

adopted by the Commission. Under the proposed condition, if any carrier's settlement rate on the route in question is outside the appropriate benchmark range, a carrier would not be permitted to use its private line resale authorization to provide switched, basic services until such time as all settlement rates on the route are brought within the benchmark range.¹¹⁹ We also proposed to order all U.S. international carriers to pay a cost-based settlement rate¹²⁰ if, after a carrier has commenced switched service via a resold private line, we learn that competition on the route has been distorted — *i.e.*, that one-way bypass is occurring.¹²¹ We believe our concern about the potential for distortions in the U.S. IMTS market from one-way bypass can be effectively addressed through these settlement rate conditions.

121. In light of our proposal in Section III.A.1.b above to eliminate the equivalency test as the standard for authorizing the provision of switched service over resold *or facilities-based* private lines between the United States and WTO Member countries, we believe it may be necessary to apply to U.S. facilities-based private line carriers the benchmark settlement rate conditions that we have proposed to apply to U.S. private line resellers.¹²² Facilities-based private line carriers also have the ability to distort competition on a particular route to the extent they terminate one-way bypass traffic from a foreign carrier. We believe this condition may be necessary in order to limit effectively the potential for distortion in the U.S. IMTS market from one-way bypass of the settlements process. Thus, we propose generally to prohibit a U.S. facilities-based private line carrier from originating or terminating U.S. switched traffic over its facilities-based private lines until all U.S. carriers' settlement rates for the country or location at the foreign end of the private line are within the benchmark settlement range to be established in the *Benchmarks* proceeding. In a Public Notice issued simultaneously with this Notice, the International Bureau invites interested parties to file

¹¹⁹ We noted that this condition would apply to any U.S. carrier seeking to provide switched, basic services via resold private lines regardless of whether the carrier is operating on a particular route in correspondence with an affiliated foreign carrier. We reasoned that even an unaffiliated U.S. carrier would have the ability to distort competition on the route to the extent it accepted one-way bypass traffic from a foreign carrier. *Benchmarks Notice* ¶ 82.

¹²⁰ The *Benchmarks NPRM* proposes that carriers be required to pay at the proposed low end of the appropriate benchmark range, which for all three ranges is based on an estimate of the long run incremental cost of providing international termination services. *Benchmarks NPRM* ¶ 83.

¹²¹ We asked for comment on what mechanism or approach we should use to determine when competition has been distorted and the lower settlement rate should be applied. *Benchmarks NPRM* ¶ 83.

¹²² Our current rules generally prohibit U.S. facilities-based carriers from diverting U.S. switched traffic to their private lines unless the Commission has made an equivalency finding for the country at the foreign end of the private line. The only exception to this rule is where the U.S. facilities-based carrier's private line is interconnected to the public switched network on one end only and the U.S. carrier's foreign correspondent does not own the underlying foreign half-circuit. *See supra* ¶¶ 48-49.

supplemental comments on this proposal in the *Benchmarks* proceeding. We will decide whether to adopt rules to implement these proposed benchmark settlement rate conditions in the *Benchmarks* proceeding.

iii. Alternative Competitive Safeguards

122. We also request comment on what measures we should take in the event we decline, or are unable, to implement any of the safeguards we have proposed in this section of the Notice. Under these circumstances, what additional safeguards should the Commission adopt to promote effective competition and prevent anticompetitive conduct in the provision of U.S. international services and facilities? For example, should we reinstate the ECO and equivalency tests for WTO Member countries?

123. Alternatively, in these circumstances should we condition the Section 214 authorizations granted to foreign carriers or their U.S. affiliates to prohibit or limit service to a country where the foreign carrier has market power if that country retains prohibitions on international service competition and has failed to authorize new facilities-based entrants within one year of the date the foreign carrier initiated service in the United States? We seek comment on this option and any other safeguards or measures that may be necessary if the Commission declines, or is unable, to implement any of the safeguards proposed here.

2. Enforcement of Safeguards

124. Once we issue a Section 214 authorization to a foreign carrier, we intend to enforce vigorously the dominant carrier and other operating safeguards that we adopt in this proceeding. We have many remedies that we may pursue against a carrier that fails to comply with these conditions. These remedies include imposing a monetary forfeiture for a carrier's willful or repeated violation of the conditions.¹²³ Section 503 of the Act allows us to impose a forfeiture of up to \$100,000 for each violation or each day of a continuing violation by a carrier. The amount assessed for a continuing violation may go up to \$1,000,000 for any single act or failure to act.¹²⁴ In addition or in the alternative, we also retain the power to revoke a Section 214 certificate.

125. We also have ample authority to investigate allegations that a carrier has violated our rules, and we will not hesitate to do so when presented with credible evidence of such a violation. Section 218 of the Act authorizes the Commission to inquire into the management of the business of all carriers subject to the Act and to "obtain from such

¹²³ 47 U.S.C. § 503(b)(1).

¹²⁴ *Id.* § 503(b)(2)(B); *see also* 47 C.F.R. § 1.80.

carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created." Thus, for example, where a carrier's quarterly traffic report or other information submitted to the Commission suggests that a U.S. carrier and its affiliated foreign carrier may have manipulated the settlements process on a particular route, we may find it necessary to audit the revenue and traffic records of the U.S. carrier, or foreign carrier, or both.

126. Where we have actually adjudicated a violation of our rules, we also have ample authority to impose additional conditions on a carrier's Section 214 authorization. For example, where we find that a carrier has knowingly received technical network information regarding foreign bottleneck facilities in advance of unaffiliated U.S. carriers, it may be necessary to impose strict structural separation on the U.S. and foreign carrier. Such a condition may also be warranted where we find that a carrier has knowingly received preferential provisioning and maintenance of foreign bottleneck facilities and services from its affiliated foreign carrier.

127. We request comment on additional remedies that we may use to redress rule violations and the circumstances in which such remedies would be appropriate. We have several additional remedies available to us, including the revocation of a carrier's license, fines, an audit, imposing strict structural separation, freezing circuits, prohibiting the use of foreign market telephone customer information and the joint marketing of basic services by a U.S. carrier and its foreign affiliate, and imposing mandated accounting rates at the low end of our benchmarks, if our proposed approach is adopted. We make clear here that any carrier, regardless of any foreign affiliation, would be subject to significant sanctions for violation of the Commission's rules.

