a heightened ability to discriminate in favor of a U.S. affiliate, a practice that could result in higher rates and less innovative, lower quality service than is available under competitive conditions. We therefore propose to adopt dominant carrier safeguards that would apply to foreign-affiliated carriers depending on the risk of competitive harm the carrier poses. The basic safeguards would apply to all U.S. carriers that are regulated as dominant on a particular route due to an affiliation with a carrier with market power in the destination country. A carrier that is affiliated with a foreign carrier that has market power but that faces competition from multiple international facilities-based carriers in the foreign destination country would be subject to these basic safeguards only. A carrier that is affiliated with a foreign carrier that has market power and does not face competition from multiple international facilities-based carriers in the foreign destination country would also be subject to supplemental safeguards. This approach allows the Commission to maintain maximum oversight where competitive risks are substantial while limiting the regulatory burden imposed generally on foreign-affiliated carriers.

85. We believe that this approach is a significant advance from the regime imposed by the *Foreign Carrier Entry Order*. This approach, together with the other safeguards discussed below, would allow entry by all carriers from WTO countries, but would prevent foreign carriers with market power from leveraging that market power into the U.S. market. We seek comment on this tentative conclusion.

86. We also tentatively conclude that we should continue our current regulatory treatment of non-equity business arrangements between U.S. and foreign carriers. We stated in the *Foreign Carrier Entry Order* that we would impose dominant carrier regulation on a U.S. carrier for its provision of international basic service on particular routes where a co-marketing or other arrangement with a foreign carrier that has market power presents a substantial risk of anticompetitive effects in the U.S. international services market.[80] We continue to believe that circumstances may arise where a non-equity business relationship between a U.S. carrier and a foreign carrier with market power creates a risk of anticompetitive conduct that warrants increased Commission oversight. We therefore propose that, where we do find a substantial risk of anticompetitive effects from a particular co-marketing or other non-equity arrangement, we will impose the basic and, where applicable, the supplemental dominant carrier safeguards on the participating U.S. carrier. We request

80 *Foreign Carrier Entry Order* ¶ 253.

comment on this proposal, including whether additional safeguards are necessary for these joint venture arrangements.[81]

87. Finally, we propose that, in determining whether to classify a foreign-affiliated U.S. carrier as dominant with respect to an affiliated destination market, we should generally not consider the effectiveness of foreign regulation in the destination market as a relevant factor. Currently, our rules permit carriers to argue that effective regulation in the foreign market weighs in favor of non-dominant treatment.[82] Our experience has been that analyzing the effectiveness of regulation in a foreign market imposes significant burdens on the Commission and on applicants and delays foreign carrier entry. Rather, we believe it would be faster and fairer to apply dominant carrier regulation to all foreign-affiliated carriers on routes where their affiliates have market power, regardless of the foreign country's regulatory regime. We believe that improved safeguards should cause no additional undue burdens on the affiliated U.S. carrier where a foreign country has adopted effective competition safeguards. We seek comment on this proposal.

a. Purpose of Dominant Carrier Regulation

88. As the Commission has previously observed, there are two ways in which a carrier can exercise its market power to profitably raise and sustain prices above competitive levels.[83] First, a carrier may be able to raise prices by restricting its own output (which usually requires a large market share); second, a carrier may be able to raise prices (or prevent prices from falling to a lower competitive level) by increasing its rivals' costs and thereby causing its rivals to restrict their output through the carrier's control of an essential

[81] *See* MCI Petition for Reconsideration of the *Foreign Carrier Entry Order* at 6 (arguing that, in order to determine whether to impose dominant carrier regulation, we should require all U.S. carriers that have entered into a non-equity business agreement to file copies of that agreement within 30 days of execution and to file all agreements related to routing of traffic and settlement of accounts on the affected route to the extent not already required under Section 43.51 of the rules; file semi annual circuit status reports; maintain records on provisioning and maintenance of network facilities and services procured from a foreign partner; and file quarterly traffic and revenue reports); *see also* BTNA Petition for Reconsideration at 7 (arguing that we should require U.S. carriers to notify the Commission within 30 days of the formation of a co-marketing or other non-equity business agreement and clarify that we will impose competitive safeguards in addition to dominant carrier regulation where necessary and appropriate).

[82] *See* 47 C.F.R. § 63.18(h)(8)(ii); *see also* 47 C.F.R. § 63.10(a)

[83] *See LEC Regulatory Treatment Order* ¶ 83.

input, such as access to bottleneck facilities, that its rivals need to offer their services.[84] We believe that foreign affiliations primarily present concerns falling into this second category.

