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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

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

File No. IB 97-142

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**COMMENTS**

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## SUMMARY

With this NPRM, the Commission proposes broad and far-reaching changes in its regulation of U.S. international services. The effective competitive opportunities ("ECO") test, established less than two years ago to prevent competitive harm in the U.S. market from the leveraging of foreign market power, would be removed for Section 214 authorizations, Section 310(b) applications, and Submarine Cable Act applications by carriers from all 130 Member countries of the World Trade Organization ("WTO"). Section 214 authorizations by carriers from these countries would henceforth be presumed to be in the public interest, rebuttable only by a showing that a grant would pose "a very high risk" to competition that post-entry safeguards could not address. Submarine Cable Act applications by such carriers would be routinely granted unless a similar showing was made. The equivalency test preventing the 'one-way' inbound by-pass of settlement rates would likewise be removed for these countries, and flexible agreements would be presumed lawful. Existing post-entry dominant carrier regulation of foreign carriers also would be reduced.

The NPRM proposes these changes in response to the recent WTO Agreement on Basic Telecommunications. The NPRM states that WTO commitments by 69 countries to allow competition by foreign suppliers and by 65 countries to enforce fair rules of competition will bring about fundamental changes in the global market that allow entry rules in the U.S. international market to become similar to those in the U.S. domestic market. According to the NPRM, the Commission's goal in establishing the ECO test of promoting effective competition in the U.S. market has been "substantially achieve[d]" by

the WTO agreement, and the test may therefore be removed for all WTO Member countries.

AT&T welcomes the WTO agreement as a major landmark in the development of a competitive global telecommunications market. A substantial number of countries have committed to open their markets in varying degrees both by removing legal barriers to entry and by establishing rules to ensure that other countries' carriers may compete on fair and equal terms. The agreement promises to benefit consumers through lower prices and new service options, while providing many new opportunities for carriers.

Because many of the beneficial effects of the WTO agreement will not be felt for some time, the potential abuse of foreign market power must nonetheless remain a major Commission concern. Competition has taken many years to develop in the U.S. and will also take some time to develop in other countries. The WTO agreement does not become effective until January 1, 1998 and in most countries the implementation process is still far from complete. Indeed, the commitments of a number of countries do not become effective until much later than 1998. It is therefore premature to conclude that the Commission may henceforth rely on the competitive marketplace and relax existing entry standards.

Indeed, on January 1, 1998, less than one fifth of WTO Member countries would qualify as fully open under the Commission's existing rules to prevent the leveraging of foreign market power. Thus, in many WTO Member countries, international services will continue to be the monopoly of the incumbent, frequently government-owned carrier. In others, including Canada and Mexico, the two largest U.S. international traffic

routes, there will still be significant limitations on competition. Indeed, the foreign market conditions that led the Commission in 1995 to find that a careful pre-entry evaluation of potential anticompetitive conduct by foreign carriers with market power was necessary to protect the U.S. public interest will, in large part, remain in place for some years after 1998, notwithstanding the WTO agreement.

The NPRM recognizes the importance of ensuring that anticompetitive abuse does not occur and emphasizes the Commission's intent to deny licenses where post-entry safeguards would not do so. But in other respects, the NPRM would go too far in relaxing standards and entry procedures that will still be required, at least for now, to ensure that competitive harm does not occur in the U.S. market. The NPRM repudiates neither the concerns nor the analysis that led to the establishment of the ECO test -- notably, the ineffectiveness of post-entry safeguards -- and even reaffirms the validity of this analysis by proposing to continue the ECO test for non-WTO countries. Yet it would establish a presumption in favor of the entry to the U.S. market of carriers from all 130 WTO Member countries rebuttable only on a showing of "a very high level" of risk to competition. The Commission has not shown an adequate basis for these changes in existing practices.

The NPRM also cites the need for consistency with the multilateral rules of the WTO. In the past, the U.S. has not made broad changes in regulatory rules in response to new trade agreements unless it has been clear that they have been strictly required. No such clarity is evident here, where GATS rules do not require the NPRM's proposed high threshold of harm or its presumptions in favor of entry and flexible accounting rate arrangements. Moreover, license denial to prevent competitive harm that

cannot be addressed by safeguards is consistent with multilateral rules. As both the Commission and the Department of Justice have previously found, license denial is necessary to prevent competitive harm from the leveraging of foreign market power.