3. Amendments to Part 63

128. We propose below rule changes to afford streamlined processing to the international Section 214 applications filed by foreign carriers from WTO Member countries consistent with our proposals above. We also make technical corrections to, and propose to amend, certain other rules adopted in the *Foreign Carrier Entry Order* and our *Streamlining Order*.¹²⁵

129. We emphasize that a decision in this proceeding to eliminate or revise the ECO test as it applies to certain applications may require that we amend the Section 214 application content and related rules contained in Sections 63.18, 63.11, and 63.12. We invite

¹²⁵ Streamlining the International Section 214 Authorization Process and Tariff Requirements, *Report and Order*, 11 FCC Rcd 12,884 (1996).

parties to submit specific proposed changes to these rules to implement their substantive recommendations.

a. Streamlined Section 214 Procedures

130. We have significantly reduced the time required to process international Section 214 applications in recent years by streamlining our processing of these applications. We were not, however, able to apply these streamlined procedures to applications that raised competitive concerns, including, in particular, applications filed by dominant foreign-affiliated carriers. These carriers have expressed concern that they were not able to take advantage of our streamlined process, which generally ensured action in a very short time frame. Our policy has always been to make streamlined procedures available to the maximum number of applicants possible, consistent with ensuring that our competitive concerns are addressed. 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. Therefore, we believe that expanding the scope of streamlined processing will benefit U.S. consumers by speeding procompetitive new entry into our market.

131. We propose to streamline the international Section 214 applications filed by foreign carriers, or their U.S. affiliates, from WTO Member countries as much as possible. Our current rules generally permit streamlined processing of Section 214 applications filed by foreign carriers or their U.S. affiliates in circumstances where the foreign carrier is *not* a "facilities-based" carrier in the destination market.¹²⁶ Our decision to streamline process applications from carriers whose foreign affiliates are not "facilities-based" in the destination market reflects our view that participation in the U.S. market by foreign carriers that do not own or control telecommunications facilities in a foreign market is unlikely to raise market power concerns.¹²⁷

¹²⁶ Our rules define a "facilities-based carrier" as "one that holds an ownership, indefeasible-right-of-user, or leasehold interest in bare capacity in an international facility, regardless of whether the underlying facility is a common or non-common carrier submarine cable, or an INTELSAT or separate satellite system." 47 C.F.R. § 63.18(h) n.2.

¹²⁷ Because our definition of a facilities-based carrier does not by its terms include carriers with interests in foreign domestic facilities, we have streamlined the processing of many applications from carriers whose affiliates hold interests only in foreign domestic facilities. These applications generally have involved affiliated foreign carriers that own foreign domestic mobile radio facilities. We have relied upon initial staff review of the application, and information provided by the applicant, to determine whether the affiliated foreign carrier's domestic facilities raised market power concerns. In such a case, Commission staff has the discretion to place the application on Public Notice as not eligible for streamlined processing.

132. We believe it likely will continue to be necessary, however, for Commission staff to identify particular applications that raise market power concerns, even if we adopt several of the changes we have proposed to make to our framework for foreign carrier entry and regulation. This would be the case where we may have to determine whether to regulate a U.S. carrier as dominant on a particular route because of an affiliated foreign carrier's market power in the destination country. This would also be the case if we continue to apply the ECO test to applicants that are affiliated with foreign carriers from non-WTO countries. We would like to reexamine our streamlining rules, however, to assess whether we can expand the class of carriers that, as a general rule, would appear unlikely to raise market power concerns. This would permit us to afford streamlined processing to all but a limited number of affiliated U.S. carriers.

133. We therefore request comment whether we can expand the class of affiliated applicants eligible for streamlined processing to include some applicants whose affiliated foreign carriers may fall within the definition of a "facilities-based" carrier. For example, there is a growing number of "new entrants" in liberalized foreign markets. We expect that this will increasingly be the case with the WTO Basic Telecom Agreement. Many of these carriers do not provide public switched voice service.

134. We request commenters to submit specific proposals to expand the class of affiliated carriers eligible for streamlined processing. We specifically propose to afford streamlined processing to the Section 214 application of any applicant that is affiliated with a carrier from a WTO Member country where the applicant requests authority to serve that country solely by reselling the switched services of unaffiliated U.S. international carriers. Streamlined processing is warranted in such a case because, as we have previously found, pure switched resale presents no substantial risk of a foreign carrier leveraging its market power into the U.S. international services market.¹²⁸

135. We also propose to afford streamlined processing to the Section 214 applications of applicants affiliated with carriers from WTO Member countries that seek to serve those countries other than through pure switched resale. In circumstances where the applicant does not otherwise qualify for streamlined processing (for example, where the affiliated foreign carrier is "facilities-based" in the WTO Member country), we propose to streamline process the application so long as the applicant certifies it will comply with basic and supplemental dominant carrier regulations described in Section III.D.1.b-c, *supra*.¹²⁹

¹²⁸ See Regulation of International Common Carrier Services, *Report and Order*, 7 FCC Red 7331, 7334 ¶ 20 (1992) (*International Services*); see also *Foreign Carrier Entry Order* ¶ 143.

¹²⁹ Such a carrier would always have the option of later petitioning the Commission at any time to remove dominant carrier regulation.

136. We also propose that Commission staff exercise its discretion to afford streamlined processing in circumstances where the applicant certifies it will comply with our basic dominant carrier safeguards and demonstrates clearly and convincingly in its Section 214 application that the WTO Member country has eliminated legal barriers to international facilities-based entry and licensed multiple additional international facilities-based carriers to compete with the incumbent carrier. We request comment on these proposals.