89. We tentatively conclude that we should target our dominant carrier safeguards at issue in this proceeding to address the ability of a carrier that has market power on the foreign end of a U.S. international route to increase the costs of unaffiliated U.S. carriers through its control of services or facilities used to terminate U.S. international traffic. A foreign carrier with bottleneck control over essential foreign facilities has the incentive and ability to restrict the supply of facilities and services needed to terminate U.S. traffic and to discriminate in favor of its U.S. affiliate in providing such facilities and services. As a new entrant in competition with incumbent U.S. international carriers, it is less likely, however, that a foreign carrier will possess sufficient market share needed to raise its U.S. international service prices by restricting output. Further, given the framework we propose to adopt in this proceeding to govern entry by foreign carriers with market power, 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 such a carrier would have the ability, upon entry or shortly thereafter, to raise the price of U.S. international service by restricting its output.[85] Thus, our analysis below focuses on retaining or modifying our safeguards only to the extent necessary to prevent a carrier from exercising its foreign market power by raising the costs of unaffiliated U.S. international carriers through control of bottleneck facilities.

90. Our primary concerns with anticompetitive conduct by a foreign carrier that has market power include: (1) routing calls to the U.S. affiliate in proportions greater than those justified under our proportionate return policy; (2) otherwise inappropriately manipulating the calculations and settlements payments to favor the U.S. affiliate wrongfully; (3) routing low-cost proportionate return traffic to the U.S. affiliate, and leaving the rest to its competitor; (4) providing the U.S. affiliate better provisioning and maintenance intervals and better quality of service for essential facilities in the destination country, including the foreign circuit and termination facilities for private network services; (5) undercharging the U.S. affiliate and/or overcharging its competitors for use of the same essential facilities in the destination country; (6) revealing to the U.S. affiliate the confidential information that the foreign carrier receives from the U.S. affiliate's competitors; (7) giving the U.S. affiliate advance notice of network

[84] Economists have recognized these different ways to exercise market power by distinguishing between "Stiglerian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by restricting its own output, and "Bainian" market power, which is the ability of a firm profitably to raise and sustain its price significantly above the competitive level by raising its rivals' costs, thereby causing the rivals to restrain their output. Thomas G. Krattenmaker, Robert H. Lande, & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 249-53 (1987).

[85] *See supra* ¶ 40.

changes and other information that the U.S. affiliate and its competitors will need to know; (8) refusing to implement a new service or capability in correspondence with an unaffiliated U.S. carrier until the U.S. affiliate is able to provide the service or capability; or (9) either as an agent or through an affiliated third party, selling the services of the U.S. affiliate in ways that use the foreign carrier's home market power.[86]

91. We discuss below proposed modifications to our dominant carrier safeguards to strengthen our ability to detect and deter these forms of anticompetitive conduct.[87] We also discuss below proposed revisions to our no special concessions prohibition, which currently prohibits all U.S. carriers from agreeing to accept special concessions from any foreign carrier or administration. Finally, we also reiterate the benchmark settlement rate proposals raised in the *Benchmarks Notice* and discuss possible remedies where anticompetitive conduct has occurred.

b. Basic Dominant Carrier Safeguards

i. Tariffing Requirements

92. Currently, we require carriers regulated as dominant due to a foreign carrier affiliation to file their international service tariffs on no less than 14 days' notice.[88] The international service tariffs filed by these dominant carriers are not presumed lawful. We believe that these dominant carrier tariffing safeguards are generally designed to prevent a carrier from raising prices by restricting its own output rather than to prevent a carrier from raising prices by raising its rivals' costs.[89] These tariffing safeguards are not well-suited to prevent the competitive risks generally associated with a U.S. carrier operating in

[86] *See Sprint Corp., Declaratory Ruling and Order*, 11 FCC Rcd 1850, ¶¶ 56.57 (1996) (*Sprint/DT/FT*).

[87] *See supra* note 77 (listing our current dominant carrier requirements).

[88] We adopted this notice period in the *Foreign Carrier Entry Order*, reducing it from the previous requirement of 45 days' notice. We also eliminated in that proceeding the requirement that these dominant carriers file cost support. We based our new tariffing requirements on our belief that competition in the U.S. international services market is a better constraint on unreasonable prices than Commission review of a foreign carrier's cost showing, and that a shortened notice period provides carriers with additional flexibility to respond to customer demand. *See also Foreign Carrier Entry Order* ¶ 261 ("We have due authority to request . . . [cost support] information under the Act, and we will do so when necessary to review the lawfulness of particular tariff filings."). We also found a 14-day notice period sufficient to permit interested parties and the Commission an opportunity to assess the lawfulness of these tariffs. *See also Foreign Carrier Entry Order* ¶ 262.