AT&T strongly supports the Commission's initiative to establish new benchmark settlement rates at levels that are closer to the underlying costs of terminating international traffic. AT&T also supports the Commission's proposed use of settlement rates to address market entry on affiliate routes. However, the use of high-end benchmark settlement rate safeguards to address facilities-based entry and the provision of switched services over international private lines, as currently proposed, would not sufficiently mitigate the resulting competitive harm in the U.S. market. If only high-end benchmark rates are required, pre-entry analysis of competitive conditions in the foreign market and license denial would continue to be necessary (but with a modified analysis to focus on the market power of the applicant). Otherwise, the ability to leverage above-cost settlement rates through price squeezes and one-way settlement rate by-pass would remain, providing the incentive to capture excess settlement subsidies in order to raise rivals' costs or to fund anticompetitive strategies in the U.S. market.

However, as shown herein and in the accompanying affidavit of Dr. William H. Lehr, a requirement for cost-based settlement rates (i.e., at the low end of the proposed benchmark ranges) for all types of switched services, including outbound switched resale, would significantly lower the potential risks to competition. The Commission should, in particular, apply a cost-based settlement rate safeguard to switched resale services. As Dr. Lehr concludes, "the mode of entry does not affect the attractiveness of executing the price squeeze strategy" and resale entry even has many

advantages over facilities-based entry -- especially if no settlement rate safeguard is applicable.

A requirement for cost-based settlement rates, together with strengthened post-entry safeguards, would thus greatly reduce the potential harm to competition from the new entry rules proposed by the NPRM. Unless the Commission adopts such requirements, it should continue to deny licenses for any carrier, including those from WTO Member countries, where conditions of competition in the foreign country are not yet sufficient to preclude the leveraging of foreign market power.

Strengthened post-entry safeguards are also important to prevent other anticompetitive conduct and should include requirements for the disclosure of all affiliate transactions, structural separation and an accelerated complaint procedure as part of the supplemental dominant carrier rules. The supplemental rules should apply to the U.S. affiliates of carriers with market power in foreign markets unless the destination country has authorized multiple facilities-based competitors, does not prohibit non-nationals from controlling such carriers, and has implemented the requirements of the WTO Reference Paper. Finally, the Commission should apply a neutral presumption to flexible accounting rate arrangements, with the burden of production on the proponent of the arrangement.

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In the Matter of )  
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Rules and Policies on Foreign Participation )  
in the U.S. Telecommunications Market ) File No. IB 97-142

**COMMENTS**

AT&T Corp. ("AT&T") hereby submits its Comments in response to the Order and Notice of Proposed Rulemaking<sup>1</sup> concerning the Commission's proposed revision of its rules governing foreign carrier entry to, and participation in, the U.S. telecommunications market.

**I. FOREIGN PARTICIPATION IN THE U.S. TELECOMMUNICATIONS MARKET REQUIRES EFFECTIVE SAFEGUARDS AGAINST COMPETITIVE HARM.**

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Although proposing (§§ 55, 65, 77) to continue the effective competitive opportunities ("ECO") and equivalency tests for non-WTO Member countries, the NPRM (§§ 32, 50, 62, 68) would eliminate these requirements for all Members of the WTO. The primary basis for this proposal is the NPRM's tentative conclusion (§ 29) that the WTO commitments made in the basic telecommunications negotiations "substantially achieve"

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<sup>1</sup> *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Order and Notice of Proposed Rulemaking, (released June 4, 1997), FCC 97-195 ("NPRM").

the *Foreign Carrier Entry Order* goal of promoting effective competition in the U.S. market. The NPRM (§ 31) anticipates that "countries representing over 95 percent of the world's telecommunications revenues will be open to competition by U.S. carriers" and "most foreign carriers with monopoly positions today should have far less market power." A critical assumption underlying the NPRM, therefore, is that WTO commitments and disciplines now provide sufficient competition in the U.S. international services market to warrant reliance on other regulatory approaches to redress anticompetitive conduct.