137. We also propose to amend our rules to extend streamlined processing to applications for assignments and transfers of control of Section 214 authorizations. We propose to define the class of carriers eligible for streamlined processing of assignments and transfers in the same manner as we adopt for the grant of an initial Section 214 authorization. Thus, we intend to exclude only those proposed assignments and transfers that raise market power concerns. We invite comment on this proposal and specific suggestions for rule changes.

b. Other Rule Changes

138. We here make several technical corrections to part 63 of our rules.¹³⁰ Because these rule changes are minor corrections that simply conform our rules to our intent and to current practice and were justified in an earlier rulemaking proceeding, we find good cause to conclude that notice and comment procedures are unnecessary.¹³¹ First, we correct Section 63.18(e)(3) of the rules, which sets forth the equivalency test we currently apply in authorizing the use of private lines between the United States and all countries for the provision of switched services.¹³² In drafting this rule, we inadvertently omitted the word "reasonable" from paragraph (e)(3)(i)(B). As corrected, this paragraph will provide in relevant part that the "charges, terms and conditions for interconnection to foreign domestic carrier facilities" be both "reasonable and nondiscriminatory."

139. Second, Section 63.11(b) requires that any U.S. international carrier that knows of a planned investment by a foreign carrier of a ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier shall notify the Commission within

¹³⁰ See *infra* Appendix A.

¹³¹ See 5 U.S.C. § 553(b)(B) (providing that notice and comment is not required "when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

¹³² 47 C.F.R. § 63.18(e)(3). See Section III.A.1.b, *supra* for an explanation of our equivalency criteria and our proposed changes to our framework for authorizing U.S. carriers to use private lines for the provision of switched services.

60 days prior to the acquisition of such interest.¹³³ Paragraph (e) of Section 63.11 provides that, where the Commission finds that the planned investment by the foreign carrier raises a substantial and material question of fact as to whether the investment serves the public interest, convenience and necessity, the U.S. carrier shall not consummate the investment until it has submitted an application under Section 63.18 of the rules.

140. Carriers have argued that this rule can be read to include only investments by foreign carriers, and not investments by their parent holding companies. Such an interpretation is not in accord with our intent in adopting this prior notification requirement. The prior notification requirement is intended to provide the Commission the opportunity to determine whether a particular planned investment in a U.S. carrier raises concerns that a foreign carrier with market power may, as a result of the investment, obtain a financial incentive to discriminate in favor of the U.S. carrier.¹³⁴ Such an incentive can exist whether the foreign carrier itself makes the investment in the U.S. carrier or whether the investment is made by an entity that directly or indirectly controls the foreign carrier, is controlled by the foreign carrier, or is under direct or indirect common control with the foreign carrier. Our definition of affiliation in Section 63.18(h)(1)(i)(B) of the rules is written to cover all such ownership interests. We intended that the reference in Section 63.11(b) to investments by a foreign carrier, "whether direct or indirect," also cover such interests.

141. Commission staff has issued a Public Notice that advises carriers to calculate the 10 percent ownership interests under Section 63.11(b) in the same manner as affiliations are calculated under the first clause of Section 63.18(h)(1)(i)(B).¹³⁵ We here correct Section 63.11(b) to state that carriers shall report the planned acquisition of "a ten percent or greater planned investment in the capital stock of the carrier by a foreign carrier, or by any entity that directly or indirectly controls or is controlled by a foreign carrier, or that is under direct or indirect common control with a foreign carrier."

142. We also correct Section 63.11(b) to make clear the current obligation of U.S. carriers that have notified us of a 10 percent or greater planned investment by a foreign carrier (or affiliated company) to maintain the accuracy of the initial report by notifying us of additional investment interests by the foreign carrier or an affiliated company. Finally, we

¹³³ 47 C.F.R. § 63.11(b). This paragraph also requires that the notification certify to certain information specified in paragraph (c) of Section 63.11.

¹³⁴ *Foreign Carrier Entry Order*, 11 FCC 96-98.

¹³⁵ Public Notice, Commencement of Streamlined Section 214 Procedures and Tariff Requirements, 11 FCC Rcd 12,219 (1996).

delete the word *within* in the first sentence of Section 63.11(b) to make clear that the initial notification must be filed at least 60 days before the acquisition of the interest.

143. We propose to maintain the Section 63.11(b) prior notification requirement for U.S. carriers with planned investments by foreign carriers (and their affiliated companies) regardless of whether or not the foreign carrier is from a WTO Member country. Although we believe that only exceptional circumstances would justify denying approval of an investment by a foreign carrier (or an affiliated company) where the foreign carrier is from a WTO Member country, we cannot rule out the possibility that a particular investment might present a very high threat of anticompetitive harm. We therefore propose that, if we inform a U.S. carrier under Section 63.11 that it must seek formal approval of a planned investment by a foreign carrier (or an affiliated company) that is from a WTO Member country, we will apply to the U.S. carrier's application the same standard that we have proposed in Section III.A.1.a of this Notice for considering the Section 214 applications filed by carriers from WTO Member countries.¹³⁶ We will not apply an ECO analysis to these applications. We will continue to apply an ECO analysis, however, to applications in which a U.S. carrier seeks approval for a planned investment by a foreign carrier (or an affiliated company) from a non-WTO country. We request comment on this proposal.

E. Framework for Accounting Rate Flexibility

144. We also seek comment on whether we should modify the framework adopted in our *Flexibility Order*¹³⁷ for approving alternative settlement arrangements. In the *Flexibility Order*, we authorized U.S. carriers to negotiate alternative settlement arrangements that deviate from the requirements of our International Settlements Policy (ISP)¹³⁸ with any foreign correspondent in a country that satisfies the ECO test. We also stated that we would consider such alternative settlement arrangements between a U.S. carrier and a foreign correspondent in a country that does not satisfy the ECO test, where the U.S. carrier can demonstrate that deviation from the ISP will promote market-oriented pricing and competition, while precluding the abuse of market power by the foreign correspondent.

¹³⁶ See *supra* ¶ 32.

¹³⁷ 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*.

¹³⁸ The ISP prevents foreign carriers from discriminating among U.S. carriers in bilateral accounting rate negotiations. It requires: (1) the equal division of accounting rates; (2) nondiscriminatory treatment of U.S. carriers; and (3) proportionate return of inbound traffic. See Implementation and Scope of the International Settlements Policy for Parallel Routes, CC Docket No. 85-204, *Report and Order*, 51 Fed. Reg. 4736 (1986), *modified in part on recon.*, 2 FCC Red 1118 (1987), *further recon.*, 3 FCC Red 1614 (1988); see also Regulation of International Accounting Rates, 6 FCC Red 3552 (1991), *on recon.*, 7 FCC Red 8049 (1992).