[89] *See LEC Regulatory Treatment Order* ¶ 85.

correspondence with an affiliated foreign carrier that has market power in a destination country.[90]

93. We also believe that applying the current dominant carrier tariffing safeguards to a U.S. carrier that does not have the ability to raise prices for international services by restricting its own output can dampen competition. The advance notice period and "no presumption of lawfulness" can facilitate the tacit coordination of prices and impede a carrier's ability to innovate and efficiently respond to changes in demand and cost. Moreover, we believe that our dominant carrier tariffing requirements can impose significant administrative burdens on the Commission and carriers, particularly to the extent they encourage competitors to challenge a carrier's rates in order to impede the carrier's ability to compete. We also believe that a shortened notice period, when coupled with a presumption of lawfulness, will provide carriers with additional flexibility to respond to customer demand.[91]

94. We tentatively conclude that the burdens imposed on competition, the regulated firms, and the Commission by the current tariffing requirements we apply to dominant foreign-affiliated carriers (the 14-day advance notice period and the no presumption of lawfulness) outweigh any benefits of such regulation. We thus tentatively conclude that we should allow dominant, foreign-affiliated U.S. carriers to file their international service tariffs on one day's notice and that we should accord such tariff filings a presumption of lawfulness. We request comment on these tentative conclusions. We also request comment on whether we should maintain the longer notice period as a tool to detect predatory price squeezes.

ii. Addition or Discontinuation of Circuits

95. In the *Foreign Carrier Entry Order*, we retained our requirement that carriers regulated as dominant because of a relationship with a foreign carrier obtain Section 214 approval before adding or discontinuing circuits on those routes for which the carrier is regulated as dominant. We explained that prior authorization enables us to monitor the addition of circuits on affiliated routes and detect deviations from expected traffic flows, including the flow of return traffic. We found that it was necessary to retain the requirement

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[90] These risks are explained *supra* ¶ 90.

[91] *But see Sprint/DT/FT* ¶ 107 (finding that the 14-day notice period, rather than a one-day notice period, provided a better opportunity to detect potential predatory pricing before it occurs).

to remedy promptly any abuses of foreign market power in the provision of U.S. international services.[92]

96. We do not believe that the value of prior approval as a tool to detect and remedy potential anticompetitive conduct justifies the burden it imposes on carriers regulated as dominant in their provision of service to countries that have eliminated legal barriers to international facilities-based competition and licensed multiple international facilities-based competitors to compete with the incumbent carrier. Foreign market conditions in these circumstances will provide some protection against discrimination by the foreign carrier against unaffiliated U.S. carriers. We believe that we can rely on other less burdensome mechanisms to monitor an affiliated carrier's circuit growth on the affiliated route. These mechanisms include quarterly traffic and revenue reports, discussed below, and our annual circuit status and addition reports.[93] We also propose to require as a basic dominant carrier safeguard that the carrier notify the Commission of the addition of circuits on the dominant route, specifying the joint owner of the circuit. We request comment on our proposal not to include as a basic dominant carrier safeguard prior approval to add or discontinue circuits but to instead require quarterly notification of circuit additions.[94] We also request comment whether we should require that the quarterly notification of circuit additions specify the particular facilities on which each circuit is added.

97. Finally, we note that certain carriers regulated as dominant on particular routes due to a foreign carrier affiliation obtained their Section 214 authorization prior to adoption of the ECO test in the *Foreign Carrier Entry Order*. As Cable & Wireless, Inc., has noted in its petition for reconsideration of that order, the ECO test applies to applications from these dominant carriers when they seek to add circuits on their authorized dominant routes. By eliminating the prior certification requirement as a basic dominant carrier safeguard, a foreign carrier that obtained authority to serve a non-WTO Member country prior to adoption of the ECO test would be permitted to add circuits to non-WTO Member countries that have eliminated legal barriers to entry and licensed multiple new international facilities-based

[92] *Foreign Carrier Entry Order* ¶¶ 263-65; *see also id.* ¶ 264 ("To the extent a U.S. carrier is engaged in collusive behavior with a foreign carrier, the prior authorization process allows the Commission to condition the grant of additional circuits or otherwise deny them, rather than to engage in what could be a lengthy revocation process."); *accord Sprint/FT/DT* ¶ 107.