The WTO agreement does indeed promise major changes in the global telecommunications industry that will increase competition, reduce the market power of incumbent carriers, and bring lower prices and new and innovative services for consumers and new market opportunities for U.S. carriers. However, the WTO agreement will not immediately result in the creation of open, competitive markets in all WTO countries or the removal of the market power of incumbent carriers. Just as competition took many years to have this effect in the United States, so it will take time for competition to develop in other countries as they open their markets and implement the new laws and regulations that comprise the first step towards developing competitive markets.

While 68 countries did commit to varying degrees of market liberalization in the WTO negotiations, the agreement does not become effective until January 1, 1998 and in most countries the implementation process is not yet complete. Indeed, the commitments of a number of countries do not become effective until much later than 1998. At this early stage, it therefore appears premature to conclude that Commission may relax the standard and procedures for entry into the U.S. international services market and henceforth rely on "competitive market forces rather than [the] ECO test as a means

of achieving the maximum benefits for U.S. consumers." NPRM, ¶ 33. The mere prospect that these countries may have open markets in the future is an insufficient basis for such a major change in existing procedures.

As further evidence that existing safeguards should not be removed at this early stage, only the commitments made by 20 countries would, if implemented, meet the requirements of the ECO test for facilities-based entry to the U.S. market on January 1, 1998. Similarly, only 25 countries would meet equivalency requirements on January 1, 1998 on the basis of their WTO commitments. Additionally, the extent to which many new commitments will be forthcoming from the "approximately 60" WTO Member countries (NPRM, ¶ 35) that have not made market access commitments is unclear, as such countries would thereby be deprived of the considerable benefits of their "free-rider" status. As the conditions of competition the Commission has found necessary to preclude the leveraging of foreign market power are likely to exist only in a relatively small number of WTO Member countries in the near future, there is no present basis to change existing entry procedures.

**1. Commitments to Open Markets in the Future Provide No Basis for Altering the Public Interest Standard.**

The Commission proposes (¶ 32) that all Section 214 entry applications from WTO Member countries be presumptively authorized unless it is shown that the application poses "a very high risk to competition."<sup>2</sup> As the Commission concluded only

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<sup>2</sup> The present standard for judging applications is whether they pose a "substantial risk to competition." *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3876, 3915, 3961, 3967, 3969. This standard reflects a similar test found in antitrust law that the

two years ago, a careful evaluation of the potential anticompetitive conduct by a foreign carrier with market power is necessary to protect the U.S. public interest:

We disagree with [the] assertion that safeguards, absent open competition in foreign markets, can adequately promote an effectively competitive market for the provision of U.S. international services. Competitive safeguards can be used to prevent carriers with market power from leveraging that market power into an adjacent competitive market to the disadvantage of competition and, ultimately consumers. We are not, however, convinced that our regulatory safeguards, standing alone, are the optimal way to ensure that entry, particularly facilities-based entry, by a foreign carrier on routes where it has bottleneck control will preserve and promote competition in the U.S. international services market. Effective competition in such circumstances depends upon the ability of U.S. carriers to participate in a competitive market on the foreign end. If there is no opportunity for U.S. participation in competitive markets abroad, then the benefits of providing international service on an end-to-end basis will flow solely to a dominant foreign carrier and its U.S. affiliate. *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3880.

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Commission is bound to consider. Section 7 of the Clayton Act prohibits acquisitions when "the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18, *quoted in* NPRM ¶ 42. The Commission recognizes that it has a statutory obligation to analyze potential anticompetitive effects that is only "discharged . . . when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors." *Id.* (quoting *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980)(en banc). The "substantial risk of anticompetitive effects" standard predates the *Foreign Carrier Entry Order*. See e.g., *In re Domtel Communications, Inc.*, 10 FCC Rcd. 12159, 12161 (1995) ("properly conditioned, grant of Domtel's application will not present a substantial risk of anticompetitive effects in the U.S. market for international services"); *In re Americatel Corp.*, 9 FCC Rcd. 3993, 4001 (1994) ("[W]e find that current market conditions in Chile, Chile's regulatory regime, and the regulatory safeguards we impose as a conditions of this authorization are sufficient to prevent ATA from obtaining an unfair competitive advantage or any undue preferential treatment as a result of its affiliation with ENTEL-Chile. We conclude that entry by ENTEL-Chile will not present a substantial risk of anticompetitive effects in the U.S. market for international telecommunications services.")