145. We adopted the ECO test as the standard for permitting flexibility because we believe it is a good indicator of whether the legal, regulatory and economic conditions in a foreign market support competition such that the ISP is no longer necessary to protect against abuse of market power by foreign carriers. In particular, we noted that, where the ECO test has been satisfied, the ability of foreign carriers to exercise market power is constrained by the existence of, or potential for, competitive entry. We also noted that the ECO test seeks to ensure that a foreign country has implemented competitive safeguards to protect against the exercise of market power by a dominant carrier.¹³⁹

146. We anticipated that, in many instances, a U.S. carrier will seek approval to enter an alternative arrangement with a foreign carrier in a country that has already been found to satisfy the ECO test in the context of a prior Section 214 facilities application to serve that country. However, we noted that a U.S. carrier could also seek approval to enter an alternative payment arrangement with a carrier in a foreign country where we have not yet made an ECO determination, and in that case, a petitioning carrier would be required to submit sufficient evidence to support a finding that the ECO test has been satisfied.¹⁴⁰ Thus, we considered that use of the already established ECO test as the threshold standard for permitting flexibility would be administratively efficient and would provide consistent results and business certainty for U.S. carriers.¹⁴¹

147. We believe, however, that it would be administratively inefficient for the Commission and burdensome to carriers to continue to conduct an ECO analysis for purposes of determining whether to permit flexibility if, as a result of our review of the ECO test in this proceeding, we conclude that it is no longer necessary to apply the test to applications for international Section 214 authorization from carriers in WTO Member countries. As noted above in paragraph 34, the ECO test requires a fact-specific, detailed review of competitive conditions on a given route. If it has no application in another regulatory context, we believe such a thorough review may not be appropriate or necessary solely for purposes of determining whether to permit flexibility.

¹³⁹ To ensure that our flexibility policy does not have anticompetitive effects in the international market, we adopted the following safeguards: (i) alternative settlement arrangements between affiliated carriers and those involved in non-equity joint ventures affecting the provision of basic services must be filed with the Commission and be publicly available and (ii) alternative arrangements affecting more than 25 percent of either the inbound or outbound traffic on a particular route must be filed with the Commission and be publicly available and must not contain unreasonably discriminatory terms and conditions. *Flexibility Order* ¶¶ 45, 48. We do not propose here to change these safeguards.

¹⁴⁰ *Flexibility Order* ¶ 58.

¹⁴¹ *Flexibility Order* ¶ 38.

148. We further believe that the WTO agreement makes application of the ECO test as the threshold for permitting flexibility unnecessary. As we explained above in Section III.A.1, we believe that the commitments to competition and fair regulatory principles in the WTO Basic Telecom Agreement will substantially lessen the ability of foreign carriers with market power to discriminate among U.S. carriers.

149. In light of the changes in the global telecommunications market due to the WTO Basic Telecom Agreement, we believe flexibility can be more the rule than the exception. As we stated in the *Flexibility Order*, our ISP was designed for a global telecommunications market dominated by monopoly providers. In adopting our flexibility policy, we recognized that the global market is changing, and that without updating, our settlement policies could impede competitive behavior and the development of effectively competitive markets.¹⁴² The WTO Basic Telecom Agreement hastens the changes in the global telecommunications market that prompted our flexibility policy and makes the need for updating our settlement policy even more urgent.

150. We therefore tentatively conclude that, if we no longer apply the ECO test to international Section 214 applications filed by carriers from WTO Member countries, we should not conduct an ECO analysis for purposes of determining whether to permit a U.S. carrier to enter an alternative settlement arrangement with carriers from WTO Member countries. Instead, we tentatively conclude that we should adopt a rebuttable presumption that flexibility is permitted for carriers from WTO Member countries. We believe that such a presumption would be appropriate because, as stated above, our concern about discriminatory treatment of U.S. carriers by foreign carriers with market power is significantly diminished by the commitments to competition and fair regulatory treatment made by WTO Member countries. A presumption in favor of flexibility for WTO Member countries would also bring our settlements policy in line with the reality of a global market where most of the world's major trading partners have committed to open entry and procompetitive regulation of basic telecommunications services.

151. We recognize, however, that WTO membership alone will not guarantee conditions in a foreign market are sufficiently competitive to prevent foreign carriers with market power from discriminating among U.S. carriers in settlement rate negotiations. In particular, market conditions in WTO Member countries that have made weak or no market access commitments are unlikely to be sufficiently competitive to warrant deviation from the requirements of the ISP. Therefore, we further tentatively conclude that the presumption in favor of flexibility may be rebutted by a showing that market conditions in the country in question are not sufficiently competitive to prevent a carrier with market power in that

¹⁴² *Flexibility Order* ¶ 15.

country from discriminating against U.S. carriers. Specifically, we propose that the presumption could be rebutted by a showing that the country has not opened its market to competition, either because the country has not complied with its market access commitment, its commitment has not taken effect, or it made no commitment. The presumption could also be rebutted by a showing that the country does not, or will not in the near future, have in place fair rules of competition, such as those contained in the Reference Paper, to ensure viable opportunities for actual entry.¹⁴³

152. Under the procedures adopted in our *Flexibility Order*, U.S. carriers may obtain approval to enter an alternative payment arrangement by filing a detailed petition for declaratory ruling that the alternative payment arrangement is permitted under the criteria for deviating from the ISP adopted in that proceeding. The petition for declaratory ruling is put on public notice and interested parties are given an opportunity to file a formal opposition within twenty days. We propose minor changes to these procedures to conform to the proposals made here. Specifically, we propose that where a U.S. carrier seeks approval to enter an alternative arrangement with a carrier in a WTO Member country, the requesting carrier be required to show only that the carrier is operating in a WTO Member country. The burden would be on opposing parties to show that market conditions in the country in question are not sufficient to prevent a carrier with market power from discriminating against U.S. carriers. This showing could be made by presenting evidence that the country has not opened its market to competition or that it does not, or will not in the near future, have in place fair rules of competition.¹⁴⁴ We thus expect that for WTO Member countries that have made weak or no market access commitments, the presumption in favor of flexibility we propose here can be easily rebutted. We propose to apply this new policy to all flexibility petitions pending before the Commission in any procedural status at the time our new rules become effective.