[93] 47 C.F.R. §§ 43.82, 63.15(b).

[94] When the Commission approved British Telecom's 20 percent investment in MCI, it did not impose dominant carrier regulation, and therefore a prior certification requirement, on MCI. It imposed other safeguards, however, including the requirement that MCI notify the Commission of each addition of circuits on the U.S.-U.K. route. *See* MCI Communications Corporation/British Telecommunications plc, *Declaratory Ruling and Order*, 9 FCC Rcd 3960, ¶¶ 37, 39, 46 (1994) (*BT/MCI*).

competitors, unless we otherwise prohibited these circuit additions by rule. We request comment on whether such a rule is necessary to achieve the goals in this proceeding.

iii. Quarterly Traffic and Revenue Reports

98. In the *Foreign Carrier Entry Order,* we decided to retain our requirement that carriers regulated as dominant because of a relationship with a foreign carrier file quarterly traffic and revenue reports. We held that maintaining the quarterly traffic and revenue report requirement was "necessary to limit the potential for anticompetitive conduct."[95] We continue to believe that quarterly traffic and revenue reports help enable us to detect and deter anticompetitive conduct. In particular, they assist us in detecting deviations from expected traffic flows — for example, in the flow of return traffic from an affiliated country.

99. Commenters addressing our tentative conclusion to maintain our quarterly traffic and revenue reports should address whether, if we retain these reports, we should change them to make them more effective in identifying anticompetitive conduct by providing greater specificity regarding the type of information to be reported.

100. We believe that, if we revise our approach to authorizing foreign carriers with market power to participate in the U.S. international services market as proposed in this Notice, we must strengthen our ability to detect and deter anticompetitive conduct. We therefore request comment on whether other measures would be useful to strengthen the reporting requirements proposed as basic safeguards for dominant foreign-affiliated carriers. Alternatively, we request comment whether our annual filing requirements under Section 43.61 of the rules and the reporting requirements established in our equivalency decisions and our recent *Flexibility Order*[96] provide sufficient information to identify anticompetitive

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[95] *Foreign Carrier Entry Order* ¶ 265; *see also Sprint/FT/DT* ¶ 107 ("[T]he requirement that Sprint file quarterly traffic reports and seek prior approval for circuit additions or changes on the France and Germany routes will better enable us to monitor traffic flows between Sprint and FT in France and DT in Germany and to remedy promptly any abuses of foreign market power. . . . [This requirement] is necessary to aid detection of, and help deter, anticompetitive conduct.").

[96] 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*. To facilitate our review of alternative settlements, we required in the *Flexibility Order* that U.S. carriers include in their annual report of international telecommunications traffic filed pursuant to Section 43.61 of our rules the number of minutes of outbound and inbound traffic settled pursuant to each alternative arrangement. *See id.* ¶ 61. We also require that carriers routing switched traffic over private lines to countries deemed to offer equivalent resale opportunities file semi-annual traffic reports for such traffic for the first three years following an equivalency determination. *See, e.g.*, fONOROLA/EMI, 7 FCC Rcd 7312 (1992), *on recon.*, 9 FCC Rcd 4066 (1994).

conduct. We also request carriers to address whether they have their own internally compiled information that better aides them in detecting anticompetitive conduct by their competitors.

101. We further request comment on whether there should be presumptions about what constitutes evidence of distortions in competition based on traffic flow. Commenters should address whether there are thresholds that would allow for a normal variation in traffic but that would in themselves be a basis for invoking additional safeguards.

iv. Provisioning and Maintenance Records

102. In the *Foreign Carrier Entry Order*, we required that a dominant, foreign-affiliated carrier maintain complete records of the provisioning and maintenance of basic network facilities and services it procures from its foreign carrier affiliate. We required that this information be available to the Commission upon request. We found that this recordkeeping requirement would constitute a minor burden and that such information would be useful in guarding against improper discrimination.[97]

103. We propose to retain the requirement that foreign-affiliated dominant carriers maintain records on the provisioning and maintenance of basic network facilities and services procured from the foreign carrier affiliate. We tentatively conclude that the potential for undue discrimination in the provisioning and maintenance of foreign facilities and services by a foreign carrier with market power in favor of an affiliated U.S. carrier presents a substantial risk to competition in the U.S. international services market and that this risk justifies maintaining this recordkeeping requirement. We believe this requirement serves as a valuable deterrent to discriminatory behavior and can serve as evidence of such behavior in the event we find it necessary to undertake an investigation and possible enforcement action. We request comment on this tentative conclusion. Commenters on this issue should discuss whether the provisioning and maintenance recordkeeping requirement is sufficient and necessary to prevent discrimination in favor of an affiliated U.S. carrier by a foreign carrier with market power. We also request commenters on this issue to address whether we should specify a particular form and content for provisioning and maintenance records.[98]

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[97] *Foreign Carrier Entry Order* ¶ 266.

[98] *See also Sprint/FT/DT* ¶ 119 (requiring Sprint to file with the Commission quarterly reports summarizing its records on the provisioning and maintenance of facilities and services by FT and DT including, but not limited to, correspondent or other basic services or facilities procured on behalf of customers of their joint venture offerings, in France and Germany); *Non-accounting Safeguards Order and FNPRM, supra* note 10 (requesting comment on procedures for implementing the service interval disclosure requirements of section 272(e)(1) of the Telecommunications Act).

c. Supplemental Dominant Carrier Safeguards

104. Although we propose above to remove portions of our existing dominant carrier regulation, we believe that significant concerns continue to exist for carriers affiliated with foreign carriers that do not face international facilities-based competition in the destination market. We therefore propose to impose supplemental dominant carrier regulation on U.S. carriers whose foreign affiliates have market power in destination countries and do not face facilities-based competition for international services in these destination countries. These safeguards would generally apply in addition to our proposed basic dominant carrier safeguards.[99] Where a foreign carrier with market power in a destination country can demonstrate that the country has eliminated legal barriers to international facilities-based competition and has authorized multiple international facilities-based competitors to compete with the incumbent carrier, we would presume that supplemental dominant carrier regulation is not necessary. Where a foreign carrier cannot make this showing, we would presume that sufficient competition does not exist to help protect against discrimination in favor of the foreign carrier's U.S. affiliate and would impose supplemental dominant carrier regulation as discussed below. We seek comment on these tentative conclusions. We also seek comment on whether a different standard than the presence of multiple international facilities-based competitors is an appropriate measure of competition in the foreign market.

105. We propose to prohibit a U.S. carrier that is subject to supplemental dominant carrier regulation from entering into an exclusive arrangement with the affiliated foreign carrier for the joint marketing of basic telecommunications services, the steering of customers by the foreign carrier to the U.S. carrier, or the use of foreign market telephone customer information (including names and addresses). Where the carrier authorized to enter the U.S. market is itself a foreign carrier with market power, we would similarly prohibit that carrier from marketing U.S. and foreign services jointly, steering foreign market customers to its U.S. operations, and using foreign market telephone customer information unless these arrangements were made available on a nondiscriminatory basis to other U.S. carriers. We request comment on this approach, including whether these exclusive arrangements should instead be treated as special concessions under Section 63.14 of the rules.[100] Our concern with adopting a blanket prohibition of these arrangements is that it may unnecessarily limit potential U.S. consumer benefits, such as one-stop shopping.

[99] To the extent any supplemental safeguard we adopt is duplicative of, or inconsistent with, a basic safeguard, we would require a carrier subject to the supplemental safeguards to comply with the supplemental safeguard only. For example, if we require dominant carriers subject to supplemental safeguards to obtain prior approval before adding circuits and to file quarterly circuit status reports on the dominant route, it would appear unnecessary to require that they also notify us quarterly of their circuit additions.

[100] *See infra* ¶¶ 114-118.

106. We also specifically request comment whether a U.S. carrier's use of foreign market telephone customer information is subject to the provisions of Section 222 of the Act and should be subject to any rules the Commission may adopt to implement this provision of the Act.[101] We note that Section 222 of the Act applies to all carriers, not just carriers that would be subject to the supplemental safeguards.

107. We further believe that, where a foreign carrier with market power does not face international facilities-based competition in the destination country, it is critical that we enhance our monitoring of the carrier's traffic and circuit growth for that country and have the ability to remedy promptly any anticompetitive conduct. We therefore propose that foreign carriers subject to supplemental dominant carrier regulation on an affiliated route be required to obtain prior approval to add circuits on that route. We also propose to require these carriers to file quarterly circuit status reports for their facilities-based circuits and resold private line circuits and to make these reports publicly available in order to facilitate detection of improper routing of traffic. We believe that both of these requirements would allow for more timely oversight of the level of traffic carried by the foreign carrier on the affiliated route and would enhance our ability to remedy more promptly any anticompetitive conduct in the routing of U.S. international traffic. We seek comment on these tentative conclusions. We also request comment whether, if we adopt a quarterly circuit status reporting requirement, it is necessary to require carriers to specify the particular facility on which each of their circuits on the dominant route is either active or idle.[102]