The Commission also declared, "We do not believe that effective competition will occur if foreign carriers that continue to hold market power in foreign markets are allowed unlimited access to the U.S. market."<sup>3</sup> The Commission did not assume static monopolies abroad, but recognized that "[f]oreign domestic markets are . . . undergoing critical transformations with increasing privatization and liberalization."<sup>4</sup> The 1995 Order nevertheless observed that "sets of preconditions for effective competition in this changing environment" are needed, and determined that "effective competition requires regulation that precludes undue discriminatory and exclusionary behavior."<sup>5</sup> For these reasons, the Commission expressly rejected the position, advanced by two foreign carriers, that post-entry "safeguards alone are adequate."<sup>6</sup>

The Commission continues to state (NPRM ¶ 26) that one of its goals "is to prevent anticompetitive conduct in the provision of international services or facilities." Yet, nothing has happened to change the Commission's obligation to assess the competitive effects of a service offering involving a U.S. carrier and its affiliate who dominates a foreign market. The Commission's NPRM does not repudiate any of the conclusions reached in the 1995 *Foreign Carrier Entry Order*, i.e., the potential of dominant foreign carriers to abuse their monopolies, that such abuse is against the public interest, and that post-entry safeguards were insufficient to curb these risks to

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<sup>3</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3875.

<sup>4</sup> *Id.* at 3878-79.

<sup>5</sup> *Id.* at 3879 (emphasis added).

<sup>6</sup> *Id.* at 3885.

competition. To the contrary, the NPRM affirmatively endorses the ECO analysis for applications from non-WTO Member affiliates.

In the face of this long-standing precedent, the Commission offers only one substantive reason for departing from existing standards and adopting a pro-authorization presumption: "the WTO commitments made by 68 other governments will, when fulfilled, substantially achieve the paramount goal of our Foreign Carrier Entry Order, promoting effective competition in the U.S. international services market." NPRM, ¶ 29 (emphasis added). Thus, implicit in the Commission's Notice is the recognition that the competitive dangers that the Commission has previously recognized will continue to exist until the WTO commitments are fully and adequately fulfilled. Many WTO commitments, however, will take substantial time to implement. The possibility of a diminished risk of anticompetitive conduct in the future is insufficient to justify a change in the rules that would permit entry today by affiliates from countries that have not yet fulfilled those commitments.

Similarly, in the Telecommunications Act of 1996, Congress recognized that effective regulation requires evaluation of practical evidence of competition, not just paper commitments. Bell Operating Companies that wish to offer long distance service from their dominant market are required to seek pre-entry approval from the Commission. *See* 47 U.S.C. § 271. The Act mandates that the Commission conduct a pre-entry approval process including a detailed analysis of whether the BOC's market is open to competition. *Id.* at § 271(c).

**2. The Commission Should Not Relax Standards and Establish a Pro-Authorization Presumption Based on Commitments Not Meeting ECO Requirements.**

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The Commission predicts that the commitments made by the governments of monopoly foreign carriers to liberalize markets in the future "should provide a meaningful check on their exercise of market power" and that "most foreign carriers with monopoly positions today should have far less market power as a result of the WTO commitments." NPRM ¶ 31 (emphasis added). In addition, the Commission "believe[s] that the WTO commitments will soon result in a dramatically changed global competitive environment in which almost all of the major traffic routes will be open to competition." *Id.* at ¶ 33 (emphasis added). However, not more than a small proportion of WTO Member countries will be sufficiently open in the near future under the standards established in the *Foreign Carrier Entry Order* as necessary to limit anticompetitive conduct by foreign carriers with market power.

The ECO test examines whether a carrier controlling bottleneck facilities at the foreign end of an U.S. international route is subject to effective competition in that foreign market.<sup>7</sup> As the Commission has found, the criteria of the ECO test -- the legal

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<sup>7</sup> The ECO test currently applies to Section 214 and 310(b)(4) public interest analysis of applications by foreign carriers to provide international facilities-based services, switched resale services or non-interconnected private line resale services on routes from the U.S. to any country in which the foreign carrier controls bottleneck facilities, or otherwise possesses market power. *Market Entry and Regulation of Foreign-affiliated Entities*, 11 FCC Rcd. 3873, 3875-76, 3881, 3928, 3944-45 (1995) (Report and Order) ("*Foreign Carrier Entry Order*"). The Commission has recently decided to apply "an analysis similar to an effective competitive opportunities analysis" to submarine cable landing license applications. *Telefonica Larga Distancia De Puerto Rico, Inc.*, File Nos. ITC-92-116-AL, SCL-93-001, ITC-93-029, Memorandum

right to offer the relevant service; the existence of reasonable and non-discriminatory charges, terms and conditions for interconnection; adequate safeguards against anticompetitive conduct; and an independent regulatory framework -- are necessary to limit the leveraging of foreign market power into the U.S. market.<sup>8</sup> Accordingly, the criteria of the ECO test are those on which the Commission should assess the adequacy of the market-opening commitments of WTO Member countries in preventing the leveraging of foreign market power.<sup>9</sup>

When each WTO Member country's commitments on basic telecommunications are compared with the requirements of the ECO test, it is evident that competitive conditions sufficient to prevent the leveraging of foreign market power will in 1998 exist in many fewer countries than the 68 referenced by the NPRM (§ 1) as allowing entry in "basic telecommunications services," and in fewer even than the 52 countries the NPRM cites (§ 35) as having allowed competition in international services.

As shown in Attachment 1, only 20 countries, which account for just 33 percent of U.S.-billed IMTS revenues, would meet the requirements of the ECO test on January 1, 1998 on the basis of their WTO commitments. These are the only countries

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Opinion and Order, (released May 2, 1997), §§ 2, 27 (denying applications by the U.S. affiliate of Spain's monopoly carrier to acquire ownership interests in COLUMBUS II cable system and Section 214 authority to provide service to Spain).

<sup>8</sup> *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3880, 3886.

<sup>9</sup> As described in Section II below, the requirements of the ECO analysis should be modified to focus on the extent to which the ability of the applicant to engage in discrimination through use of its market power is limited by competitive conditions.

committing to provide market access for the provision of international facilities-based voice services,<sup>10</sup> to allow non-nationals to hold controlling interests in facilities-based carriers,<sup>11</sup> and to provide reasonable and non-discriminatory charges, terms and conditions for interconnection, safeguards against anticompetitive behavior and independent regulatory procedures.<sup>12</sup> Taking account of the additional countries committing to open their markets on a delayed basis, 25 countries would meet ECO requirements by 2000, and 39 countries would do so in total by the time all WTO commitments are effective in 2013.<sup>13</sup>

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<sup>10</sup> The first requirement of the ECO test is "whether U.S. carriers are permitted, as a matter of law, to offer international facilities-based services in the destination foreign country." *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3891.

<sup>11</sup> The *Foreign Carrier Entry Order* emphasizes the importance of "the legal right to obtain a controlling interest in a facilities-based carrier." *Id.* at 3981. Without this right, "the incumbent foreign carrier will have the ability to leverage economic power into the U.S. international services market. Absent the ability to obtain such an interest in a competitive enterprise, U.S. carriers cannot obtain a degree of bargaining power sufficient to constrain anticompetitive behavior by the incumbent, or respond effectively to competitive inroads made by the incumbent as a result of its unique ability to operate on an end-to-end basis." *Id.* at 3891-92.

<sup>12</sup> These are the second, third and fourth factors of the ECO test. *Id.* at 3892-94. These requirements are included in the regulatory principles set forth in the WTO Reference Paper, which has been accepted in whole or in part by 65 WTO Member countries.

<sup>13</sup> Significantly, many of the WTO Member countries to which the U.S. makes the largest settlements outpayments have made commitments falling short of ECO standards or no commitments at all. The 50 countries to which the U.S. made the largest settlements payments in 1995 include 45 WTO Member countries, of which nine made no commitments in the recent negotiations, nineteen made commitments below ECO standards, and another four committed only to delayed market-opening. *See International Settlement Rates*, IB Docket No. 96-261, Notice of Proposed Rulemaking, (released Dec. 19, 1997), FCC 96-484 ("*Benchmark Settlement Rate NPRM*"), Appendix B (Top 50 U.S. Net Settlement Payments in 1995).

Similarly, the extent to which WTO Member countries' commitments will protect against 'one-way resale' should be assessed under the similar criteria applied under the Commission's equivalency test.<sup>14</sup> The purpose of this safeguard is to ensure that "U.S. entities, faced with the diversion of inbound traffic to resellers, would have a reasonable opportunity to respond to that diversion by entering the resale market and diverting outbound traffic."<sup>15</sup> The NPRM (§ 50) cites 52 countries as allowing U.S. carriers to send U.S.-outbound switched traffic over private lines, but Attachment 2 demonstrates that only the WTO commitments of 25 countries meet this and the additional requirements of the equivalency test on January 1, 1998.<sup>16</sup>

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<sup>14</sup> The equivalency test governs the provision of switched services over international private lines and employs a similar market analysis to the ECO test. *Foreign Carrier Entry Order*, 11 FCC Rcd at 3925 (conforming equivalency and ECO criteria).

<sup>15</sup> *fONOROLA Corp.*, 9 FCC Rcd. 4066, 4068 (1994) (Order on Reconsideration)

<sup>16</sup> The equivalency test requires that the foreign country must provide the legal right to sell international private lines interconnected at both ends for the provision of switched services, and meet the same regulatory criteria required under the second, third and fourth criteria of the ECO test. *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3925. The requirements of the equivalency test must be in existence before an authorization may be granted. *See e.g., Cherry Communications, Inc.*, File No. ITC-96-183, Memorandum Opinion and Order, (released Mar. 31, 1997), ¶ 8.

Even taking account of the nineteen additional countries have made WTO commitments meeting equivalency requirements to open their markets on a delayed basis, only 43 countries would do so in total by the time all commitments are effective in 2013.

**3. There is Also no Basis on Which to Relax Standards for Those Nations That Have Refused to Commit to Granting Access to their International Services Markets.**

The Commission properly concludes that carriers from non-WTO Member countries -- who, by definition, have not made WTO commitments to open market entry -- should continue to be subject to the ECO test to prevent competitive harm in the U.S. market, but the NPRM unjustifiably concludes similar measures are not necessary for WTO Members that have made no or deficient commitments. There is no sufficient reason to distinguish between the nations who could have made full commitments but refused and those countries who did not commit because they are not Members of the WTO.

The Commission justifies treating non-committing Member countries with the same new "open entry" approach on the grounds that there is a "likelihood of liberalization" in these markets, despite their governments' refusal to commit at this time, and that when and if they liberalize their markets, the WTO obliges them to not discriminate against U.S. carriers. NPRM, ¶¶ 36-37. Yet, the expectation that these countries will liberalize their markets is speculative -- and not a sufficient basis for changing the Commission's rules. These countries all recently resisted the opportunity to make such commitments in the WTO negotiations. Moreover, WTO Member countries that have not opened their international services markets now have a lesser incentive to do so -- particularly if the Commission does not adopt effective remedies against competitive

harm from these 'free-rider' countries.<sup>17</sup> Even the Commission acknowledges that "[f]or carriers from [the non-committing] countries, the WTO Basic Telecom Agreement will be less effective in preventing anticompetitive conduct." *Id.* at ¶ 35.

**II. THE WTO AGREEMENTS ALLOW THE COMMISSION TO PROMOTE COMPETITION BY DENYING LICENSES WHERE NECESSARY AND REQUIRE NEITHER A SHOWING OF "A VERY HIGH RISK" OF HARM NOR PRESUMPTIONS IN FAVOR OF ENTRY OR ACCOUNTING RATE FLEXIBILITY.**

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The NPRM (¶ 37) states that "applying the same rules to all WTO Members would be most consistent with U.S. international trade obligations under the GATS." Indeed, a significant motivating force behind the NPRM is apparently the desire to remove any market entry limitation that anyone could assert to be inconsistent with the requirements of a multilateral trade regime following the WTO agreement on basic telecommunications. But the NPRM does not explain any such concern, or specify how it may have influenced the proposed changes in Commission rules and practices. Moreover, the U.S. practice has been not to make sweeping changes in U.S. regulatory rules in response to new trade agreements unless it has been clear that those agreements have strictly required them.