153. We seek comment on these tentative conclusions and proposals. In particular, we seek comment on whether we should continue to conduct an ECO analysis for purposes of determining whether to permit flexibility with a carrier from a WTO Member country. We further seek comment on whether our proposal to adopt a rebuttable presumption that flexibility is permitted with such countries would further the policy stated in the *Flexibility*

¹⁴³ As we stated in the *Foreign Carrier Entry Order*, even if a country permits entry as a legal matter, to ensure viable opportunities for actual entry, the country must also have in place fair rules of competition. *Foreign Carrier Entry Order* ¶ 44.

¹⁴⁴ All other procedural and filing requirements adopted in the *Flexibility Order* would remain in place. In addition, a U.S. carrier could still seek approval to enter an alternative arrangement by showing that the arrangement will promote market-oriented pricing and competition, while precluding the abuse of market power by the foreign correspondent. See *Flexibility Order* ¶ 40.

Order of allowing flexibility where competitive market conditions exist in a foreign market. We also seek comment on what showing should be required to rebut the presumption that flexibility is permitted for WTO Member countries.

154. We further tentatively conclude that we should continue to apply the ECO test as the threshold standard for permitting flexibility with carriers that are from countries that are not WTO Members. For countries that are not WTO Members, we have no basis to presume that conditions in the foreign market are sufficiently competitive to warrant deviation from our ISP. We continue, therefore, to believe that the ECO test provides the best indicator of whether the legal, regulatory and economic conditions in a foreign market support competition such that the ISP is no longer necessary to protect against abuse of market power by foreign carriers. We seek comment on this tentative conclusion.

IV. Procedural Issues

A. *Ex Parte* Presentations

155. This is a non-restricted (i.e., permit-but-disclose) notice-and-comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

B. Initial Regulatory Flexibility Analysis

156. Pursuant to the Regulatory Flexibility Act of 1990, 5 U.S.C. §§ 601-612, ("RFA") as amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, the Commission's Initial Regulatory Flexibility Analysis with respect to this Notice of Proposed Rulemaking is as follows:

157. **Reason for Action:** The Commission is issuing this Notice of Proposed Rulemaking to seek comment on possible changes to our rules and policies for allowing foreign-affiliated entities to participate in the U.S. telecommunications market. In light of the recent agreement reached by Members of the World Trade Organization to liberalize the provision of basic telecommunications services, we believe it is appropriate to relax our scrutiny of applications filed by affiliates of entities from WTO Member countries for authority pursuant to Section 214 of the Communications Act, 47 U.S.C. § 214, and the Cable Landing License Act, 47 U.S.C. §§ 34-39; and to relax our scrutiny of indirect foreign investment in holders of common carrier radio licenses under Section 310(b)(4) of the Communications Act, 47 U.S.C. § 310(b)(4). We also believe that other changes to our regulation of foreign-affiliated entities are appropriate in light of the WTO agreement and our experience applying our current rules.

158. **Objectives:** The objective of this proceeding is to increase competition in the U.S. market for basic telecommunications services while minimizing the risk of anticompetitive harm. In light of the changed circumstances that will result from the WTO agreement on basic telecommunications and our nearly two years of experience with our current rules on market entry, we believe that reducing entry barriers for applicants affiliated with entities from WTO Member countries is the appropriate way to accomplish that objective. The Commission believes that the "effective competitive opportunities" test developed in its *Foreign Carrier Entry Order* is no longer necessary as applied to countries that are members of the WTO. Instead, we propose to rely primarily on regulatory safeguards and settlement-rate benchmarks to prevent anticompetitive conduct in the U.S. telecommunications marketplace. We propose some revisions to those regulatory safeguards in this Notice.

159. **Legal basis:** This Notice of Proposed Rulemaking is adopted pursuant to Sections 1, 4(i), 201(b), 214, 303(r), 307, 309(a), 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 214, 303(r), 307, 309(a), 310.

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply:

160. The RFA generally defines *small entity* as having the same meaning as the terms *small business*, *small organization*, and *small governmental jurisdiction* and defines *small business* as having the same meaning as the term *small business concern* under section 3 of the Small Business Act unless the Commission has developed one or more definitions that are appropriate for its activities.¹⁴⁵ The Small Business Act defines *small business concern* as one that (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁴⁶

161. The rules proposed in this Notice apply only to entities providing international common carrier services pursuant to Section 214 of the Communications Act; entities providing domestic or international wireless common carrier services under Section 309 of the

¹⁴⁵ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

¹⁴⁶ Small Business Act, 15 U.S.C. § 632.

Act; and entities licensed to construct and operate submarine cables under the Cable Landing License Act.

162. Because the small incumbent local exchange carriers (LECs) subject to these rules are either dominant in their fields of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definitions of *small entity* and *small business concern*.¹⁴⁷ Accordingly, our use of the terms *small entities* and *small businesses* does not encompass small incumbent LECs. Out of an abundance of caution, however, for the purposes of this initial regulatory flexibility analysis, we will consider small incumbent LECs to be within this analysis, where a small incumbent LEC is any incumbent LEC that arguably might be defined by the SBA as a "small business concern."¹⁴⁸

a. Section 214 International Common Carrier Services

163. Entities providing international common carrier service pursuant to Section 214 of the Act fall into the SBA's Standard Industrial Classification (SIC) categories for Radiotelephone Communications (SIC 4812) and Telephone Communications, Except Radiotelephone (SIC 4813). The SBA's definition of *small entity* for those categories is one with fewer than 1,500 employees.¹⁴⁹ We discuss below the number of small entities falling within these two subcategories that may be affected by the rules proposed in this Notice.

164. The most reliable source of information regarding the number of international common carriers is the data that we collect annually in connection with the *Telecommunications Industry Revenue: Telecommunications Relay Service Fund Worksheet Data (TRS Worksheet)*. In 1995, 445 toll carriers filed TRS fund worksheets. We believe that between 50 and 200 carriers failed to file TRS fund worksheets. We believe also that fewer than 10 toll carriers had 1,500 or more employees. Thus, at most 635 international carriers would be classified as small entities. Many TRS filers, however, are affiliated with other carriers, and therefore the number of aggregated carriers is far fewer than the preceding estimate. Of the 445 toll filers, 239 reported no carrier affiliates. Adding 50 non-filers gives a lower estimate of 289 international carriers that would be classified as small entities. Thus, our best estimate of the total number of small entities is between 289 and 635. We are unable at this time to estimate with greater precision the number of international carriers that

¹⁴⁷ See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Red 15,499, ¶¶ 1328.1330, 1342 (1996), *partial stay granted, Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996).