108. We also propose to require that carriers subject to supplemental dominant carrier regulation make available an electronic summary of contracts filed under Section 43.51 and to identify in the summary particular provisions in other agreements that the new agreement supersedes.[103] We believe that this requirement would facilitate the ability of the Commission and other carriers to more easily become aware of the subject matter of a given contract and the extent to which a newly concluded agreement supersedes existing agreements. We tentatively conclude that such carriers should file an electronic summary (on a 3½-inch diskette, formatted in IBM-compatible form, using WordPerfect 5.1 software) of contracts that would be made publicly available. We also propose that foreign-affiliated

[101] 47 U.S.C. § 222; *see* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, *Notice of Proposed Rulemaking*, 11 FCC Rcd 12,513 (1996).

[102] The annual circuit status and addition reports filed by all U.S. international carriers under Sections 43.82 and 63.15 of the rules are not facility-specific. *See Rules for the Filing of International Circuit Status Reports*, CC Docket No. 93-157, 10 FCC Rcd 8605, 8606 ¶ 9 (1995); Public Notice, Annual Circuit Status Reports Due on March 31, DA 97-577, released March 18, 1997.

[103] 47 C.F.R. § 43.51.

carriers subject to supplemental dominant carrier regulation file quarterly reports summarizing their records on the provisioning and maintenance of facilities and services by their affiliated foreign carriers.[104] We seek comment on these tentative conclusions.

109. Our goal in proposing these heightened safeguards is not to impose burdensome regulations that might deter foreign carrier entry. On the contrary, we have attempted to craft safeguards that are no more burdensome than necessary to address our competitive concerns. With this goal in mind, we ask for comment on whether we should lift these supplemental safeguards for any dominant foreign-affiliated carrier whose foreign affiliate offers settlement rates at or below the *low* end of the benchmark range proposed in our *Benchmarks Notice* on the affiliated route. We believe that the ability of any such carrier to distort competition on this route would be significantly reduced if the settlement rate were at this low level.[105]

110. We propose to streamline all applications from carriers that are willing to accept such heightened regulation.[106] We seek comment on this tentative conclusion.

d. Structural Separation

111. We seek comment on whether we should adopt an additional safeguard that would apply to carriers regulated as dominant on a particular route or routes due to a foreign carrier affiliation. Specifically, we seek comment on whether we should require some level of structural separation between the U.S. carrier and its affiliated foreign carrier. We seek comment on the level of separation that should be imposed and on whether the U.S. interexchange marketplace is an appropriate model. We note that Bell Operating Companies (BOCs) will be subject to strict structural separation requirements when they are authorized to enter into the long distance market on an in-region basis. Non-BOC LECs currently are authorized to enter the in-region long-distance market and are also subject to separation

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[104] *See also Sprint/FT/DT* ¶ 119 (requiring Sprint to file with the Commission quarterly reports summarizing its records on the provisioning and maintenance of facilities and services by FT and DT including, but not limited to, correspondent or other basic services or facilities procured on behalf of customers of their joint venture offerings, in France and Germany); *Non-accounting Safeguards Order and FNPRM*, *supra* note 10 (requesting comment on procedures for implementing the service interval disclosure requirements of section 272(e)(1) of the Telecommunications Act).

[105] In the *Benchmarks Notice*, we proposed to condition Section 214 authorizations to serve foreign-affiliated markets on the foreign affiliate's offering U.S. carriers a settlement rate within the relevant benchmark range for traffic on the route in question. *See Benchmarks Notice* ¶ 76.

[106] *See infra* ¶¶ 131.137.

requirements. These requirements, however, are not as stringent as those that apply to BOC provision of in-region service.[107]

112. We seek comment on whether either of these approaches is an appropriate model to apply as a basic safeguard for U.S. carriers regulated as dominant on particular routes. Alternatively, should we instead only require such carriers to maintain separate accounts, in particular, for facilities and services acquired from its foreign carrier affiliate? Or, should we require that, to the extent a U.S. carrier regulated as dominant uses any of its or any affiliate's foreign market facilities or services on the dominant route to carry U.S. outbound or inbound traffic to or from third countries, it must do so only pursuant to rates that are published in the foreign country or publicly filed with the Commission? This requirement may be necessary in the prevention and detection of anticompetitive conduct.