Such caution is particularly desirable here. The inclusion of basic international telecommunications services under the WTO General Agreement on Trade in

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<sup>17</sup> As the Coalition for Hemispheric Competitiveness emphasized in its Comments in response to the *Benchmark Settlement Rate NPRM*, if carriers from closed markets are now able to use their above-cost settlement rates to subsidize their activities in open markets and to engage in the one-way by-pass of accounting rates, they will have little incentive to make WTO commitments that would limit their future

Services ("GATS") involves the extension of multilateral trade disciplines to services supplied through bilateral intercarrier relationships providing unique opportunities for the leveraging of domestic market power, raising trade and competition issues not previously considered in the WTO. Further, the relevant multilateral agreement, the GATS, was adopted only three years ago and has so far been subject to just one WTO dispute resolution procedure decision that did not involve telecommunications.

In the past, both the Commission and the Department of Justice have found that entry limitations are necessary on purely competitive grounds to prevent anticompetitive behavior by carriers with market power in closed foreign markets. The NPRM thus properly proposes (¶¶ 32, 39-40) to limit market entry by carriers with market power where the resulting harm to competition cannot be addressed by any less burdensome safeguard, and the Commission would be entirely within U.S. rights under the WTO in taking such action. A necessary part of that analysis, as the Commission recognizes in its proposed approach to flexible accounting rate arrangements, is whether there is sufficient competition in the foreign market to limit the potential abuse of foreign market power in the U.S.

Similarly, the Commission would be well within U.S. rights under the WTO in retaining a lower threshold of harm, such as the "risk of substantial harm to competition" standard it presently requires. The Commission also is not precluded from

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monopoly profits from such practices. *Benchmark Settlement Rate NPRM*, Comments of the Coalition of Hemispheric Competitiveness (filed Feb. 7, 1997), at 6-7.

adopting neutral presumptions that would place no burden of proof on any party to a Section 214 or accounting rate flexibility application, but that would instead obligate the Commission to render findings based upon all available evidence. The NPRM's proposals go beyond the requirements of U.S. international trade obligations and would thereby expose the U.S. market to unnecessary competitive harm.

1. **The WTO Agreement Does Not Affect the Commission's Ability and Obligation to Protect the U.S. Market Against Competitive Harm.**

As an initial matter, WTO agreements are not self-executing, but apply only to the extent they are enacted into U.S. law and regulation. The 1994 Uruguay Round implementing legislation (which included implementation of the GATS) also made clear that U.S. law prevails in the event of a conflict. Section 102 of the Uruguay Round Agreements Act provides that no provision of any WTO agreement "that is inconsistent with any law of the United States shall have effect."<sup>18</sup>

The review of those agreements involved close scrutiny of any necessary changes in U.S. law or regulation. The "fast track" rules under which the Uruguay Round was approved by Congress required a detailed Statement of Administrative action to

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<sup>18</sup> Section 102 (a), Uruguay Round Agreements Act, 19 U.S.C. § 3512(a). Similarly, Section 102(c) of the Act, 19 U.S.C. § 3512 (c), denies a private right of action against any department or agency on the basis of a WTO agreement. Thus, no challenge to any Commission action on the basis of any alleged WTO obligation may be brought in U.S. courts.

accompany the implementing legislation, including any proposed changes to Federal regulations required by the Uruguay Round agreements.<sup>19</sup>

In any event, the WTO agreements plainly recognize the right of the Commission to prevent anticompetitive practices. Article VI of the GATS establishes a clear right of governments to maintain domestic regulations, provided that they are "administered in a reasonable, objective and impartial manner."<sup>20</sup> Further, Section 1.1 of the Reference Paper affirmatively requires the U.S. to maintain measures to prevent carriers with market power from "engaging in or continuing anti-competitive practices."<sup>21</sup>

Article VI of the GATS also recognizes a basic right to regulate, including the adoption and implementation of licensing qualifications designed to achieve legitimate objectives, such as the prevention of anticompetitive conduct. Article VI thus provides the ability to adopt competitive safeguards imposing strict conditions on suppliers. Such requirements must merely be administered in a manner that is "reasonable" (i.e., not

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<sup>19</sup> Indeed, the Uruguay Round Agreements Act further requires that if the WTO finds an agency regulation or practice to be inconsistent with a WTO agreement, "that regulation or practice may not be amended, rescinded, or otherwise modified" without consultation with the Congress by both the U.S. Trade Representative and the head of the relevant agency, and the submission of a report to the appropriate congressional committees by the U.S. Trade Representative, in addition to the opportunity for public comment. *See* Section 123(g), Uruguay Round Agreements Act, 19 U.S.C. § 3533(g). These requirements would apply to any future WTO finding concerning any Commission regulation or practice once basic telecommunications is subject to the GATS.

<sup>20</sup> GATS, Article VI, Paragraph 1.

<sup>21</sup> World Trade Organization, Communication from the United States, Attachment to the United States Offer in Basic Telecommunications Services, Reference Paper, Section 1.1, February 15, 1997.

arbitrary), "objective" (i.e., unbiased) and "impartial" (i.e., non-discriminatory),<sup>22</sup> be based on "objective and transparent criteria"<sup>23</sup> and be "not more burdensome than necessary to ensure the quality of the service."<sup>24</sup> In addition, by requiring that license procedures may not be "in themselves" a restriction on supply, Article VI addresses potential procedural abuses, such as arbitrariness or unreasonable delay.<sup>25</sup> Neither these nor other GATS requirements limit the ability of the Commission to ensure that the U.S. market is adequately protected against competitive harm.

**2. License Denial is Permissible to Prevent Competitive Harm That Could Not be Addressed by Other Safeguards.**

The NPRM (§ 32) properly proposes that license applications posing risks to competition that could not be addressed by safeguards should be denied. Such an

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<sup>22</sup> The Article VI requirement that the measures are applied in a "reasonable, objective and impartial manner" is similar to the language of Article X:3(a) of the General Agreement on Tariffs and Trade ("GATT"), which applies to the procedures and means of carrying out a regulatory or administrative function rather than the actual standard itself. *See* Statement of Administrative Action contained in Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, House Document 103-316, Vol. 1, 103d Congress, 2d Sess. (Sept.27, 1994), 968 (describing Article VI(1) as "closely paralleling the long-standing language of GATT Article X:3(a)"); GATT Document L/3149, *cited in* Guide to GATT Law and Practice, 6<sup>th</sup> ed. (the analogous language of Article X would not permit the "application of one set of ... procedures with respect to some contracting parties and a different set with respect to others").

<sup>23</sup> GATS, Article VI, § 4(a).

<sup>24</sup> *Id.*, § 4(b).

<sup>25</sup> *Id.*, § 4(c). This condition is similar in purpose to Article 3 of the WTO Import Licensing Agreement, and seeks to ensure that licensing procedures themselves do not add restrictions to those imposed by the objective licensing criteria. *See* Agreement on Import Licensing Procedures, Art. 3 (2), House Document 103-316, Vol. 1, , 103d Congress, 2d Sess. (Sept.27, 1994), 1526, 1529.

approach is fully consistent with the GATS. A showing that safeguards could not address the harm would meet the Article VI requirement that the denial be no more burdensome than necessary<sup>26</sup> and would not be contrary to the "Most-Favored-Nation" ("MFN") non-discrimination requirement of Article II of the GATS or to the national treatment requirement of Article XVII. A licensing decision that is dependent upon a carrier's market power, rather than its national origin, and that is based solely upon the potential adverse impact of that carrier upon competition in the U.S., would not be contrary to MFN requirements.

As the Commission reaffirms in the NPRM, market conditions in the foreign country are a critical factor in determining whether such an adverse impact is likely to occur. The NPRM proposes (§§ 151-52) to allow the "easy rebuttal" of the presumption in favor of flexible accounting rate agreements on a showing that "market conditions in the country in question are not sufficiently competitive to prevent a carrier with market power in that country from discriminating against U.S. carriers." In establishing its present rules for flexible accounting rate agreements in December,

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<sup>26</sup> The concept of "not more burdensome than necessary" normally requires the complaining country to demonstrate that it was not necessary to adopt a certain standard in order to achieve its legitimate regulatory objective. For example, the Agreement on Technical Barriers to Trade ("TBT Agreement") contains a similar requirement that "technical regulations shall not be more trade restrictive than necessary to fulfill a legitimate objective." See TBT Agreement, Art. 2.2., Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 757 (1994). The Statement of Administrative Action submitted to Congress confirms that in order to show a violation of this requirement a Member would need to demonstrate that there is another measure which is reasonably available, which would fulfill the legitimate objective, and which would be significantly less restrictive to trade. See Statement of Administrative Action, fn. 22 *supra*, at 780.