¹⁴⁸ See *id.*

¹⁴⁹ 13 C.F.R. § 121.201.

would qualify as small business entities under the SBA's definition. While not all of these entities may have provided international service in 1995, we expect that many of these entities will seek to do so in the future, as will additional entrants into the market.

b. Title III Common Carrier Services

165. *Cellular licensees.* Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. The closest applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies (SIC 4812). The most reliable source of information regarding the number of cellular services carriers nationwide of which we are aware appears to be the data that the Commission collects annually in connection with the *TRS Worksheet*.¹⁵⁰ According to the most recent data, 792 companies reported that they were engaged in the provision of cellular services.¹⁵¹ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular services carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 792 small cellular service carriers.

166. *220 MHz Radio Services.* Because the Commission has not yet defined a small business with respect to 220 MHz radio services, we will utilize the SBA's definition applicable to radiotelephone companies — i.e., an entity employing less than 1,500 persons.¹⁵² With respect to the 220 MHz services, the Commission has proposed a two-tiered definition of small business for purposes of auctions: (1) for Economic Area (EA) licensees,¹⁵³ a firm with average annual gross revenues of not more than \$6 million for the preceding three years, and (2) for regional and nationwide licensees, a firm with average annual gross revenues of

¹⁵⁰ Federal Communications Commission, CCB Industry Analysis Division, *Telecommunication Industry Revenue: TRS Worksheet Data* Tbl. 1 (Average Total Telecommunication Revenue Reported by Class of Carrier) (December 1996) (*TRS Worksheet*).

¹⁵¹ *Id.*

¹⁵² 13 C.F.R. § 121.201, SIC 4812.

¹⁵³ Economic Area (EA) licenses refer to the 60 channels in the 172 geographic areas as defined by the Bureau of Economic Analysis, Department of Commerce. See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, GN Docket 93-252, *Second Memorandum Opinion and Order and Third Notice of Proposed Rule Making*, 10 FCC Red 6880 (1995), 60 FR 26861 (May 19, 1995).

not more than \$15 million for the preceding three years.¹⁵⁴ Since this definition has not yet been approved by the SBA, we will utilize the SBA's definition applicable to radiotelephone companies. Given the fact that nearly all radiotelephone companies employ fewer than 1,500 employees,¹⁵⁵ with respect to the approximately 3,800 incumbent licensees in this service, we will consider them to be small businesses under the SBA definition.

167. *Common Carrier Paging.* The Commission has proposed a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging services. Under that proposal, a small business would be either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. Since the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, i.e., an entity employing fewer than 1,500 persons.¹⁵⁶ At present, there are approximately 74,000 Common Carrier Paging licensees. We estimate that the majority of common carrier paging providers would qualify as small businesses under the SBA definition.

168. *Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers such as paging companies. The closest applicable definition under the SBA rules is for radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that the Commission collects annually in connection with the *TRS Worksheet*. According to the most recent data, 117 companies reported that they were engaged in the provision of mobile services.¹⁵⁷ Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under the SBA's definition. Consequently, we estimate that fewer than 117 mobile service carriers are small entities.

¹⁵⁴ *Id.*

¹⁵⁶ 13 C.F.R. § 121.201, SIC 4812.

¹⁵⁷ *Id.*

169. *Broadband Personal Communications Services (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has defined *small entity* in the auctions for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.¹⁵⁸ For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenue of not more than \$15 million for the preceding three calendar years.¹⁵⁹ These regulations defining *small entity* in the context of broadband PCS auctions have been approved by the SBA. No small business within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small businesses won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully; therefore, there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning bidders and the 93 qualifying bidders in the D, E, and F Blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules.

170. *Narrowband PCS.* The Commission does not know how many narrowband PCS licenses will be granted or auctioned, as it has not yet determined the size or number of such licenses. Two auctions of narrowband PCS licenses have been conducted for a total of 41 licenses, out of which 11 were obtained by small businesses owned by members of minority groups and/or women. Small businesses were defined as those with average gross revenues for the prior three fiscal years of \$40 million or less.¹⁶⁰ For purposes of this initial regulatory flexibility analysis, the Commission is utilizing the SBA definition applicable to radiotelephone companies, i.e., an entity employing less than 1,500 persons.¹⁶¹ Not all of the narrowband PCS licenses have yet been awarded. There is therefore no basis to determine the number of licenses that will be awarded to small entities in future auctions. Given the

¹⁵⁸ See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824 (1996).

¹⁵⁹ *See id.*

¹⁶⁰ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, and Amendment of the Commission's Rules to Establish New Narrowband PCS, GEN Docket No. 90-314, *Competitive Bidding Third Memorandum Opinion and Order and Further Notice*, 10 FCC Rcd 175, 208 (1994).

¹⁶¹ 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812.

facts that nearly all radiotelephone companies have fewer than 1,000 employees¹⁶² and that no reliable estimate of the number of prospective narrowband PCS licensees can be made, we assume, for purposes of the evaluations and conclusions in this Initial Regulatory Flexibility Analysis, that all the remaining narrowband PCS licenses will be awarded to small entities.

171. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small business specific to the Rural Radiotelephone Service, which is defined in Section 22.99 of the Commission's Rules.¹⁶³ A significant subset of the Rural Radiotelephone Service is BETRS, or Basic Exchange Telephone Radio Systems (the parameters of which are defined in Sections 22.757 and 22.759 of the Commission's Rules). Accordingly, we will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing fewer than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them have fewer than 1,500 employees.¹⁶⁴

172. *Air-Ground Radiotelephone.* The Commission has not adopted a definition of small business specific to the Air-Ground Radiotelephone Service, which is defined in Section 22.99 of the Commission's Rules.¹⁶⁵ Accordingly, we will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing fewer than 1,500 persons.¹⁶⁶ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA definition.

