DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)	IB Docket No. 97-142
	)	
Market Entry and Regulation of Foreign-Affiliated Entities	)	IB Docket No. 95-22

REPORT AND ORDER AND ORDER ON RECONSIDERATION

Adopted: November 25, 1997 Released: November 26, 1997

By the Commission: Chairman Kennard issuing a statement.

Table of Contents

Topic — Paragraph No.

I. Introduction and Executive Summary . . . 1
- A. Introduction . . . 1
- B. Executive Summary . . . 13

II. Background . . . 22
- A. *Foreign Carrier Entry Order* . . . 22
- B. WTO Basic Telecom Agreement . . . 25

III. Open Entry Policies toward WTO Member Countries . . . 29
- A. General Standard for Foreign Participation . . . 29
  - 1. Removing ECO . . . 30
  - 2. Public Interest Analysis . . . 44
    - a. Presumption in Favor of Entry . . . 47
    - b. Other Public Interest Factors . . . 59
- B. Section 214 Entry Standard . . . 67
  - 1. Facilities-Based, Resold Switched and Resold Non-interconnected Private Lines . . . 67
  - 2. Provision of Switched Services over Private Lines . . . 72
- C. Foreign Ownership under the Submarine Cable Landing License Act . . . 87
- D. Section 310(b)(4) Standard for Indirect Foreign Ownership of Radio Licensees . . . 97

IV. Policies toward Non-WTO Members 119
A. Application of ECO Analysis 119
B. Modification of Contexts in Which ECO Analysis Applies 133

V. Regulatory Issues 143
A. Regulatory Approach 143
B. General Obligations on All U.S. International Carriers 150
1. "No Special Concessions" Rule 150
2. Foreign Market-Derived Confidential Information 171
a. Competing U.S. Carrier Information 171
b. U.S. Customer Proprietary Network Information 172
C. Competitive Safeguards for Affiliated Carriers 177
1. Benchmark Conditions 179
a. Benchmark Condition for Facilities-Based Service to Affiliated Markets 192
b. Consideration of Benchmark Condition for Switched Resale Service to Affiliated Markets 193
2. Dominant Carrier Safeguards 215
a. Regulatory Framework 215
b. Competitive Safeguards 240
(i) Modified Tariffing Requirements 240
(ii) Removal of Prior Approval of Circuit Additions and Discontinuances 246
(iii) Separation Requirements 252
(iv) Quarterly Traffic and Revenue Reports 270
(v) Quarterly Provisioning and Maintenance Reports 274
(vi) Quarterly Circuit Status Reports 281
(vii) Rejection of Ban on Exclusive Arrangements Involving Joint Marketing, Customer Steering, or Use of Foreign Market Telephone Customer Information 287
D. Enforcement of Safeguards 293
E. Alternative Settlement Arrangements 297

VI. Procedures 314
A. Streamlined Application Procedures 314
B. Notifications of Foreign-Carrier Affiliations 330

VII. Compliance with U.S. Commitments under the WTO Basic Telecom Agreement 335

VIII. Petitions for Reconsideration in IB Docket No. 95-22 376

IX. Administrative Matters 384

X. Ordering Clauses 387

Appendix A: Lists of Commenters and Reply Commenters
Appendix B: Petitions for Reconsideration in IB Docket No. 95-22
Appendix C: Final Rules
Appendix D: Final Regulatory Flexibility Analysis

I. Introduction and Executive Summary

A. Introduction

1. An efficient and cost-effective global telecommunications marketplace is essential to an emerging information economy. The substantial resources required to build a global infrastructure are unlikely to come from regulated monopolies or multilateral international organizations. In the U.S. domestic market, we have found that private sector competition dramatically lowers the cost of providing service and stimulates creation of innovative services and investment in infrastructure deployment.[1] These positive developments encouraged Congress to enact the Telecommunications Act of 1996 (the 1996 Act), with its emphasis on competition and deregulation.[2] The United States, in an effort to achieve these same benefits internationally, urged foreign governments to open their markets to competition and to adopt procompetitive, transparent regulatory policies in order to foster the growth of a global information infrastructure.

2. On February 15, 1997, 69 nations, including the United States and most of its major trading partners, took the historic step of concluding the World Trade Organization (WTO) Basic Telecommunications Agreement,[3] and committing to open their markets for basic telecommunications services. The WTO Basic Telecom Agreement seeks to replace the traditional regulatory regime of monopoly telephone service providers with procompetitive and deregulatory policies. We expect the market-opening commitments of our trading partners to bring procompetitive developments throughout the world. The 69 nations that concluded the Agreement account for more than 90 percent of worldwide telecommunications services revenues. In light of the United States' WTO market access commitments and the market-opening commitments of our trading partners, as well as our improved regulatory framework, we find that it serves the public interest to adopt rules in this *Order* to complete our goal of opening the U.S. market to competition from foreign companies, in parallel with our major

---

[1] *See Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980).

[2] Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amends the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq*. Hereinafter, all citations to the Communications Act will be to the relevant section of the United States Code unless otherwise noted. The Communications Act of 1934, as amended, will be referred to herein as the Communications Act or the Act.

[3] As described below in Section II.B, the results of the WTO basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services (GATS) by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement."

trading partners. We adopt an open entry standard for WTO Member country applicants that favors their participation and will enable U.S. consumers to enjoy the benefits of increased competition.

3. We also adopt today a companion order that establishes a uniform framework for foreign-licensed satellite systems that seek to serve the U.S. market.[4] The companion order adopts the same general approach we apply in this *Order* to encourage entry by foreign-licensed satellite systems into the United States to provide basic telecommunications services. Both orders are guided by the common objective of promoting competition in the U.S. market, and of achieving a more competitive global market for all basic telecommunications services.

4. Prior to the conclusion of the WTO Basic Telecom Agreement, the United States and many foreign governments had looked for ways to encourage foreign governments to open their telecommunications markets. By removing obstacles to entry to all telecommunications service markets, including our own, we believed that we could deliver tangible benefits to U.S. consumers, U.S. companies, and the world at large. At the same time, however, we sought to prevent anticompetitive harm from the leveraging of foreign market power into the U.S. market for telecommunications services. The WTO Basic Telecom Agreement helps achieve these goals by furthering the principles of open markets, private investment and competition, as well as the adoption of procompetitive regulatory principles. Under the terms of the Agreement, the United States has committed to allow foreign suppliers to provide a broad range of basic telecommunications services in the United States. We expect that entry by foreign telecommunications carriers and other investors will increase competition in the U.S. telecommunications service market, providing lower prices and increased quality of service.[5] In return, most of the world's major trading nations have made binding commitments to move from monopoly provision of basic telecommunications services to open entry and procompetitive regulation of these services. These commitments will allow U.S. companies to enter previously closed foreign markets and develop competing networks for local, long distance, wireless and international services. In most cases, these markets have been entirely closed to competition until now. The initiative to move from a world of regulated monopolies to one that is characterized by open entry policies parallels the procompetitive and deregulatory mandate of the Telecommunications Act of 1996.

5. This *Order* represents the culmination of efforts taken by the Commission to promote competition in the global market for telecommunications services. Beginning in November 1995, when only a handful of the world's telecommunications markets were open to competition by U.S. carriers, the Commission issued the *Foreign Carrier Entry Order* to encourage foreign governments to

---

[4] *See Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, IB Docket No. 96-111, Report and Order, FCC No. 97-399 (rel. Nov. 26, 1997) (*International Satellite Service Order*).