113. We also seek comment on what level of separation is warranted as a supplemental dominant carrier safeguard for foreign carriers seeking entry into the U.S. market where such carriers have market power in the destination country and do not face competition from multiple international facilities-based carriers. As discussed above, we

[107] *See* 47 U.S.C. § 272 (requiring that a BOC provide in-region, interLATA service (*i.e.*, service between local access and transport areas) through a separate affiliate that meets the structural and transactional requirements of Section 272); *id.* § 272(b) (the Section 272 separate affiliate: (1) is required to "operate independently" from the BOC; (2) is required to maintain separate books, records, and accounts from the BOC; (3) is required to have "separate officers, directors, and employees" from the BOC; (4) "may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC]"; and (5) is required to "conduct all transactions with the [BOC] . . . on an arm's length basis with any such transactions reduced to writing and available for public inspection"); *see also Non-accounting Safeguards Order and FNPRM* ¶¶ 15, 146-191 (in implementing the structural separation requirements mandated by Section 272, the Commission determined, *inter alia*, that (1) a BOC and its Section 272 affiliate are prohibited from jointly owning transmission and switching facilities or the land and buildings on which such facilities are located and (2) a BOC and its affiliates, other than the Section 272 affiliate itself, is prohibited from providing operating, installation, and maintenance services associated with the facilities owned by the Section 272 affiliate (and, similarly, that a Section 272 affiliate is prohibited from providing such services associated with the BOC's facilities)); *LEC Regulatory Treatment Order* ¶¶ 2, 7, 179 (requiring incumbent independent LECs (*i.e.*, exchange telephone companies other than the BOCs) that control local exchange and exchange access facilities to provide their in-region, interstate, domestic, interexchange services through a separate affiliate that (1) maintains separate books of account; (2) does not jointly own transmission or switching facilities with its affiliated exchange telephone company; and (3) acquires that exchange telephone company's services at tariffed rates and conditions); *id.* ¶ 164 ("In addition to taking exchange services by tariff, the LEC may alternatively take unbundled network elements or exchange services for the provision of a telecommunications service subject to the same terms and conditions as provided in an agreement approved under section 252 to which the independent LEC is a party."); *id.* ¶ 8 (requiring the independent LECs to provide in-region, international services through a separate affiliate that satisfies the same separation requirements that apply to their provision of in-region, interstate, domestic, interexchange services).

believe such carriers have greater ability to discriminate in favor of affiliated carriers,[108] and it may thus be appropriate to apply stricter separation requirements than we apply to carriers that face competition in their markets.

e. Other Operating Safeguards

i. "No Special Concessions" Requirement

114. We currently prohibit all U.S. carriers, regardless of their regulatory status or whether they have a foreign affiliate, from agreeing to accept special concessions from any foreign carrier or administration.[109] Although this provision, on its face, applies to any foreign carrier or administration, regardless of its market power, we stated in the *Foreign Carrier Entry Order* that we would look favorably upon requests to waive the special concessions prohibition in circumstances where a U.S. carrier could demonstrate that the foreign carrier granting the concession lacks market power. We found that a waiver process is necessary in order to assess the market power of the foreign carrier granting the concession but stated that we would revisit our approach as foreign markets eliminate restrictions to entry and adopt competitive safeguards.[110]

115. With the WTO Basic Telecom Agreement, competition will become more the rule than the exception on the foreign end of major U.S. international routes. We therefore propose to modify our no special concessions prohibition to apply only to concessions granted by foreign carriers with market power in the provision of services or facilities necessary for the provision of international services, including inter-city or local access facilities on the foreign end.[111]

116. We request comment on how best to implement this proposal in circumstances where the Commission has not made a specific market power determination for a particular foreign carrier.[112] For example, is there a "bright-line" test that we can use to identify a class

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[108] *See supra* ¶ 104.

[109] *See* 47 C.F.R. § 63.14.

[110] *Foreign Carrier Entry Order* ¶ 257.

[111] *See Foreign Carrier Entry Order* ¶ 116 (defining market power).

[112] We may make market power determinations, for example, in circumstances where a foreign carrier has itself filed an international Section 214 application and requested classification as a non-dominant carrier under Section 63.10 of the rules.

of foreign carriers that do not raise market power concerns?[113] Formulating such a bright-line test could reduce the need for U.S. carriers to file petitions for declaratory ruling to determine whether it is permissible to enter into exclusive arrangements with such carriers.

117. We also propose to give greater specificity to our "no special concessions" requirement by delineating in this proceeding the types of conduct that we consider to be prohibited by that requirement. We propose to interpret the no special concessions prohibition of Section 63.14 of our rules to prohibit any U.S. carrier from agreeing to accept from a foreign carrier with market power in the destination country an exclusive arrangement that affects traffic or revenue flows to or from the United States not offered to similarly situated U.S. carriers involving (1) operating agreements for the provision of basic services; (2) distribution or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; (3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers; (4) any proprietary or confidential information obtained by the foreign carrier from competing U.S. carriers in the course of regular business activities with such U.S. carriers, unless specific permission has been obtained in writing from the U.S. carrier involved; and (5) arrangements for the joint handling of basic U.S. traffic originating or terminating in third countries.

118. We request comment on our tentative conclusion that we should interpret Section 63.14 to prohibit these special concessions between a U.S. carrier and a foreign carrier that has market power in the destination country. In particular, we seek comment on whether we should permit any of these exclusive arrangements where the foreign carrier has market power in a country that has eliminated barriers to international facilities-based entry and licensed multiple international facilities-based competitors. Finally, we propose to revise the text of Section 63.14 specifically to cover circumstances where a foreign carrier has entered the U.S. market directly and without creating a separate legal entity to operate on the U.S. end.

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[113] Our processing rules for "streamlining" Section 214 applications contain a bright-line test to identify those facilities applications filed by foreign-affiliated carriers that do not appear likely to raise market power concerns and that, as a result, can be granted without conducting an ECO analysis or imposing dominant carrier safeguards. *See* 47 C.F.R. § 63.12(c)(1). We request comment *infra* in paragraphs 133.137, on whether we can modify the bright-line test used for processing Section 214 applications to expand the class of carriers that appear unlikely to raise market power concerns and that therefore can be authorized on a streamlined basis.

ii. Benchmark Settlement Rates Condition

119. We proposed in the *Benchmarks* proceeding to condition the facilities-based switched and private line authorizations of U.S. carriers to serve affiliated markets on the affiliated foreign carrier offering authorized U.S. international carriers a settlement rate that is within the benchmark range proposed in that proceeding.[114] Consistent with our existing International Settlements Policy (ISP), all U.S. carriers would receive the same settlement rate for traffic on that route.[115] If, after the carrier has commenced service to the affiliated market, we learn that the carrier's service offering has caused a distortion of competition on the route in question, we proposed in the *Benchmarks* proceeding to order that settlement rates to that country be reduced to the bottom of the range (which in our view approaches cost-based termination) or to revoke the authorization of the carrier to serve the affiliated market.[116] We emphasized in the *Benchmarks Notice* that the purpose of this proposal is to prevent carriers from distorting the IMTS market through service to affiliated markets with excessive settlement rates.[117] We will decide whether to adopt this proposed condition in the *Benchmarks* proceeding.

120. We also proposed in the *Benchmarks Notice* a competitive safeguard to address the potential market distortions resulting from one-way bypass of the accounting rate system.[118] Specifically, we proposed to grant carriers' applications for authority to resell international private lines to provide switched services on the condition that accounting rates on the route or routes in question are within the settlement rate benchmark ranges to be

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[114] *Benchmarks Notice* ¶ 76. We proposed in the *Benchmarks Notice* to revise our settlement rate benchmarks adopted in 1992. We proposed three benchmarks ranges, based on countries' level of economic development . upper income, middle income, and low income. We proposed to calculate the upper end of each range using foreign carriers' tariffed rates for the three network elements used to provide international termination services (*i.e.*, international transmission facilities, international switching facilities, and domestic transport and termination) and the lower end of each range using an estimate of the long run incremental cost of providing international termination services. *Id.* ¶¶ 43 52.

[115] See *infra* note 138 for an explanation of the ISP.

[116] *Benchmarks Notice* ¶ 76. An authorization granted to a facilities-based carrier would thus be granted subject to a condition to this effect. *Id.* n.76.

[117] *Benchmarks Notice* ¶ 77.

[118] One-way bypass exacerbates the net settlements deficit by allowing a foreign carrier to route U.S.-bound traffic over private lines, where traffic is not subject to settlements payments, while the U.S. carrier is prohibited from routing its foreign-bound traffic over private lines and must therefore make settlement payments for the foreign-bound traffic. The prevention of such one-way bypass is the basis for the Commission's equivalency policy. *See supra* ¶¶ 48-49.