173. *Specialized Mobile Radio Licensees (SMR).* Pursuant to Section 90.814(b)(1) of our rules, the Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz Specialized Mobile Radio (SMR) licenses to firms that had revenues of less than \$15 million in each of the three previous calendar years. This regulation defining "small

¹⁶² The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92 S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

¹⁶³ 47 C.F.R. § 22.9.

¹⁶⁴ 13 C.F.R. § 121.201, SIC 4812.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.¹⁶⁷ We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations or how many of these providers have annual revenues of less than \$15 million. We do know that one of these firms has over \$15 million in revenues. We assume that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected includes these 60 small entities.

174. *Microwave Video Services.* Microwave services includes common carrier,¹⁶⁸ private operational fixed, and broadcast auxiliary radio services. At present, there are 22,015 common carrier licensees. Inasmuch as the Commission has not yet defined *small business* with respect to microwave services, we will utilize the SBA's definition applicable to radiotelephone companies — i.e., an entity with less than 1,500 employees.¹⁶⁹ Although some of these companies may have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of common carrier microwave service providers that would qualify under the SBA's definition. We therefore estimate that there are fewer than 22,015 small common carrier licensees in the microwave video services.

175. *Offshore Radiotelephone Service.* This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.¹⁷⁰ At present, there are approximately 55 licensees in this service. Some of those licensees are common carriers. We are unable at this time to estimate the number of licensees that would qualify as small under the SBA's definition.

¹⁶⁷ See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-583, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2693-702 (1995), 60 FR 48913 (September 21, 1995); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463 (1995), 61 FR 6212 (February 16, 1996).

¹⁶⁸ 47 C.F.R. § 101 *et seq.* (formerly part 21 of the Commission's rules).

¹⁶⁹ 13 C.F.R. § 121.201, SIC 4812.

¹⁷⁰ These licensees are governed by subpart I of part 22 of the Commission's rules, 47 C.F.R. § 22.1001..1037.

176. *Local Multipoint Distribution Service (LMDS)*. The Commission has so far licensed only one licensee in this service, and that licensee is not providing service as a common carrier. There will be a total of 986 LMDS licenses.¹⁷¹ Licensees will be permitted to decide whether to provide common carrier service, and we have no way of estimating how many will choose to do so. Because there will be no restrictions on the number of licenses a given entity may acquire, we have no way of estimating how many total licensees there will be. We also cannot estimate the number of common carrier licensees that will qualify as small entities.

177. *Space Stations (Geostationary)*. Very few systems are currently operated on a common carrier basis. Because we do not collect information on annual revenue or number of employees of all these licensees, we cannot estimate with precision the number of such licensees that may constitute a small business entity. It is likely that no more than one such entity that is currently operating as a common carrier would constitute a small business entity. There may be a small increase in the number of such entities in the future as a result of recent licensing action in the Ka-band.

178. *Space Stations (Non-geostationary)*. These systems by and large do not operate as common carriers. Because we do not collect information on annual revenue or number of employees, we cannot estimate with precision whether any carrier that may choose to operate on a common carrier basis constitutes a small business entity. The trend is for such systems to operate on a non-common carrier basis. These systems, of which there will be a limited number, by and large are not yet operational and are still being licensed and constructed.

179. *Earth Stations*. The vast majority of earth stations licensed by the Commission are not operated on a common carrier basis. Earth stations that communicate with non-geostationary and Ka-band satellite systems may operate on a common carrier basis but these systems are not yet operational and are still being licensed and constructed. We are unable to estimate at this time the number of earth stations communicating with such systems that may operate on a common carrier basis and, of those, the number that will be licensed to small business entities.

c. Submarine Cable Landing Licenses

¹⁷¹ See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 25.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, FCC 97-82 (Mar. 13, 1997), ¶ 13 (*LMDS Order*).

180. Our proposals would affect all holders of and future applicants for cable landing licenses, whether or not they operate their cables as common carriers. We have no way of knowing how many applications for cable landing licenses will be filed in coming years, but that number will likely increase if we adopt our proposal to lower the barriers to granting licenses for cables to WTO Member countries. Since 1992, there have been approximately 35 applications for cable landing licenses. The total number of licensees is difficult to determine, because many licenses are jointly held by several licensees. Our rules will also permit more current licensees to accept additional investment from entities from WTO Member countries.

181. **Reporting, recordkeeping, and other compliance requirements:** The actions contained in this Notice of Proposed Rulemaking may affect large and small carriers. We propose to require that U.S. carriers whose foreign affiliates have market power maintain or provide certain records regarding their foreign affiliates. Our proposals would in most cases reduce the burdens that are currently imposed on such carriers, and we anticipate that the remaining requirements would not impose a significant economic burden on small entities. A variety of skills may be required to comply with the proposed requirements, but all of the skills that may be required are of the type needed to conduct a carrier's normal course of business. No additional outside professional skills should be required, with the possible exception of preparing an initial Section 214 or cable landing license application and of preparing a submission for our consideration under Section 310(b)(4), all of which would be simplified by our proposals.

182. *Section 214 and the Cable Landing License Act.* The proposed revisions to our rules and policies pursuant to Section 214¹⁷² and the Cable Landing License Act¹⁷³ would significantly reduce the burdens on international common carriers. Our proposal would reduce the burden on foreign-affiliated carriers seeking to enter the market by requiring only that they show that their foreign affiliate is from a country that is a Member of the World Trade Organization. We believe this to be a minimal burden for most small entities and a significant reduction of burdens relative to our current application requirements.

183. The proposed "basic dominant carrier safeguards"¹⁷⁴ would be less burdensome to most international common carriers than our current regulations. Carriers would no longer be required to obtain approval before adding or discontinuing circuits. Instead, they would be required only to file quarterly notification of additions of circuits. We propose to eliminate

¹⁷² 47 U.S.C. § 214.

¹⁷³ 47 U.S.C. §§ 34.39.