[5] *See International Competitive Carrier Policies*, CC Docket No. 85-107, Report and Order, 102 FCC 2d 812 (1985).

open their markets to competition.[6] That order adopted the effective competitive opportunities (ECO) test. The ECO test required, as a condition of foreign carrier entry into the U.S. market, that there be no legal or practical restrictions on U.S. carriers' entry into the foreign carrier's market. The ECO test was crafted to serve our three goals for regulation of international telecommunications services: to promote effective competition in the U.S. telecommunications service market; to prevent anticompetitive conduct in the provision of international services or facilities; and to encourage foreign governments to open their telecommunications markets.[7]

6. In addition, the Commission's 1996 *Flexibility Order* opened the way for carriers to engage in alternative arrangements outside of traditional settlement practices to encourage the more economically efficient routing of traffic.[8] The recent *Benchmarks Order* requires U.S. carriers to reduce the settlement rates they pay to foreign carriers and also imposes certain conditions on participation in the U.S. market that are aimed at reducing the incentives and ability of a foreign carrier to act anticompetitively to the detriment of U.S. consumers.[9] These orders, along with the market-opening commitments contained in the WTO Basic Telecom Agreement, pave the way for a new approach to foreign participation in the U.S. telecommunications market.

7. Even before the effective date of the WTO Basic Telecom Agreement, significant procompetitive changes in global telecommunications markets have been evident. In the two years since the *Foreign Carrier Entry Order* became effective in January 1996, the world has seen a significant change in the structure of international telecommunications markets. Throughout the world, markets are opening, more and more traffic is exchanged outside of the traditional settlements process, and new technologies are having a profound impact on traffic patterns. In January 1996, only 17 percent of the world's top 20 telecommunications markets were open to U.S. companies. Pursuant to the WTO Basic Telecom Agreement, 92 percent of major markets are covered by commitments to remove restrictions on competition and foreign entry by January 1, 1998. We expect that competitive forces will soon result in higher quality, lower priced, more innovative service offerings. Carriers are adopting non-traditional, more cost-efficient means of routing traffic, such as routing switched traffic over private lines and switched hubbing. Some experts predict that by 2005, the resale market will be

---

6 *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket 95-22, Report and Order, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*), *recon pending*.

7 *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3877 ¶ 6.

8 *Regulation of International Accounting Rates*, Phase II, CC Docket 90-337, Fourth Report and Order, 11 FCC Rcd 20,063 (1996), *recon. pending* (*Flexibility Order*).

9 *International Settlement Rates*, IB Docket 96-261, Report and Order, FCC 97-280 (rel. Aug. 18, 1997) (*Benchmarks Order*), *recon. pending, appeal filed, Cable & Wireless et al. v. FCC*, No. 97-1612 (D.C. Cir. filed Sept. 26, 1997). Settlement rates are the per-minute rates paid by U.S. and foreign carriers to terminate international traffic.

worth ten times what it was in 1996.[10] New technologies such as callback and Internet telephony are already putting significant pressure on international settlement rates and domestic collection rates.

8. In June 1997, the Commission issued a *Notice of Proposed Rulemaking* to create a new regulatory framework for the more open environment sparked by the WTO Basic Telecom Agreement.[11] In response to our proposed rules, we received comments from 47 parties, including 14 foreign telecommunications carriers.[12] We discuss below the issues raised in the *Notice*, as well as the responses of commenting parties. In addition, we address in this *Order* related issues raised in petitions for reconsideration of the *Foreign Carrier Entry Order*.[13]

9. With this *Order*, we remove the ECO test and replace it with an open entry standard for applicants from WTO Member countries. We find that the commitments made in the context of the WTO Basic Telecom Agreement, an increasingly competitive environment and our improved regulatory tools enable us to adopt a deregulatory approach that presumes entry is in the public interest. In light of the market-opening commitments in the WTO Basic Telecom Agreement, we expect to see a shift away from monopoly provision of telecommunications services and toward competition, open markets and transparent regulation. Instead of undertaking an in-depth review of the competitiveness of each foreign market in order to preclude potential anticompetitive conduct, we address such concerns with safeguards, while allowing more open competitive entry. We find that our own enhanced safeguards, together with those introduced by our trading partners, pursuant to their commitments to procompetitive regulatory principles, should be sufficient to reduce the danger of anticompetitive conduct resulting from foreign entry into the U.S. market.

10. We find that the market-opening approach we adopt in this *Order* will have significant benefits for consumers. First, we find that entry by foreign suppliers of telecommunications services will stimulate the U.S. market for international services, creating incentives for carriers to offer existing services at lower prices and adopt innovative new services to attract residential and small business customers. Second, we find that further opening the U.S. market to foreign carrier entry, along with U.S. carrier entry into foreign markets, will let carriers capitalize on newly found

---

[10] Ovum Ltd., *Resale and Callback, International Telephony: Opportunities and Threats* 17 (Nov. 1996).

[11] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket 97-142, Order and Notice of Proposed Rulemaking, FCC 97-195 (rel. June 4, 1997) (*Notice*).

[12] See Appendix A for a complete list of parties filing comments and reply comments.

[13] BT North America Inc. Petition for Reconsideration (IB Docket No. 95-22) (BTNA Petition); Cable & Wireless, Inc., Petition for Reconsideration (IB Docket No. 95-22) (CWI Petition); MCI Telecommunications Corporation Petition for Reconsideration (IB Docket No. 95-22) (MCI Petition); Telefónica Larga Distancia de Puerto Rico, Inc., Petition for Reconsideration (IB Docket No. 95-22) (TLD Petition); WorldCom, Inc., Petition for Reconsideration (IB Docket No. 95-22) (WorldCom Petition); *see also* Reply Comments of NYNEX Corp., Regulation of International Accounting Rates (CC Docket No. 90-337) (NYNEX *Flexibility* Reply Comments).

efficiencies by offering one-stop shopping. This allows customers to have a single service provider in multiple markets, thereby reducing administrative costs to users.

11. We conclude that our new approach will better serve the original goals of our international telecommunications regulations as stated in the *Foreign Carrier Entry Order* than the approach outlined in that order.[14] First, we believe that removing barriers to entry and focusing on competitive safeguards will promote effective competition in the U.S. telecommunications services market by removing unnecessary regulation and barriers to entry that can stifle competition and deprive U.S. consumers of the benefits of lower prices, improved service quality, and service innovations. Second, we believe that our new approach will enable us to prevent anticompetitive conduct in the provision of international services or facilities by relying on more effective and targeted safeguards to ensure that entry by a foreign carrier with market power does not cause anticompetitive harm in the U.S. market. Third, we find that this approach will encourage foreign governments to implement their commitments to open their telecommunications markets by serving as an example that open markets and minimal regulation are beneficial to consumers and industry.

12. We are confident that global implementation of the WTO Basic Telecom Agreement will result in significant consumer and economic benefits. At the same time, however, we recognize that much work needs to be done to ensure that the promise of the WTO Basic Telecom Agreement is fulfilled. With this *Order* and the companion *International Satellite Service Order*, we have taken important steps to carry out the letter and spirit of the market-opening commitments made by the United States . We expect that foreign carriers will begin to enter and compete in the U.S. market soon after January 1, 1998. We also expect that U.S. carriers will likewise be able to enter and compete in previously closed foreign markets. We also plan to look carefully at market-opening steps taken by the rest of the world.

B. Executive Summary

Open Entry Policies for WTO Members

13. In this *Order* we adopt a new standard for foreign participation in the U.S. telecommunications market. Our rules will no longer require applicants from WTO Members to demonstrate that their markets offer effective competitive opportunities (ECO) in order to obtain Section 214 authority,[15] authorization to exceed the Section 310(b)(4)[16] foreign ownership benchmark, or a cable landing license.[17] Instead, we adopt an open entry standard for WTO Member applicants, which will enable U.S. consumers to enjoy the benefits of increased competition in U.S. markets. Our

[14] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3877 ¶ 6.

[15] 47 U.S.C. § 214.

[16] 47 U.S.C. § 310(b)(4).

[17] *See* 47 U.S.C. §§ 34-39.

approach includes a presumption in favor of foreign participation by these applicants. We find the open entry policies and competitive safeguards that many WTO Members are adopting, as well as our own improved competitive safeguards, are better able to address any competitive concerns that may arise. Although we find that our safeguards will generally provide sufficient protection against anticompetitive conduct, we recognize the possibility that circumstances might arise in which our safeguards might not adequately constrain the potential for anticompetitive harm in the U.S. market for telecommunications services. In such rare cases, the Commission reserves the right to attach additional conditions to a grant of authority, and in the exceptional case in which an application poses a very high risk to competition, to deny an application.

14. We apply the above policy to applicants from WTO Members for: (1) Section 214 authority to provide international facilities-based service as well as resold switched services and resold noninterconnected private line services; (2) cable landing licenses; and (3) authorizations to exceed the 25 percent foreign ownership benchmark in Section 310(b)(4) of the Act. We also find that the market-opening commitments of WTO Members, along with our recently adopted benchmark settlement rates condition, remove the need to maintain our equivalency analysis for carriers seeking to provide switched services over private lines between the United States and WTO Member countries.[18] Even where carriers on those routes do not meet our benchmark settlement rate condition, we will continue to approve applications to provide switched services over private lines where such markets meet our equivalency test.[19]

Policies toward Non-WTO Members

15. We find that the circumstances that existed when the Commission adopted the *Foreign Carrier Entry Order* have not changed sufficiently with respect to countries that are not members of the WTO. We find that competitive concerns continue to exist for carriers that possess the ability to exercise market power in such countries and that we should continue to pursue our goal of encouraging such countries to open their markets to competition. We therefore find that it continues to serve the public interest goals of our international telecommunications policy to apply the ECO and equivalency tests in the context of non-WTO Member countries.

---

[18] The equivalency test requires that, before granting such applications, the Commission make a finding that the country at the foreign end of the private line affords U.S. carriers resale opportunities equivalent to those available under U.S. law. *See infra* Section III.B.2.

[19] In the *Benchmarks Order*, the Commission adopted a benchmark settlement rate condition for the provision of switched services over private lines. It required that carriers seeking to provide switched services over resold or facilities-based international private lines demonstrate that settlement rates for at least 50 percent of the settled, U.S.-billed traffic on the route be at or below the appropriate settlement rate benchmark. *Benchmarks Order* ¶¶ 242-259.

Regulatory Issues

16. We conclude, in light of our new open entry approach, that we should revise the competitive safeguards governing foreign-affiliated carrier provision of basic telecommunications service in the U.S. market and, more broadly, U.S. carrier dealings with foreign carriers. In particular, we strengthen our rules preventing the exercise of foreign market power in the U.S. market. At the same time, we modify or eliminate other rules that could hamper competition. We accordingly adopt a more narrowly tailored regulatory framework that enhances our ability to monitor and detect anticompetitive behavior in the U.S. market.

17. We narrow our "No Special Concessions" rule so that it only prohibits U.S. carriers from entering into exclusive arrangements with foreign carriers that possess sufficient market power on the foreign end of a U.S. international route to affect competition adversely in the U.S. international services market.[20] To provide greater certainty to U.S. carriers as they negotiate agreements with their foreign counterparts, we adopt a rebuttable presumption that foreign carriers with less than 50 percent market share in each relevant foreign market lack such market power. We also protect the confidentiality of competing U.S. carriers and consumers by prohibiting U.S. carriers from accepting from a foreign carrier any foreign-derived confidential carrier or U.S. customer information without appropriate U.S. carrier or customer approval.

18. In the *Benchmarks Order*, the Commission concluded that we should condition foreign-affiliated carrier authorizations to provide facilities-based switched or private line service to an affiliated market on compliance with the benchmark settlement rates. The Commission found that this authorization condition is necessary to reduce the ability of carriers serving affiliated markets to engage in price squeeze behavior. We do not revisit those conclusions here, but describe the benchmark condition in this *Order*. We also decline to apply a similar condition to the provision of resold switched services to affiliated markets because we find that the incentive to engage in a predatory price squeeze is significantly less in this context than for facilities-based service. We do adopt, however, a reporting requirement for switched resellers affiliated with a foreign carrier with market power in a foreign market in order to monitor the potential for traffic distortion on the affiliated route.

19. We also revise our dominant carrier safeguards that apply to U.S. carriers with foreign affiliates that possess sufficient market power on the foreign end of a U.S. international route to affect competition adversely in the U.S. market. We decline to adopt the two-tier framework proposed in the *Notice* which would have applied more stringent supplemental dominant carrier safeguards to carriers with foreign affiliates that do not face facilities-based competition in the foreign market. We adopt the *Notice*'s proposal to modify our tariffing requirement to remove the 14-day advance notice requirement and accept tariff filings on one day's advance notice with a presumption of lawfulness for such filings. We also remove the requirement that foreign-affiliated dominant carriers obtain prior approval for circuit additions and discontinuances on their dominant route. Instead, we will apply the prior

[20] The No Special Concessions rule prohibits all U.S. international carriers from agreeing to accept special concessions from any foreign carrier or administration. *See infra* Section V.B.1.

approval requirement as a remedial measure in the event of demonstrated anticompetitive conduct. Further, we adopt a limited structural separation requirement and also require that foreign-affiliated dominant carriers file traffic and revenue reports, provisioning and maintenance reports and circuit status reports on a quarterly basis. We decline to adopt the *Notice*'s proposal to ban exclusive arrangements involving joint marketing, customer steering, or the use of foreign market telephone customer information. As with the No Special Concessions rule, we adopt a rebuttable presumption that foreign carriers with less than 50 percent market share in each relevant market on the foreign end lack sufficient market power to affect competition adversely in the U.S. market and, as a result, their U.S. affiliates should presumptively be treated as non-dominant. Finally, we emphasize that we have authority to enforce our safeguards through fines, conditional grants of authority and the revocation of authorizations.

20. We also adopt the *Notice*'s proposal to create a presumption in favor of alternative settlement arrangements on routes serving WTO Members, in place of the ECO standard set out in the *Flexibility Order*.[21] This presumption could be rebutted with a showing that there are not multiple facilities-based competitors operating in the foreign market for international services. In the event the presumption is overcome, an applicant nonetheless may demonstrate that the proposed alternative settlement arrangement will promote market-oriented pricing and competition, while precluding the abuse of market power by the foreign correspondent. We do not otherwise alter the existing approach to flexible settlement arrangements, and we retain the safeguards and enforcement mechanism adopted in the *Flexibility Order*.

Procedures

21. We adopt our proposal to streamline review of most applications for international Section 214 authority for foreign carriers or their affiliates. We will streamline the processing of an application of any carrier that qualifies for non-dominant treatment or that certifies that it will comply with our dominant carrier safeguards. We will also streamline the Section 214 application of any applicant that seeks to serve a WTO Member country only by reselling the switched services of unaffiliated U.S. international carriers. We will, in addition, streamline any application for assignment or transfer of control of a Section 214 authorization in circumstances where an initial application by the assignee or transferee would be eligible for streamlined processing. Finally, we will streamline applications to exceed the 25 percent foreign ownership benchmark under Section 310(b)(4) of the Act that do not involve an initial application or a transfer of control. We anticipate that it will normally take approximately 45 days to reach a decision on a streamlined application. For those applications that are removed from streamlined processing, we will normally issue a decision on the application within 60 days. In addition, we will no longer require authorized international common carriers to notify the Commission before accepting investments by foreign carriers (or commonly controlled companies) unless the investment by a single foreign carrier or by multiple foreign carriers acting jointly exceeds 25 percent or results in a transfer of control. We will require an authorized carrier to notify the Commission before it or its holding company acquires a direct or indirect interest of over 25 percent or a controlling interest in a foreign carrier.

[21] 11 FCC Rcd 20,063 (1996).

II. Background

A. *Foreign Carrier Entry Order*

22. The Commission adopted the *Foreign Carrier Entry Order* to promote its procompetitive goals in regulating international telecommunications services. In that order, the Commission adopted the ECO test as part of an overall public interest analysis for both international Section 214 authorizations and indirect foreign ownership of common carrier radio licensees under Section 310(b)(4). Prior to adopting the ECO test, the Commission evaluated foreign carrier applications to provide service in the U.S. market on an *ad hoc*, case-by-case basis. Under the *Foreign Carrier Entry Order*, we apply the ECO test to applications for international facilities-based, switched resale, and non-interconnected private line resale under Section 214 only in circumstances where an applicant seeks authority to provide the service between the United States and a destination market in which an affiliated foreign carrier has market power in a relevant market.[22] We also apply the ECO test to common carrier radio applicants or licensees that seek to exceed the 25 percent indirect foreign ownership benchmark contained in Section 310(b)(4).

23. In applying our ECO test, we first examine first the legal, or *de jure*, ability of U.S. carriers to enter the foreign destination market and provide the relevant service. If there are no legal barriers to entry, we consider the practical ability for U.S. carriers to compete in those markets. This analysis focuses on the actual conditions of entry, *i.e.*, terms and conditions of interconnection, competitive safeguards, and the regulatory framework.[23]

24. The *Foreign Carrier Entry Order* also delineated additional public interest factors that we consider in determining whether to grant a foreign-affiliated carrier's application. We consider these factors in addition to the ECO analysis, and they may weigh in favor of or against grant of a particular application. These include the general significance of the proposed entry on competition in the U.S. telecommunications services market, the presence of cost-based accounting rates (under

---

[22] In general, for purposes of applying our ECO test under Section 214 of the Act, we consider an applicant to be affiliated with a foreign carrier when a foreign carrier owns a greater than 25 percent interest in, or controls, the applicant. 47 C.F.R. § 63.18(h)(1)(i); *Foreign Carrier Entry Order*, 11 FCC Rcd at 3900-02, 3966-69 ¶¶ 73-78, 248-251; *see also id.* at 3902-06 ¶¶ 88-92 (scrutiny of foreign carrier investments of 25 percent or less; aggregation of multiple carrier interests).

[23] *Foreign Carrier Entry Order*, 11 FCC Rcd at 3890-94 ¶¶ 42-53 (we examine "whether there exist reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services . . . [and whether there are] adequate means to monitor and enforce these conditions"); (competitive safeguards we examine include: "(1) existence of cost-allocation rules to prevent cross-subsidization; (2) timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities; and (3) protection of carrier and customer proprietary information"); (in examining the regulatory framework in the destination country, our focus is on "whether there is separation between the foreign regulator and the operator of international facilities-based services, and whether there are fair and transparent regulatory procedures in the destination market").

Section 214), as well as national security, law enforcement issues, foreign policy and trade concerns brought to our attention by the Executive Branch.[24] Finally, the Commission stated that it would amend its rules if the Executive Branch were to succeed in negotiating greater market access for U.S. carriers.[25]

B. WTO Basic Telecom Agreement

25. The WTO Basic Telecom Agreement was concluded under the framework established by the General Agreement on Trade in Services (GATS), which is one of the agreements negotiated in conjunction with the creation of the WTO.[26] For the first time, the GATS brought trade in services within the international trading regime established for trade in goods by the General Agreement on Tariffs and Trade after the Second World War. The GATS consists of general obligations and specific sectoral commitments contained in individual Member schedules.[27]

26. At the conclusion of the negotiations creating the WTO in April 1994, the United States and other WTO Members made commitments to allow market access for a broad range of services — including such diverse industries as construction services, professional services (such as legal and medical services), distribution services, and value added (or enhanced) telecommunications services.[28] Basic telecommunications, however, was one of a limited number of service sectors for which negotiations were extended beyond the April 1994.[29] WTO Members recognized the economic importance of basic telecommunications services and established a separate, sector-specific negotiation for these services, which were scheduled to conclude by April 30, 1996. Because the negotiations had made insufficient progress by that date, the WTO agreed to extend the deadline for concluding the negotiations to February 15, 1997.

---

[24] *Id.* at 3896-3899 ¶¶ 61-65.

[25] *Id.* at 3964-65 ¶¶ 239-244.

[26] The WTO came into being on January 1, 1995, pursuant to the Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1125 (1994) (the "Marrakesh Agreement"). The Marrakesh Agreement consists of multilateral agreements on trade in goods, services, intellectual property and dispute settlement. The General Agreement on Trade in Services is Annex 1B of the Marrakesh Agreement, 33 I.L.M. 1167 (1994). There are currently about 130 members of the WTO.

[27] *See infra* Section VII for a fuller description of the GATS.

[28] The United States adopted the Commission's definition of enhanced services for purposes of its GATS obligations, that is, services offered over common carrier transmission facilities which employ computer processing applications that 1) act on the format, content code, protocol or similar aspects of the subscriber's transmitted information; or 2) provide the subscriber additional, different or restructured information; or 3) involve subscriber interaction with stored information. *See* 47 C.F.R. § 64.702.

[29] The other sectors were financial services and maritime services.

27. As a result of the WTO Basic Telecom Agreement, 44 WTO Members (representing 99 percent of WTO Members' total basic telecommunications services revenues) will permit foreign ownership or control of all telecommunications services and facilities, while an additional 12 WTO Members will permit foreign ownership of some telecommunications services. Fifty-two WTO Members (covering 88 percent of WTO Members' international services revenues) will provide market access for the provision of international services and another five will provide market access for limited international services. Forty-nine WTO Members (accounting for more than 80 percent of WTO Members' total satellite services revenues) also guaranteed market access for the provision of satellite services. In addition, 55 WTO Members agreed to adopt the Reference Paper, which sets out pro-competitive regulatory principles (Reference Paper),[30] and another ten WTO Members agreed to adopt these regulatory principles in part or at a future date. These regulatory principles are consistent with the requirements of the Communications Act and the Telecommunications Act of 1996 passed by Congress in February 1996.[31] The WTO Basic Telecom Agreement is scheduled to enter into force on January 1, 1998.[32]

28. The commitments of the 69 countries that participated in the WTO Basic Telecom Agreement can be enforced through WTO dispute settlement process.[33] If a WTO Member fails to give a U.S. carrier market access consistent with that WTO Member's commitments or fails to implement the Reference Paper regulatory principles, the United States may enforce those commitments through the dispute settlement process at the WTO. The remedies available if the United States prevails include, first, an obligation by the losing WTO Member to fulfill its market access commitments or implement the necessary regulatory principles. If the losing WTO Member fails to do so, it is required to compensate the United States in trade terms or else the United States may take compensatory trade action, first in the services sector, but if sufficient compensatory trade action is not available in the services sectors, then the United States would be authorized to take compensatory action in the goods sector. Thus, if a WTO Member that has committed to allow market access to provide international service denied a license to a U.S. carrier on the grounds of its nationality, the United States would have the right to take a dispute against that WTO Member in the WTO. Similarly, if a dominant carrier provided interconnection to U.S. carriers on less favorable terms than it provides to its own affiliates or to carriers from a third country, the United States could take to the WTO a dispute against the dominant carrier's government for failing to maintain measures to ensure nondiscriminatory interconnection. While companies from the defendant WTO Member might not be interested in entering the U.S. telecommunications market, its industry likely would have substantial volumes of trade with the United States in a variety of other goods and services sectors. Thus, if the United States prevailed in a dispute, the losing WTO Member would most likely agree to fulfill its

---

[30] The regulatory principles embodied in the Reference Paper are described below in Section VII, *infra*.

[31] Pub. L. No. 104-104, 110 Stat. 56.

[32] *See* ¶ 3 of the Fourth Protocol to the GATS.

[33] GATS Article XXII provides that any WTO Member may initiate a dispute settlement if it believes that another Member has failed to carry out its obligations and commitments.

market access or regulatory principles commitments rather than provide trade compensation in other services or goods sectors.

III. Open Entry Policies toward WTO Member Countries

A. General Standard for Foreign Participation

29. We adopt in this *Report and Order* a new standard for foreign participation in the U.S. telecommunications market. We will no longer require applicants from WTO Members to demonstrate that their markets offer effective competitive opportunities in order to obtain Section 214 authority, authorization to exceed the Section 310(b)(4) foreign ownership benchmark, or a cable landing license. We find here, as discussed below, that the binding commitments made by 69 WTO Members to open their telecommunications markets to competition, along with the increased pressure to lower settlement rates and the emergence of new technologies and routing configurations, will bring dramatic changes to the competitive landscape for global telecommunications services. In anticipation of these changes, we adopt an open entry standard for WTO Member applicants. From the effective date of this *Order* forward, the Commission will expeditiously grant the vast majority of applications filed by foreign telecommunications carriers and investors. We find it will no longer be necessary or appropriate to engage in the detailed, in-depth analysis of foreign markets that the ECO test required.

1. Removing ECO

Background

30. In the *Notice*, the Commission tentatively concluded that it should remove the ECO test. It stated that the WTO commitments of 68 other governments would substantially achieve the goals we articulated in the *Foreign Carrier Entry Order*[34] and would promote effective competition in the U.S. international services market. This tentative conclusion was based, in part, on the Commission's finding that the commitments of WTO Members on basic telecommunications services would, when fulfilled, substantially open foreign markets and reduce foreign carriers' ability to engage in anticompetitive conduct when they enter the U.S. market to provide international services.[35] The Commission also tentatively concluded that eliminating the ECO test would significantly reduce the time and regulatory burden associated with foreign carrier entry into the U.S. market.[36] The Commission therefore proposed to eliminate the ECO test from its public interest analysis of pending and future applications filed by applicants from WTO Members for Section 214 authority, cable

[34] *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*).

[35] *See Notice* ¶ 29.

[36] *Id.* ¶ 34.

landing licenses and requests to exceed the 25 percent indirect foreign ownership benchmark for common carrier radio licenses.[37]

Positions of the Parties

31. Most commenters strongly support removal of the ECO test.[38] These parties generally agree that, in light of the competitive changes expected to result from commitments of 68 other WTO Members to open their telecommunications markets, it is no longer necessary to maintain the ECO test. Such commenters state that by eliminating the ECO test, the Commission and carriers can save valuable time and resources by not engaging in a detailed and particularized ECO analysis.[39] Commenters also contend that removing the ECO test will promote entry by foreign carriers and thus stimulate competition in the U.S. market.[40] Several commenters urge the Commission to remove the ECO test in order to set an example for other WTO Members to follow as they open their own markets.[41] A number of carriers argue that GATS principles compel the removal of the ECO test and that the Commission should acknowledge that the agreement requires that it take the proposed action.[42]

32. AT&T and Ameritech argue that we should retain an entry standard that evaluates the extent to which the applicant's country provides unrestricted market access, allows a controlling foreign ownership interest, and satisfies the Reference Paper. These commenters argue that several WTO Members have made weak commitments, which are inadequate to ensure that they will be unable to act anticompetitively, and others have made no commitments at all.[43] Several carriers object to AT&T's proposed standard on the basis that it is inconsistent with GATS principles.[44]

---

[37] *Id.* ¶¶ 55, 62, 73.

[38] *See, e.g.*, C&W Comments at 3 (stating that elimination of the ECO test will prompt foreign-affiliated carriers to participate more fully in the U.S. market, thereby promoting competition and its intended benefits); *see also* Telmex Comments at 4; Sprint Comments at 3.

[39] FT Comments at 13-14; Telmex Comments at 4.

[40] Telmex Comments at 4; C&W Comments at 3.

[41] Telmex Comments at 4 (stating that, by promptly eliminating the ECO test, the Commission will set an example for other countries preparing to implement their own WTO commitments, further ensuring that those countries take their WTO commitments seriously); GTE Comments at 29-30; FT Comments at 4-5.

[42] GTE Reply Comments at 4-5; DT Comments at 19; KDD Comments at 3; Sprint Comments at 4.

[43] AT&T Comments at 18-19; Ameritech Comments at 7; *see also* WorldCom Comments at 4-5.

[44] *See, e.g.*, KDD Reply Comments at 2-3; TLD Reply at 4-6.

Discussion

33. We find that the Commission need no longer require applicants from WTO Member seeking to enter the U.S. market to demonstrate that their markets offer effective competitive opportunities. The WTO commitments of our trading partners require that they open their markets to competition and promote the introduction of procompetitive regulatory principles. These changes, along with our improved competitive safeguards and major changes in technology and traffic routing, remove the need for the Commission to engage in an ECO analysis for applicants from WTO Members. Two years ago, the goals of our international telecommunications policy were best served by the ECO test. These goals remain constant, but we conclude that they will henceforth be largely fulfilled by the emerging market changes resulting from the open markets for telecommunications services in combination with our improved safeguards. We therefore conclude that we can remove the ECO test from our public interest analysis and adopt an open entry policy as discussed below.

34. We find that our revised dominant carrier safeguards, together with our "No Special Concessions" requirement, discussed below, will sufficiently address competitive concerns resulting from foreign participation in U.S. telecommunications markets.[45] Further, we conclude that our settlement rate benchmarks conditions will provide an effective regulatory tool in removing incentives and reducing the ability of foreign carriers to engage in anticompetitive behavior in the U.S. international services market.[46] In addition, the Commission has various tools at its disposal to deter anticompetitive conduct. It possesses the power to impose fines and forfeitures and to condition authorizations where necessary to ensure compliance with our rules and policies.[47] Enforcement of antitrust laws is also available to remedy anticompetitive conduct or effects. We find that, as a result of increased competition and the development of effective regulatory regimes in foreign countries, foreign telecommunications carriers will possess far less market power than they did when the ECO test was adopted in 1995. We therefore find that we can rely on our competitive safeguards, instead of our existing ECO framework, to address concerns of anticompetitive behavior.

35. We also find that there are significant public interest benefits from removing the ECO test. As we stated in the *Notice*, eliminating the ECO test will significantly reduce the time and regulatory burden associated with foreign entry into the U.S. market. Application of the ECO analysis has required substantial commitments of time and resources by applicants and the Commission. We also find that entry by foreign carriers will stimulate competition in the U.S. market for international services, increasing pressure on existing carriers to lower prices and improve quality of service. We

---

[45] Our No Special Concessions requirement prohibits a U.S. licensed carrier from agreeing to accept directly or indirectly, special concessions from any foreign carrier or administration. We modify this condition below. *See infra* Section V.B.

[46] The benchmark settlement rates condition requires that the foreign affiliate of a U.S. international carrier agree to accept no more than a benchmark settlement rate from all U.S. correspondents on the affiliated route. *See Benchmarks Order* ¶¶ 195-231; *see also infra* Section V.C.1.

[47] 47 U.S.C. §§ 214, 502, 503.

therefore find that eliminating the ECO test will result in significant benefits to consumers and industry.

36. AT&T opposes our proposal to remove the ECO test. It argues that the WTO Basic Telecom Agreement does little to constrain the market power of carriers from a majority of WTO Member.[48] It states that countries that have made limited commitments or no commitments will continue to pose a significant threat of anticompetitive conduct and that the WTO Basic Telecom Agreement does not justify removing restrictions for these countries. It also argues that, regardless of a country's commitment, competitive dangers continue to exist until WTO commitments are fully and adequately fulfilled.[49] Rather than removing the ECO test, it urges the Commission to adopt a modified ECO test that focuses on "the extent to which an applicant's ability to abuse its market power is limited by effective competition."[50] AT&T bases its concern on its statement that only "25 countries would meet the ECO requirements by 2000, and 39 countries would do so in total by the time all WTO commitments are effective in 2013".[51] Other parties generally oppose considering the extent to which a country has implemented its commitment in determining whether to grant entry to a foreign applicant.[52]

37. We do not find it necessary or appropriate to retain the ECO test or examine the extent to which a WTO Member has made a market opening commitment or the extent to which that commitment has been implemented in determining whether a carrier from that country should enter the U.S. market. For the reasons discussed below, the likelihood of harm from carriers with market power in countries that have not adopted a commitment to open their markets is reduced as a result of the WTO Basic Telecom Agreement. We also find that treating carriers differently from countries that have made limited or no commitments could be viewed as inconsistent with our international obligations.

38. We believe that increased competition in global markets will increase pressure on all WTO Members to liberalize their telecommunications markets, including those that have made no

---

[48] AT&T Comments at 18; *see also* Ameritech Comments at 3-8.

[49] AT&T Comments at 6.

[50] AT&T Comments at 18.

[51] AT&T Comments at 9-11; *see also* WorldCom Comments at 4. We also note that AT&T and MCI argued in our *Benchmarks* proceeding that if the Commission did not require that carriers providing service on an affiliated route to settle traffic at total service long-run incremental cost (TSLRIC) based rates, then it should retain the ECO test. As discussed in the *Benchmarks Order*, we do not find that requiring foreign carriers entering the U.S. market to adopt TSLRIC-based settlement rates is in the public interest at this time. Also, for the reasons discussed below, we decline to retain the ECO test. *See Benchmarks Order* ¶¶ 221-223.

[52] Telefónica Internacional Comments at 16; FaciliCom Comments at 4, 6; Sprint Comments at 10-11; *see also Notice* ¶ 47.

commitments or limited commitments. After January 1, 1998, the largest telecommunications markets in the world will be open to competition, and we expect that new international carriers will develop in many of those markets. Those carriers and their governments will likely pressure foreign governments that have not liberalized not to tolerate anticompetitive abuses. We also expect that, as members of the global trading regime, WTO Members will be subject to this pressure to a greater degree than non-WTO countries. A key consideration is that, as countries that have not made commitments begin to liberalize, the GATS obligations that apply to all WTO Members will require WTO Members to treat foreign carriers from different countries in the same manner.[53] We also find that the threat of harm from carriers from countries that have made limited or no commitments may not justify retaining the ECO test. The countries that AT&T identifies as not committing to offer effective competitive opportunities in the near future account for less than 5 percent of the telecommunications revenue of WTO Member.

39. Moreover, we find that the potential for harm from carriers from countries that have not implemented their market-opening commitments to allow competition in their telecommunications markets does not justify imposing the strict limitations on entry that AT&T proposes. We note that USTR plans to monitor other Members' compliance with their WTO obligations and to pursue consultation and dispute settlement where noncompliance is found.[54] Where a WTO Member fails to implement its commitment, the United States has the ability to enforce a Member's commitment.[55] Second, we find that it is in the interest of our trading partners implementing their commitments to engage in similar oversight, along with the United States, over third countries.

40. We also find that discriminating among foreign applicants based on the quality of their WTO commitment or the extent of the implementation of their commitment could raise serious GATS concerns. Adopting such a policy could damage relations with our trading partners and serve as a poor example to other countries also implementing their market opening commitments. As discussed below, Article II of the GATS requires WTO Members to accord "service and service suppliers of any other Member treatment no less favorable treatment than that it accords to like services and service suppliers of any other country."[56] Adopting a policy that limits access to the U.S. market by telecommunications carriers purely based on the existence or quality of a country's commitment would be viewed by many WTO Members as a violation of the GATS. In contrast to our policy that considers the competitive impact of a firm's entry into the U.S. market, a policy of discrimination among carriers based on their WTO commitment alone could be interpreted by other WTO Members

---

[53] All countries that are party to the GATS have agreed, under the MFN obligation, not to discriminate among suppliers from other WTO Members, regardless of whether the service supplier's country has made a market-opening commitment in that particular service sector. *See infra* ¶¶ 336-338.

[54] USTR Reply Comments at 8-9.

[55] *See supra* ¶ 28.

[56] GATS art. II; *see infra* ¶ 336; *see also* USTR Reply Comments at 10-12.

as discriminating among "like" service suppliers based solely on foreign market conditions.[57] This could be perceived as a violation of Article II of the GATS. Regardless of whether AT&T's proposal that we retain the ECO test is consistent with U.S. GATS obligations, we find that the example the United States sets to other WTO Members would be undermined by adoption of AT&T's proposal. The success of the WTO Basic Telecom Agreement depends on implementation of the market-opening commitments of our trading partners. The United States must lead the way in prompt, effective implementation of our commitments.[58] If the United States is perceived as failing to implement its commitment, other countries would likely limit implementation of their own commitments. We find such a result would deny the benefits of open global markets and increased competition to U.S. carriers and consumers, and is not in the public interest.

41. We also find that our revised safeguards will prove to be powerful tools against anticompetitive conduct. We are confident that our benchmarks condition and regulatory safeguards will be effective at addressing most cases of anticompetitive conduct.[59] As discussed below, our revised reporting, No Special Concessions, and separate affiliate requirements will improve our ability to monitor carriers with the ability to exercise foreign market power.[60] We also find that our enforcement mechanism for detecting market distortions by a foreign-affiliated telecommunications carrier will be effective at deterring anticompetitive conduct. In the *Benchmarks Order*, the Commission adopted a trigger to determine when a market distortion has occurred, at which time enforcement action will be taken.[61] In addition, the Commission may condition grants of authority for carriers found likely to engage in anticompetitive conduct or impose sanctions on carriers failing to comply with Commission rules.[62]

42. We therefore find little justification for imposing a strict entry standard such as AT&T advocates. Further, adopting AT&T's proposal would require that we engage in an in-depth, fact-intensive analysis of the applicant's market that would be an unnecessary burden on the applicant and a drain on the scarce resources of the Commission. Such a standard would also set a poor example to those countries that the U.S. government has urged to open their markets and could damage U.S.

---

[57] *See infra* ¶ 357; *see also* USTR Reply Comments at 10-11.

[58] USTR Comments at 2.

[59] *See infra* Section V.

[60] *See infra* Sections V.B.1, V.C.2.b.(iv)-(vi).

[61] *Benchmarks Order* ¶¶ 224-227. The trigger the Commission adopted in the *Benchmarks Order* is a rebuttable presumption that a market distortion has occurred where any of a foreign affiliated carrier's tariffed collection rates on an affiliated route are less than the carrier's average variable cost on the route. Enforcement action can include requiring a carrier to lower its settlement rates on an affiliated route to the level of our best practice rate ($.08) or revoking its authorization to provide service on the affiliated route.

[62] *See, e.g.*, *Sprint Corp.*, Declaratory Ruling and Order, 11 FCC Rcd 1850 (1996) (*Sprint Order*).

relations with our trading partners by creating a perceived barrier to entry. More importantly, AT&T's entry standard would significantly restrict access to the U.S. market, denying U.S. consumers the competitive benefits of foreign carrier entry.

43. We find that the goals underlying the ECO test will largely be achieved by implementation of the WTO Basic Telecom Agreement, and that new technologies, alternative traffic routing options, and settlement rate reform further increase the pressure to liberalize and support competition. We therefore find that it is no longer necessary to include the ECO analysis as a part of our overall public interest finding for Section 214 applications, common carrier radio license applications to exceed the 25 percent indirect foreign ownership benchmark in Section 310(b)(4) and applications for cable landing licenses. Because we are removing the ECO test, there is no need to address the issue of whether it is GATS consistent.[63] We find that removing the ECO test is also likely to have the effect of providing a positive example to foreign countries that have committed to open their markets to competition. It is our expectation that the market-opening measures we take here to implement United States' WTO commitments will serve as an example for other countries that are implementing their commitments as well.

2. Public Interest Analysis

44. The Commission is under a statutory obligation to ensure that grant of Section 214 authority is consistent with the public convenience and necessity[64] and that grant of a Section 310(b)(4) application to exceed the 25 percent indirect foreign ownership benchmark is consistent with the public interest.[65] In both cases, the Commission has considered the overall impact of the grant of authority on the public interest. The Commission has made this determination with respect to all applications, from both foreign and domestic applicants, since the Communications Act was passed in 1934.

45. Prior to adoption of the *Foreign Carrier Entry Order*, the Commission evaluated foreign ownership in U.S. telecommunications carriers and radio licensees on an *ad hoc*, case-by-case basis. Each application from a foreign entity was evaluated under our public interest analysis. For carriers seeking authority to provide facilities-based or resold telecommunications services, the Commission balanced its policy in favor of open market entry against the potential for undue discrimination by the foreign parent against unaffiliated U.S. carriers.[66] For applicants seeking authority to exceed the 25

---

[63] *See* GTE Reply Comments at 4-5.

[64] 47 U.S.C. § 214(a).

[65] 47 U.S.C § 310(b)(4).

[66] *See, e.g., Telefónica Larga Distancia de Puerto Rico*, 8 FCC Rcd 106, 111-113 (1992); *Americatel Corp.*, 9 FCC Rcd 3993 (1994); *BT/MCI Declaratory Ruling*, 9 FCC Rcd 3960 (1994). *See generally Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket 95-22, Notice of Proposed Rulemaking, 10 FCC Rcd 4849-4853 ¶¶ 10-19 (1995) (*Foreign Carrier NPRM*).

percent indirect foreign ownership benchmark in a common carrier radio licensee under Section 310(b)(4) of the Act, the Commission considered national security issues, the extent of alien participation, the type of radio license and the extent to which the investment would further the Commission's policies.[67] At that time, the Commission also engaged in a similar analysis for cable landing licenses.[68]

46. In the *Foreign Carrier Entry Order*, the Commission adopted the ECO test as an important part of the Commission's public interest analysis governing grant of a Section 214 or 310(b)(4) application. The Commission also articulated additional public interest factors that it would consider relevant to either the grant or denial of foreign carrier applications. These factors include the general significance of the proposed entry to the promotion of competition in the U.S. communications market, the presence of cost-based accounting rates, and any national security, law enforcement, foreign policy or trade concerns raised by the Executive Branch.[69] Although we find that we should no longer engage in the ECO analysis, for the reasons detailed below, we are statutorily obligated to evaluate all applications to ensure that they are consistent with the public interest.

a. Presumption in Favor of Entry

Background

47. In the *Foreign Carrier Entry Order*, the Commission found that the ECO analysis should serve as an important element in the Commission's public interest analysis. In the *Notice*, the Commission tentatively concluded that the commitments of 68 other governments will, when fulfilled, significantly reduce the risk of anticompetitive effects of entry by a foreign applicant, and that post-entry safeguards will be able to protect competition in the U.S. telecommunications market.[70] The Commission proposed to remove the ECO test from our existing public interest analysis and replace it with a rebuttable presumption in favor of entry for applicants from WTO Members. The Commission tentatively concluded that the dominant carrier safeguards and conditions on grant of authority would normally be sufficient to address competitive concerns. If an application posed a very high risk to competition, the Commission proposed that it would reserve the right to condition a grant of authority or, in exceptional cases, deny an application.[71]

---

[67] *See, e.g.*, *GRC Cablevision, Inc.*, 47 FCC 2d 467, 468 (1974); *BT/MCI Declaratory Ruling*, 9 FCC Rcd at 3964; *Teleport Transmission Holdings, Inc.*, 8 FCC Rcd 3063 (Com. Car. Bur. 1991). *See generally Foreign Carrier NPRM*, 10 FCC Rcd at 4851-4853 ¶¶ 15-19.

[68] *See Telefónica Larga Distancia de Puerto Rico, Inc.*, FCC 97-127, SCL-93-001, ¶ 26 & n.35 (rel. May 2, 1997) (*TLD Order*); *see also Optel Communications Inc.*, 8 FCC Rcd 2267 (1993).

[69] *See, e.g.*, *Foreign Carrier Entry Order*, 11 FCC Rcd at 3894-97 ¶¶ 56-62.

[70] *Notice* ¶¶ 29-42.

[71] *See id.* ¶¶ 39-43, 63, 64, 75.

Positions of the Parties

48. The reaction of commenters to our proposal to adopt a rebuttable presumption in favor of entry was divided. Sprint, BT North America, and others favor adoption of the proposed presumption.[72] Sprint states, however, that the standard should be rebuttable "only in exceptional circumstances" and may be irrebuttable in fact.[73] AT&T and WorldCom argue that we should not adopt a presumption in favor of entry but should instead maintain a case-by-case public interest analysis with no presumption.[74] Others, however, oppose our proposal on the grounds that there is no basis for any restrictions on foreign entry for applicants from WTO countries.[75] For instance, Deutsche Telekom argues that if regulatory safeguards are sufficient to allow the Commission to eliminate ECO, then they are sufficient to allow the Commission to adopt an unrestricted open entry policy.[76]

49. Reaction to our proposal to reserve the right to deny an application that poses a "very high risk to competition" was mixed. Foreign carriers in general argue that the standard is vague and that our proposal accords too much discretion to the Commission.[77] The European Commission expresses its concern that foreign companies seeking to enter the U.S. market "would be subject to challenges from their competitors based on unclear conditions and criteria."[78] GTE argues that we should rely on countries' commitments to adopt the Reference Paper to prevent anticompetitive conduct and is concerned that denying entry for competitive reasons may serve as a poor example to other countries that have yet to implement their WTO commitments.[79] NTIA agrees with our proposal.[80] A

---

[72] Sprint Comments at 6-7; BTNA Comments at 2-3; FaciliCom Comments at 1, 5; SOSCo Comments at 1.

[73] Sprint Comments at 6-7.

[74] AT&T Comments at 22; WorldCom Comments at 2-4.

[75] *See, e.g.*, DT Comments at 16, 19; FT Comments at 4-6; NTT Comments at 2; Japan Comments at 3.

[76] DT Comments at 19-20.

[77] *See, e.g.*, Telefónica Internacional Reply Comments at 5; DT Comments at 14-16; FT Comments at 6; European Commission Comments at 2; NTT Reply Comments at 2.

[78] European Commission Comments at 4.

[79] GTE Comments at 2-4, 11-13.

[80] Letter from Larry Irving, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce, to William E. Kennard, Chairman, FCC, at 2 (Nov. 5, 1997).

number of parties argue that our proposals are inconsistent with U.S. GATS obligations.[81] AT&T and WorldCom object to our proposal as well, but on the alternative ground that the "very high risk to competition" standard, as articulated in the *Notice*, is not sufficient to protect existing U.S. competitors.[82] Both carriers support a standard that would deny applications from carriers that present "substantial" competitive harm, rather than the proposed "very high risk to competition" standard.

Discussion

50. We find that adopting the Commission's proposal to replace the ECO test with a presumption in favor of entry will best balance the concerns articulated by the parties. The changes resulting from implementation of WTO Members' commitments, along with new technologies and routing configurations, will open foreign markets and increase competition in the global telecommunications service market. Further, settlement rate reform and our improved safeguards will more adequately protect against anticompetitive conduct. We thus find that a presumption in favor of entry will best advance the public interest. We therefore adopt, as a factor in our public interest analysis, a rebuttable presumption that applications for Section 214 authority from carriers from WTO Members do not pose concerns that would justify denial of an application on competition grounds. We also adopt a rebuttable presumption that such competitive concerns are not raised by applications to land and operate submarine cables from WTO Members or by indirect ownership by entities from WTO Members of common carrier and aeronautical radio licensees under Section 310(b)(4) of the Act. Because we expect that other public interest issues similarly will be raised only in very rare circumstances, we find that adopting a rebuttable presumption in favor of entry will allow the Commission to grant the vast majority of applications swiftly, while maintaining the oversight necessary to ensure that entry by an applicant from a WTO Member is consistent with the public interest.

51. Nevertheless, in exceptional circumstances, entry into the U.S. market by an applicant affiliated with a foreign telecommunications carrier from a WTO Member may pose competitive risks by virtue of the applicant's ability to exercise market power in a relevant foreign market. As discussed in the *Notice*, an applicant seeking to enter the U.S. market that is affiliated with a telecommunications carrier that possesses the ability to exercise market power in the foreign market for facilities and services necessary for the provision of U.S. international services may have the ability to discriminate in favor of its U.S. affiliate to the detriment of unaffiliated U.S. carriers. The foreign carrier could raise the costs of its U.S. affiliate's rivals through discriminatory pricing or by discriminating in provisioning and maintenance intervals or quality of service.[83] We find that our safeguards will be

---

[81] *See, e.g.*, DT Comments at 9-13; KDD Comments at 5; ETNO Reply Comments at 2-3.

[82] AT&T Comments at 20-21; WorldCom Comments at 4-5.

[83] *See Merger of MCI Communications Corporation and British Telecommunications plc*, GN Docket No. 96-245, FCC 97-302, ¶¶ 156-161 (*BT/MCI Merger Order*); *see also* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986); *infra* Section V.A.

adequate to detect and deter such conduct in virtually all circumstances.[84] We cannot rule out the possibility, however, that these measures would be ineffective at preventing anticompetitive conduct in a particular context, *and* that as a result a carrier would be able to raise the costs of its rivals to the degree that end-user customers would be injured. In such circumstances, we could find it necessary to impose certain conditions on the grant of authority. Such conditions could entail additional reporting requirements, prior approval for circuit additions, or other measures designed to ensure that a carrier with the ability to exercise market power in a relevant foreign market does not use that power to harm consumers in the U.S. market. In addition, in the exceptional case where an application poses a very high risk to competition in the U.S. market, where our safeguards and conditions would be ineffective, we reserve the right to deny an application. We therefore will presume that an application does not pose a risk of competitive harm that would justify denial unless it is shown that granting the application would pose such a very high risk to competition.

52. In order to pose a risk to competition in the U.S. market that cannot be addressed by our safeguards or conditions, and would therefore warrant denial of a license, an applicant must possess the ability to harm competition in the U.S. market in addition to the ability to exercise its foreign market power. For instance, we find it highly unlikely that acquisition of less than a controlling interest in a U.S. carrier by a foreign carrier would pose a competitive risk that we could not address.[85] Moreover, we find it highly unlikely that a carrier from a WTO Member country that has open, competitive markets and a procompetitive regulatory regime in place could pose a very high risk to competition.[86] We also do not expect that an applicant would be denied entry "based solely on market share."[87] We would, however, as stated in the *Notice*, find that entry poses a very high risk to competition that would justify denial of an authorization where a carrier would have the ability upon entry, or shortly thereafter, to raise prices by restricting output.[88]

---

[84] *See infra* Section V.C.2.

[85] An acquisition of a controlling interest would be reviewed under our merger analysis that examines in detail the competitive impact of the proposed merger. *See BT/MCI Merger Order*; *see also Application of NYNEX Corp. Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, FCC 97-286 (rel. Aug. 14, 1997) (*Bell Atlantic/NYNEX Order*).

[86] *See* GTE Comments at 10 ("[F]oreign carriers from WTO Member countries that are in compliance with the GBT Agreement and the Reference Paper should not be deemed a 'very high risk' to competition and should not be denied access to the United States on that basis.").

[87] *Id.* at 13. Although we adopt a market share threshold to determine whether a carrier possesses market power in a foreign market, we find that there must be additional indications that foreign entry could harm competition in the U.S. market to find that we could not address potential competitive harm other than by denial of a license. *See infra* Section V.B.1.

[88] *Notice* ¶ 18.

53. We are also concerned with the impact of granting an authorization to an applicant that is unlikely to abide by the Commission's rules and policies. The past behavior of an applicant may indicate that it would fail to comply with the Commission's competitive safeguards and other rules and whose behavior, as a result, could damage competition in the U.S. market and otherwise negatively impact the public interest. The public interest may therefore require, in a particular case, that we deny the application of a carrier that has engaged in adjudicated violations of Commission rules, U.S. antitrust or other competition laws, or in demonstrated fraudulent or other criminal conduct.[89] This approach is consistent with our treatment of domestic applicants.[90] We find that such conduct demonstrates that a carrier is likely to evade our safeguards and thus may pose a very high risk to competition.

54. We note some commenters' concerns that reserving the right to deny a license where we are otherwise unable to address a risk of anticompetitive harm might not provide applicants with the certainty they desire, and could create the potential for petitions to deny that could delay the granting of applications.[91] We recognize that certainty and predictability are vitally important for telecommunications businesses. In fact, as discussed below, we will place most international Section 214 applications and Section 310(b)(4) requests on streamlined processing and will normally resolve petitions to deny within 90 days.[92] We therefore expect that, except in unusual circumstances, all applications filed by foreign-affiliated entities will be expeditiously granted within a specific time frame. We also find that adopting a presumption in favor of entry will have significant public interest benefits. This approach will free the Commission and parties from engaging in a detailed, fact-intensive analysis that is time consuming and a drain on resources. The resulting swift processing of applications will therefore speed entry of new competitors into the U.S. market, thus stimulating competition and benefitting U.S. consumers. We also find that, by expediting foreign entry, we will give applicants greater certainty regarding their ability to enter into U.S. markets. Nonetheless, we are unwilling to foreclose entirely the possibility, that in exceptional circumstances, we may have to attach additional conditions to (or even deny) a particular application.

55. We disagree with those parties who advocate an unrestricted entry approach. Under the approach urged by Deutsche Telekom, Telefónica Internacional, and others, risk to competition in the U.S. market and potential harm to consumers should play no role in our analysis.[93] Deutsche

---

[89] *See id.* ¶¶ 40, 41.

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

[91] *See, e.g.*, Government of Japan Comments at 12; KDD Comments at 5.

[92] *See infra* Section VI.A.

[93] DT Comments at 6; Telefónica Internacional Comments at 3; NTT Comments at 2.