¹⁷⁴ See *supra* Section III.D.1.b.

the requirement that dominant carriers file their international service tariffs on no less than 14 days' notice. Instead, we would allow those carriers to file their international service tariffs on one day's notice and accord them a presumption of lawfulness. This change would reduce regulatory burdens and increase the ability of carriers to innovate and efficiently respond to changes in demand and cost. We propose to retain the requirements that carriers file quarterly traffic and revenue reports and keep records of provisioning and maintenance of basic network facilities and services procured from the foreign affiliate. We anticipate that most of the entities subject to dominant carrier regulation would not be small entities, but we seek comment on that tentative conclusion.

184. This Notice proposes to impose supplemental dominant carrier regulation on U.S. carriers whose foreign affiliates do not face facilities-based competition for international services in the destination countries in which they have market power.¹⁷⁵ We believe that additional regulation of those carriers is necessary to ensure that the foreign carrier does not discriminate in favor of its U.S. affiliate. These additional requirements may include stricter structural separation between the U.S. carrier and its foreign affiliate; stricter limits on certain arrangements for the sharing of information, customers, and joint marketing; prior approval for addition of circuits; quarterly circuit status reports; filing an electronic summary of Section 43.51 contracts; and quarterly provisioning and maintenance reports. We anticipate that few if any small entities would be subject to supplemental regulation, but we seek comment on that tentative conclusion.

185. The Notice also seeks comment on whether, in light of our proposal to liberalize our rules on market entry, we need to impose as a dominant carrier safeguard some level of structural separation between the U.S. carrier and its foreign affiliate.

186. We have considered the impact on small and large entities in developing these proposals, and we view these proposed regulations as critical to preventing anticompetitive conduct. We also believe that these safeguards would protect small entities from entities that are affiliated with large foreign carriers by preventing foreign affiliates from leveraging their market power to the disadvantage of small, independent entities. We seek comment on whether we can further reduce the burdens on small entities and still achieve our goal of preventing anticompetitive behavior in the U.S. market.

187. *Section 310(b)(4)*. We also propose to reduce the burdens on common carrier licensees with foreign investment from WTO Member countries. Section 310(b)(4) of the Communications Act¹⁷⁶ has always required that we make a finding about whether indirect

¹⁷⁵ See *supra* Section III.D.1.c.

¹⁷⁶ 47 U.S.C. § 310(b)(4).

foreign investment in excess of 25 percent would serve the public interest. Our proposal here would, in many cases, greatly simplify the required showing by licensees or potential licensees. An applicant that could show that its foreign investor's principal place of business is in a country that is a Member of the WTO would in most cases have to make no further showing. An applicant whose foreign investment comes from a country that is not a WTO Member would still have to show that it satisfies the effective competitive opportunities test, but that burden would not be greater than that imposed by our current requirements.

188. This Notice asks for comment on whether we should adopt specific criteria for denial of Title III common carrier (and Section 214) applications that present such an unusual danger of anticompetitive effects that they should be denied even though the foreign investment is from WTO Member countries. We also ask whether we can further reduce regulatory burdens by eliminating our review of increases in foreign ownership by licensees that already have more than 25 percent foreign ownership. We also seek comment on other ways in which the consideration of foreign investment under Section 310(b)(4) could be made less burdensome for small entities.

189. *Accounting Rate Flexibility.* We propose to reduce the burden on U.S. carriers that seek approval of alternative settlement rate arrangements with foreign carriers from WTO Member countries. Currently, a carrier seeking such approval must file a detailed petition for declaratory ruling showing that the alternative arrangement is permitted under the criteria adopted in our *Flexibility Order*.¹⁷⁷ We propose here to require only that an applicant show that the foreign carrier is operating in a country that is a Member of the WTO. An opposing party would have the burden of showing that market conditions in the country in question are not sufficient to prevent a carrier with market power from discriminating against U.S. carriers.

190. **Federal rules that overlap, duplicate, or conflict with the Commission's proposal:** None.

191. **Any significant alternatives minimizing impact on small entities and consistent with stated objectives:** In developing the proposals contained in this Notice, we have attempted to minimize the burdens on all entities in order to allow maximum participation in the U.S. telecommunications markets while achieving our other objectives. We seek comment on the impact of our proposals on small entities and on any possible alternatives that could minimize the impact of our rules on small entities. In particular, we seek comment on alternatives to the reporting, recordkeeping, and other compliance requirements discussed above. We also seek specific comment on the impact on small entities of our proposals to modify our dominant carrier safeguards.

¹⁷⁷ Regulation of International Accounting Rates, Docket No. CC 90-337, *Phase II, Fourth Report and Order*, FCC 96-459 (Dec. 3, 1996) (*Flexibility Order*).

192. **Comments are solicited:** Written comments are requested on this Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines set for comments on the other issues in this Notice of Proposed Rulemaking, but they must have a separate and distinct heading designating them as responses to the Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act.

C. Initial Paperwork Reduction Act of 1995 Analysis

193. This Notice of Proposed Rulemaking contains either a proposed or a modified information collection. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from the date of publication of this NPRM in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

194. The rule changes adopted here, as set forth in Appendix A, have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified requirements or burdens on the public. Accordingly, their implementation is not subject to approval by the Office of Management and Budget under that Act.

D. Comment Filing Procedures

195. Comments and reply comments should be captioned in IB Docket No. 97-142 only. Pursuant to applicable procedures in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file initial comments on or before July 9, 1997, and reply comments on or before August 12, 1997. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with a copy to Douglas A. Klein of the International Bureau, 2000 M Street, N.W., Suite 800, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy

contractor, International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Room 239, Washington, D.C. Parties are also encouraged to file a copy of all pleadings on a 3.5-inch diskette in WordPerfect 5.1 format.

196. Written comments by the public on the proposed and/or modified information collections are due on or before 60 days after the date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov.

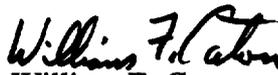
E. Ordering Clauses

197. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 201(b), 214, 303(r), 307, 309(a), and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 214, 303(r), 307, 309(a), 310, this NOTICE OF PROPOSED RULEMAKING is hereby ADOPTED.

198. IT IS FURTHER ORDERED that the minor changes to part 63 of the Commission's rules, as set forth in Appendix A, are hereby adopted effective 30 days after publication in the Federal Register.

199. IT IS FURTHER ORDERED that the Secretary shall send a copy of this NOTICE OF PROPOSED RULEMAKING, including the regulatory flexibility certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with paragraph 603(a) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary