

subject to the basic dominant carrier safeguard proposal be required to maintain the same information. Telia NA and KDD argue that AT&T's proposal is more burdensome than necessary.⁵⁸⁶

276. AT&T argues that public disclosure is necessary to ensure that affiliated U.S. carriers do not benefit from discrimination in violation of the No Special Concessions rule. Cable & Wireless argues that public reports would adversely affect competition by allowing competitors to use the information "for their own competitive purposes."⁵⁸⁷ BTNA asserts that information pertaining to provisioning and maintenance of network facilities and services provided by a foreign affiliate is commercially sensitive.⁵⁸⁸ BTNA observes that the Department of Justice addressed the commercially sensitive nature of provisioning and maintenance reports in the BT/MCI Modification of Final Judgment by limiting the purpose of disclosure "to ensure that information is not used for competitive sales or marketing purposes."⁵⁸⁹

277. We adopt a requirement that each dominant foreign-affiliated carrier file quarterly reports summarizing the provisioning and maintenance of all basic network facilities and services it procures from its foreign affiliate, including, but not limited to, correspondent or other basic facilities procured on behalf of customers of joint venture offerings.⁵⁹⁰ The provisioning and maintenance of services and facilities necessary for the provision of U.S. international traffic can be a primary source of non-price discrimination by which a foreign carrier with market power can degrade unaffiliated U.S. carriers' quality of service. We find that a reporting requirement will allow unaffiliated carriers to monitor and detect whether U.S. carriers are receiving favorable treatment from their foreign carrier affiliates and to notify the Commission if undue discrimination exists.⁵⁹¹ Such a reporting requirement will serve as a strong deterrent from engaging in unduly discriminatory behavior. We find that AT&T's proposal that these reports be filed on a monthly basis is unnecessarily onerous and instead adopt a quarterly filing requirement.

278. In response to our request for comment with regard to the content of a provisioning and maintenance requirement, AT&T submitted a detailed list of filing requirements. We find that, for the most part, these filing requirements provide a reasonable basis for determining whether facilities and

⁵⁸⁶ See Telia NA Reply Comments at 4; KDD Reply Comments at 7-8.

⁵⁸⁷ C&W Comments at 8.

⁵⁸⁸ See Letter from James E. Graf II, BTNA to William Caton, Acting Secretary, FCC, IB Docket No. 97-142, filed Oct. 21, 1997 (BTNA October 21 Letter).

⁵⁸⁹ *Id.*

⁵⁹⁰ See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3975 ¶ 266.

⁵⁹¹ This requirement extends to circumstances in which a dominant foreign-affiliated carrier acts as an agent on behalf of a U.S. customer to procure services and facilities from its foreign affiliate.

services on the foreign end are provided to an affiliated U.S. carrier on a non-discriminatory basis.⁵⁹² The provisioning and maintenance reports should contain, at a minimum, the following: the types of circuits and services provided, the average time intervals between order and delivery, the number of outages and intervals between fault report and service restoration, and, for circuits used to provide international switched service, the percentage of "peak hour" calls that failed to complete. We do not include the average number of circuit equivalents available to the affiliated U.S. carrier because we collect information on circuit status in the quarterly circuit status report we adopt below. We do not dictate the format of the report at this time, although we delegate authority to the International Bureau to adopt a standardized reporting manual if it determines that a uniform format would be helpful. We also delegate authority to the International Bureau to modify the contents of the filing requirements as necessary.

279. With regard to the public disclosure of the provisioning and maintenance reports, we agree with BTNA's comments that requiring a limited class of carriers to file public reports creates information inequities that parties could exploit for commercial advantage. We also find, however, that public disclosure allows the Commission *and* competing carriers to monitor whether U.S. affiliates benefit from undue discrimination in violation of the No Special Concessions rule. To strike a balance, we will allow carriers subject to the provisioning and maintenance reporting requirement to seek a protective order, which essentially requires parties to whom confidential information is made available to limit the persons who will have access to the information and the purposes for which the information will be used.⁵⁹³ Here, we will allow interested parties to review the reports for purposes of determining whether the affiliated U.S. carrier is receiving provisioning and maintenance on a discriminatory basis and, where appropriate, to file a complaint with the Commission.

280. In recent years, the Commission "has relied on special remedies such as . . . protective orders to balance the interests in disclosure and the interests in preserving the confidentiality of competitively sensitive materials."⁵⁹⁴ For example, the Commission recently adopted a standard protective order for use in review of local exchange carrier tariff filings submitted pursuant to Section 204(a)(3) of the Act.⁵⁹⁵ As in that decision, we will apply a standard protective order where the submitting party includes with its filing a showing by a preponderance of the evidence to support its case that the information should be accorded confidential treatment consistent with the provisions of

⁵⁹² See AT&T Comments at 50; *accord* TRA Reply Comments at 7.

⁵⁹³ *Cf.* U.S. v. MCI Communications Corp. and BT Forty-Eight Co. (NEWCO), Civil Action No. 94-1317 (TFH) (D.D.C. filed July 17, 1997), Modified Final Judgment and Stipulation (requiring provisioning and maintenance reports and allowing disclosure of that information to interested parties only if they sign confidentiality forms stating that they will use the information only with regard to a complaint).

⁵⁹⁴ *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, GC Docket No. 96-55, Notice of Inquiry and Notice of Proposed Rulemaking, 11 FCC Rcd 12,460 ¶ 25 (1996) (*Confidential Information Notice*).

⁵⁹⁵ See *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170, 2213 ¶ 91 (1997) (*LEC Streamlining Tariff Filing Order*).

the Freedom of Information Act (FOIA) or makes a sufficient showing that the information should be subject to a protective order. This is the standard found in Section 0.459 of our rules⁵⁹⁶ that is applicable to requests that materials or information submitted to us be withheld from public disclosure.⁵⁹⁷ In GC Docket No. 96-55, we have proposed a model protective order that is intended to create a standard for use in Commission proceedings generally.⁵⁹⁸ In the *LEC Tariff Filing Order*, we refined the model order slightly, and we direct the International Bureau to use a standard protective order here that reflects these modifications.⁵⁹⁹ This standard protective order will reflect the fact that these provisioning and maintenance reports are filed on a regular basis and are not a part of a proceeding. It also will reflect the fact that the appropriate use of the material involves the determination of whether a foreign carrier with market power on the foreign end of a U.S. international route is engaged in undue discrimination in the provisioning and maintenance of basic facilities and services in favor of its affiliated U.S. carrier.⁶⁰⁰

(vi) **Quarterly Circuit Status Reports**

281. We proposed in the *Notice* to require dominant foreign-affiliated carriers subject to supplemental dominant carrier regulation to file quarterly circuit status reports for their facilities-based circuits and resold private line circuits on their dominant route and to make these reports publicly available.⁶⁰¹ We requested comment on whether it is necessary to require carriers to specify the particular facility on which each of their circuits on the dominant route is either activated or idle. As noted above, we decline to adopt the proposal in the *Notice* to require a quarterly notification of circuit additions or discontinuances as a basic safeguard.⁶⁰²

282. In their comments, WorldCom and AT&T support the supplemental safeguard proposal to require carriers to file quarterly circuit status reports that specify the facility on which each circuit is activated or idle.⁶⁰³ This proposal, WorldCom asserts, would "allow the Commission and competitors

⁵⁹⁶ See 47 C.F.R. § 0.459.

⁵⁹⁷ See *LEC Streamlining Tariff Filing Order*, 12 FCC Rcd at 2213 ¶ 91.

⁵⁹⁸ See *Confidential Information Notice*, 11 FCC Rcd 12,460 App. A.

⁵⁹⁹ See *LEC Streamlining Tariff Filing Order*, 12 FCC Rcd at 2215 ¶ 94.

⁶⁰⁰ We note that the protective order is not intended to constitute a resolution of the merits concerning whether any confidential information would be released publicly by the Commission upon a proper request under the Freedom of Information Act or other applicable law or regulation, including 47 C.F.R. § 0.442.

⁶⁰¹ See *Notice* ¶ 107.

⁶⁰² See *id.* ¶ 96.

⁶⁰³ See WorldCom Comments at 11; AT&T Reply Comments at 36-37.

to determine if foreign carriers with market power are warehousing capacity to the detriment of competing carriers, or unreasonably denying access to U.S. carriers by claiming a lack of corresponding facilities.⁶⁰⁴ AT&T also supports facility identification as part of its proposal to require notification of each circuit on the dominant route.⁶⁰⁵ BTNA comments that a requirement that a limited class of carriers submit for public disclosure information pertaining to operational practices could result in competitive harms.⁶⁰⁶

283. We adopt a quarterly circuit status filing requirement for all dominant foreign-affiliated facilities-based carriers. We adopt this report for these carriers' dominant foreign-affiliated routes in lieu of our basic safeguards proposal to require quarterly notifications of circuit changes. We find that a quarterly circuit status report imposes a comparable burden but provides information that can be more readily compared to the information provided by all U.S. international carriers on an annual basis pursuant to Section 43.82 of our rules.⁶⁰⁷ We decline to adopt the proposal to require dominant foreign-affiliated private line resale carriers to file quarterly circuit status reports, given that they rely on underlying U.S. facilities-based carriers to make arrangements with their affiliated carriers.

284. We agree with WorldCom that the identification of dominant foreign-affiliated facilities-based carriers' circuit status information on a facility-by-facility basis is an important safeguard to determine if foreign carriers are unreasonably denying unaffiliated U.S. carriers access to corresponding foreign half-circuits on particular facilities.⁶⁰⁸ The fact that a U.S. affiliate is able to obtain and activate circuits on a particular facility to an affiliated market while unaffiliated carriers cannot may be evidence of anticompetitive conduct. As a result, we require these dominant foreign-affiliated U.S. carriers to file quarterly reports for their dominant foreign-affiliated routes in the format set out by the International Bureau's Section 43.82 annual circuit status manual, with two exceptions: activated or idle circuits must be reported on a facility-specific basis; and the derived circuits need not be specified in the three quarterly reports due on June 30, September 30 and December 31 each year.⁶⁰⁹ We direct the International Bureau to modify the Section 43.82 reporting manual as necessary to accommodate our decision in this proceeding.

⁶⁰⁴ WorldCom Comments at 11; *see also* AT&T Reply Comments at 37.

⁶⁰⁵ *See* AT&T Comments at 47.

⁶⁰⁶ *See* BTNA October 21 Letter.

⁶⁰⁷ *See* 47 C.F.R. § 43.82 (requiring facilities-based U.S. international carriers to file annual circuit status reports no later than March 31 each year).

⁶⁰⁸ *See* WorldCom Comments at 11.

⁶⁰⁹ We recognize that this information may be commercially sensitive because disclosure may reveal a carrier's efficiencies in deriving additional channel capacity. However, we continue to require that all U.S. international carriers file their derived circuit information in their annual circuit status report (filed March 31 each year), unless and until the International Bureau modifies or eliminates the requirement from the Section 43.82 manual. This information is submitted in data field #2 of the manual.

285. We also find that WorldCom's claim about the warehousing of cable capacity may be an issue of concern. More broadly, we are concerned with the potential for concentration of supply on U.S. international routes. In 1995, the Commission replaced the monthly circuit status reporting requirement imposed on all U.S. international facilities-based carriers with an annual report and eliminated the requirement that circuit status information be filed on a facility-by-facility basis in an effort to be "the least intrusive and burdensome . . . as possible."⁶¹⁰ We conclude here, however, that to the extent warehousing is a concern, it may be relevant to all U.S. international carriers, not just those with foreign affiliates that have market power. We therefore delegate authority to the International Bureau, pursuant to its authority under Section 43.82, to seek input on the risk of warehousing and, if necessary, modify the Section 43.82 reporting manual to require all U.S. international carriers to identify in their annual circuit status reports the facility on which each circuit is activated or idle.

286. Consistent with our finding regarding the commercial sensitivity of the information contained in the provisioning and maintenance reports we adopt above, we recognize that public disclosure of the quarterly circuit status reports we adopt here could result in the information being used for commercial advantage. These quarterly reporting requirements are designed to assist the Commission and competing carriers in determining whether a U.S. carrier is receiving favorable treatment from a foreign affiliate with market power. We therefore will allow dominant foreign-affiliated carriers to request the standard protective order adopted above for the three quarterly circuit status reports that dominant foreign-affiliated carriers must file.⁶¹¹ To the extent there are information inequities between dominant foreign-affiliated carriers' final (*i.e.*, March 31) quarterly report and all U.S. international carriers' annual Section 43.82 report, we conclude that these foreign-affiliated carriers may apply for a standard protective order for those portions of the final report that warrant such an order.

(vii) Rejection of Ban on Exclusive Arrangements Involving Joint Marketing, Customer Steering, or Use of Foreign Market Telephone Customer Information

287. We proposed in the *Notice* to prohibit U.S. carriers subject to supplemental dominant carrier regulation from entering into exclusive arrangements with their foreign affiliates for the joint marketing of basic telecommunications services, the steering of customers by the foreign affiliate to the U.S. carrier, or the use of foreign market telephone customer information.⁶¹²

288. Cable & Wireless argues that the Commission should reject the proposal, arguing that "as long as a dominant foreign carrier makes fundamental network components and services available

⁶¹⁰ *Rules for the Filing of International Circuit Status Reports*, CC Docket No. 93-157, Report and Order, 10 FCC Rcd 8605, 8606 ¶ 9 (1995).

⁶¹¹ *See supra* ¶¶ 279-280.

⁶¹² *See Notice* ¶ 105.

to all on a fair, reasonable and nondiscriminatory basis . . . the existence of exclusive arrangements with respect to other facilities and services should not be a concern.⁶¹³ Sprint concurs, noting that it "is prepared to market head to head against a joint marketing effort conducted by a foreign carrier and its U.S. affiliate," provided that the foreign carrier cannot discriminate in favor of its affiliate.⁶¹⁴ GTE argues that a ban on exclusive joint marketing is unnecessary because the *Flexibility Order* ensures that carriers controlling more than 25 percent of the traffic on an international route cannot enter into alternative settlement arrangements, including joint marketing agreements, that discriminate against competing carriers.⁶¹⁵ Cable & Wireless adds that the proposal fails to recognize that multinational companies demand one-stop shopping for international services and that no single carrier has the resources, marketing capability, or technical expertise to go it alone.⁶¹⁶

289. BTNA and NTT also oppose the ban on exclusive joint marketing arrangements but propose instead that the Commission maintain the right to bar such arrangements as a remedial measure to address proven anticompetitive conduct.⁶¹⁷ This approach, BTNA maintains, would ensure that the premature imposition of a regulatory restriction does not slow the development of competitive international markets.

290. In contrast, AT&T and PanAmSat support adoption of the prohibition as proposed.⁶¹⁸ AT&T argues that "exclusivity is not a necessary feature of [end-to-end services], and exclusive arrangements . . . provide an unearned and unfair competitive advantage when the foreign carrier enjoys a protected status in its home market."⁶¹⁹ Sprint supports a prohibition against the exclusive steering of customers, although it believes that a strong commitment to enforce nondiscrimination rules would be an effective policy.⁶²⁰

291. We agree with Cable & Wireless that it is not necessary to prohibit U.S. carriers from entering into exclusive arrangements with their foreign affiliates for the provision of joint marketing or the steering of customers, provided the foreign carrier cannot discriminate in favor of its U.S. affiliate in the provision of fundamental network components or basic services. The underlying premise guiding our dominant carrier safeguards is to ensure the nondiscriminatory access to basic

⁶¹³ C&W Comments at 9.

⁶¹⁴ Sprint Comments at 22-23.

⁶¹⁵ See GTE Comments at 20.

⁶¹⁶ See C&W Comments at 8; C&W Reply Comments at 8.

⁶¹⁷ See BTNA Comments at 3-4; NTT Reply Comments at 4.

⁶¹⁸ See AT&T Comments at 49; AT&T Reply Comments at 35; PanAmSat Comments at 4.

⁶¹⁹ AT&T Reply Comments at 36.

⁶²⁰ See Sprint Comments at 23.

telecommunications services for the provision of U.S. international services. The No Special Concessions rule prohibits any U.S. carrier from agreeing to accept exclusive arrangements involving fundamental network components and basic telecommunications services from a foreign carrier with market power. The dominant carrier safeguards we adopt monitor and detect anticompetitive behavior. We find that they will be effective in ensuring that U.S. carriers can obtain nondiscriminatory access to fundamental network components and basic services. Further proscriptive safeguards, we conclude, would be unduly burdensome and could impede unnecessarily the provision of one-stop shopping by injecting uncertainty with respect to the permissible scope of joint activities. We conclude, however, that if we find anticompetitive conduct, we have the authority to impose such a ban on exclusive arrangements, as BTNA and NTT contend.

292. We also decline to adopt a ban on exclusive arrangements between dominant foreign-affiliated carriers and their foreign affiliates involving the use of foreign market telephone customer information. MCI supports a ban on exclusive arrangements involving foreign market telephone customer information obtained by U.S. carriers from foreign affiliates that do not face competition.⁶²¹ As discussed above, however, we require all U.S. carriers to obtain U.S. customer approval if they intend to make use of foreign-derived U.S. customer information.⁶²²

D. Enforcement of Safeguards

293. We sought comment in the *Notice* on whether additional remedies are necessary to address anticompetitive conduct.⁶²³ Several commenters contend that the Commission should adopt an expedited complaint procedure.⁶²⁴ AT&T argues that the Commission should establish a procedure for complaints involving abuse of foreign market power by foreign carriers that do not face facilities-based competition.⁶²⁵ MCI asserts that the Commission should adopt a complaint procedure to address and resolve complaints regarding distortion of competition by foreign-affiliated carriers.⁶²⁶ BTNA claims that any remedy in response to a proven violation should be fashioned to address the particular circumstances of the case.⁶²⁷

294. As we observed in the *Notice*, we have ample authority to investigate allegations that a violation of our rules has occurred. Section 218 of the Act authorizes the Commission to inquire into

⁶²¹ See MCI Comments at 6-7.

⁶²² See *supra* Section V.B.2.b.

⁶²³ *Notice* ¶ 127.

⁶²⁴ See AT&T Comments at 52; BTNA Comments at 4; MCI Comments at 7; GTE Reply Comments at 29.

⁶²⁵ See AT&T Comments at 52.

⁶²⁶ See MCI Comments at 7.

⁶²⁷ See BTNA Comments at 4.

the management of the business of all carriers subject to the Act and to "obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created."⁶²⁸ For example, if a carrier's quarterly traffic and revenue report indicated that there may have been manipulation of the settlements process on a particular route, we may find it necessary to audit the revenue and traffic records of the U.S. carrier, or foreign carrier, or both.

295. In the event that we find anticompetitive conduct, moreover, we have several different remedies available to us. In addition to the specific Title II forfeitures that might apply to a carrier, Section 503 of the Act allows us to impose a forfeiture of up to \$100,000 for each violation or each day of a continuing violation by a carrier.⁶²⁹ We also may impose additional conditions on a Section 214 authorization or revoke the authorization in cases of adjudicated misconduct. We could impose strict structural separation, for example, in the event that an affiliated U.S. carrier knowingly receives technical network information from its foreign affiliate in advance of unaffiliated U.S. carriers. We also could require a U.S. carrier to terminate an arrangement with a foreign carrier if we found that the arrangement resulted in anticompetitive effects in the U.S. market.⁶³⁰ Other potential remedies include, but are not limited to, freezing circuits, prohibiting the use of foreign-derived CPNI, and banning the joint marketing of basic services by a U.S. carrier and its foreign affiliate. We also adopt here a general rule that would enable us to review a carrier's authorization and, if warranted, impose additional requirements in circumstances where it appears that harm to competition is occurring on one or more U.S. international routes.⁶³¹

296. At this time, we do not find that it is necessary to adopt an expedited procedure to prevent competitive harm in the U.S. market. We recognize that a policy of timely enforcement of our safeguards will put all carriers on notice that we will be vigorous in our efforts to promote competition and prevent anticompetitive behavior in the U.S. market. We also note that we have modified our rules to facilitate the prompt resolution of all formal complaints against telecommunications carriers involving claims of unreasonably discriminatory or otherwise unlawful conduct in violation of the Act or our rules.⁶³²

⁶²⁸ See 47 U.S.C. § 218.

⁶²⁹ 47 U.S.C. § 503(b)(2)(B).

⁶³⁰ Cf. *supra* ¶ 162.

⁶³¹ See *infra* Appendix C (to be codified at 47 C.F.R. § 63.21(g)).

⁶³² See *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, CC Docket No. 96-238, Report and Order, FCC 97-396, (rel. November 25, 1997).

E. Alternative Settlement Arrangements

Background

297. In the *Notice*, we sought comment on whether we should modify the framework adopted in our *Flexibility Order*⁶³³ for approving alternative settlement arrangements. In the *Flexibility Order*, we authorized U.S. carriers to negotiate alternative settlement arrangements that deviate from the requirements of our International Settlements Policy (ISP)⁶³⁴ with any foreign correspondent in a country that satisfies the ECO test. We also stated in the *Flexibility Order* that we would consider such alternative settlement arrangements between a U.S. carrier and a foreign correspondent in a country that does not satisfy the ECO test if the U.S. carrier can demonstrate that deviation from the ISP will promote market-oriented pricing and competition, while precluding the abuse of market power by the foreign correspondent.

298. We tentatively concluded in the *Notice* that, if we no longer apply the ECO test to international Section 214 applications filed by carriers from WTO Member countries, we should not conduct an ECO analysis for purposes of determining whether to permit a U.S. carrier to enter an alternative settlement arrangement with carriers from WTO Member countries. We further tentatively concluded that we should adopt a rebuttable presumption that flexibility is permitted for carriers from WTO Member countries which could be rebutted by a showing that market conditions in the country in question are not sufficiently competitive to prevent a carrier with market power in that country from discriminating against U.S. carriers. Specifically, we proposed that the presumption could be rebutted by a showing that the country has not opened its market to competition, either because the country has not complied with its market access commitment, its commitment has not taken effect, or it made no commitment. We also proposed that the presumption could be rebutted by a showing that the country does not, or will not in the near future, have in place fair rules of competition, such as those contained in the Reference Paper, to ensure viable opportunities for actual entry.⁶³⁵ For alternative settlement arrangements with carriers from countries that are not WTO Members, we tentatively concluded that we should continue to apply the ECO test as the threshold standard for permitting flexibility.

⁶³³ *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063 (1996) (*Flexibility Order*), recon. pending.

⁶³⁴ The ISP prevents foreign carriers from discriminating among U.S. carriers in bilateral accounting rate negotiations. It requires: (1) the equal division of accounting rates; (2) nondiscriminatory treatment of U.S. carriers; and (3) proportionate return of inbound traffic. See *Implementation and Scope of the International Settlements Policy for Parallel Routes*, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (1986), modified in part on recon., 2 FCC Rcd 1118 (1987), further recon., 3 FCC Rcd 1614 (1988); see also *Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991), on recon., 7 FCC Rcd 8049 (1992).

⁶³⁵ As we stated in the *Foreign Carrier Entry Order*, even if a country permits entry as a legal matter, to ensure viable opportunities for actual entry, the country must also have in place fair rules of competition. *Foreign Carrier Entry Order*, 11 FCC Rcd at 3890 ¶ 44.

Positions of the Parties

299. Several commenters agree with our tentative conclusion that we should no longer conduct an ECO analysis for purposes of determining whether to permit a U.S. carrier to enter an alternative settlement arrangement with carriers from WTO Member countries.⁶³⁶ FCI, for example, states that, assuming WTO Member countries "honor their commitments and competitive forces fuel liberalization efforts," a rebuttable presumption in favor of flexibility for WTO Member countries will provide ample opportunity to address potential discriminatory behavior.⁶³⁷ Telia NA states that the Commission should encourage carriers from WTO Member countries to enter into alternative settlement arrangements, including arrangements where one carrier provides end-to-end service without the use of accounting rates.⁶³⁸

300. France Telecom and Sprint agree that the ECO test should no longer be the threshold standard for permitting flexibility. However, they advocate different threshold standards to replace the ECO test. France Telecom argues that there should be a presumption that flexibility is permitted for WTO Member countries and that, to rebut the presumption, a party should have to show that: (i) there is no *de jure* openness in the foreign market and (ii) no competing carriers have been licensed. France Telecom further argues that for purposes of determining whether there is *de jure* openness in the foreign market, the Commission should consider solely whether the country has committed to the Reference Paper or equivalent provisions.⁶³⁹ Sprint opposes the proposal in the *Notice* that the presumption in favor of flexibility may be rebutted by a showing that "market conditions in the country in question are not sufficient to prevent a carrier with market power from discriminating against U.S. carriers." Sprint argues that this standard is too vague and, like the ECO test, would involve the Commission in a detailed examination of regulatory conditions in another country.⁶⁴⁰ As an alternative to the proposed standard, Sprint suggests that flexibility be permitted where a U.S. carrier can demonstrate that a former monopoly carrier in a foreign country has no more than approximately 65 percent of the traffic between the U.S. and that country. Sprint states that there is "no magic" to the 65 percent standard, but it would be objective and provide carriers with regulatory certainty.⁶⁴¹

⁶³⁶ See, e.g., NYNEX LD Comments at 3; FCI Comments at 8; GTE Comments at 22; Telia NA Reply at 11.

⁶³⁷ FaciliCom Comments at 8.

⁶³⁸ Telia NA Reply at 11-12.

⁶³⁹ FT Comments at 19-20.

⁶⁴⁰ See also Japan Comments at 2 (arguing that the proposed rebuttable presumption leaves the Commission with too much discretion and is therefore inconsistent with GATS principles).

⁶⁴¹ Sprint Comments at 32-34.

301. AT&T opposes our proposal to adopt a presumption that flexibility is permitted for carriers from WTO Member countries. AT&T contends that "even allowing 'easy rebuttal' of the presumption" would not provide sufficient protection against competitive harm because of the difficulty of obtaining accurate information on regulatory conditions in other countries.⁶⁴² AT&T argues that we should adopt what it calls a "neutral presumption" with the burden of production on the proponent of the alternative settlement arrangement. The requirements for permitting flexibility, according to AT&T, should meet the same standards as the ECO test. AT&T proposes that the requirements be whether the relevant country has implemented WTO commitments to provide unrestricted market access, to allow controlling foreign ownership, and to satisfy the Reference Paper.⁶⁴³ NYNEX LD opposes AT&T's proposal, arguing that it is "inappropriate in a global market being reshaped by the [WTO Basic Telecom] Agreement."⁶⁴⁴

Discussion

302. As discussed above, we will no longer apply the ECO test to international Section 214 applications filed by carriers from WTO Member countries.⁶⁴⁵ In light of this fact, and because we expect substantial changes in the global telecommunications market due to the WTO Basic Telecom Agreement, we conclude that we should no longer apply the ECO test as the threshold standard for determining when to permit accounting rate flexibility with carriers from WTO Member countries. Instead, we conclude that we should adopt our proposal in the *Notice* to apply a rebuttable presumption that flexibility is permitted for carriers from WTO Member countries.

303. In the *Flexibility Order*, we adopted the ECO test as the standard for permitting alternative settlement arrangements because we believed it would be an appropriate indicator of whether the legal, regulatory and economic conditions in a foreign market support competition such that the ISP is no longer necessary to protect against abuse of market power by foreign carriers. We anticipated that, in many instances, a U.S. carrier would seek approval to enter an alternative arrangement with a foreign carrier in a country that had already been found to satisfy the ECO test in the context of a prior Section 214 facilities application to serve that country. Thus, we considered that the use of the already-established ECO test as the threshold standard for permitting flexibility would be administratively efficient and would provide consistent results and business certainty for U.S. carriers.⁶⁴⁶

⁶⁴² AT&T Comments at 53.

⁶⁴³ *Id.* at 56-57.

⁶⁴⁴ NYNEX LD Reply Comments at 3.

⁶⁴⁵ *See supra* Section III.A.

⁶⁴⁶ *See Flexibility Order*, 11 FCC Rcd at 20,079 ¶ 38.

304. As we stated in the *Notice*, we believe that it would be administratively inefficient for the Commission, and burdensome to carriers, to continue to conduct an ECO analysis to determine whether to permit flexibility when we no longer apply the test to applications for international Section 214 authorization from carriers in WTO Member countries. As discussed above, the ECO test requires a fact-specific, detailed review of competitive conditions on a given route.⁶⁴⁷ We conclude that such a thorough review is not appropriate or necessary solely for purposes of determining whether to permit flexibility.

305. We adopted our flexibility policy in recognition of the fact that some telecommunications markets are shifting from the traditional monopoly model to a more competitive market structure.⁶⁴⁸ Where competitive conditions exist, our flexibility policy is designed to encourage carriers to enter market-oriented agreements rather than maintain strict adherence to the ISP, which limits market conduct to prevent monopolists from causing harm to competition and U.S. consumers. We expect that countries' commitments to competition and fair regulatory principles as part of the WTO Basic Telecom Agreement will lead to more competitive conditions in many markets. As a result, we find that, with regard to carriers from WTO Member countries, flexibility should be more the rule than the exception. We agree with Telia NA that carriers from WTO Member countries should be encouraged to enter alternative settlement arrangements, including arrangements where one carrier provides end-to-end service without the use of accounting rates. As Telia NA notes, such alternative arrangements will promote competition and thus ensure that U.S. consumers have access to high-quality, affordable international telecommunications services.⁶⁴⁹

306. In the *Notice*, we acknowledged that WTO membership alone will not guarantee that conditions in a foreign market are sufficiently competitive to prevent foreign carriers with market power from discriminating among U.S. carriers. For that reason, we tentatively concluded that the presumption in favor of flexibility may be rebutted by a showing that market conditions in the country in question are not sufficiently competitive to prevent a carrier with market power in that country from discriminating among U.S. carriers.⁶⁵⁰ Nonetheless, we are concerned that, as Sprint and France Telecom point out, this standard could be considered vague and could unnecessarily delay implementation of alternative settlement arrangements. We therefore revise the showing proposed in the *Notice* to rebut the presumption in favor of flexibility.

⁶⁴⁷ See *supra* ¶ 35.

⁶⁴⁸ See *Flexibility Order*, 11 FCC Rcd at 20,069 ¶ 15.

⁶⁴⁹ See Telia NA Reply at 11-12.

⁶⁵⁰ *Notice* ¶ 151. Specifically, we proposed that the presumption could be rebutted by a showing that the country (i) has not opened its market to competition, either because the country has not complied with its market access commitment, its commitment has not taken effect, or it made no commitment; or (ii) does not, or will not in the near future, have in place fair rules of competition, such as those contained in the Reference Paper, to ensure viable opportunities for actual entry. *Id.*

307. We agree with Sprint and France Telecom that we should adopt a straightforward, objective standard to rebut the flexibility presumption. We conclude that, in order to rebut the presumption in favor of permitting flexibility, a party must demonstrate that the foreign carrier is not subject to competition in its home market from multiple (more than one) facilities-based carriers that possess the ability to terminate international traffic and serve existing customers in the foreign market. Such a standard would be objective and easy to apply. Moreover, the existence of actual competition from multiple facilities-based carriers serves as a good indicator of whether market conditions are conducive to allowing U.S. carriers to enter market-oriented arrangements.

308. Sprint expresses concern that a foreign carrier with market power may have the ability to discriminate among U.S. carriers in settlement rate negotiations, even if the foreign carrier is subject to competition in its home market. Sprint therefore suggests that we should consider the market share of the foreign carrier in determining whether to permit flexibility. We addressed this concern in the *Flexibility Order* and concluded that the safeguards we adopted there ensure that our flexibility policy does not have anticompetitive effects in the international market.⁶⁵¹ We retain these safeguards and find that they will effectively limit the ability of a carrier with market power to discriminate among U.S. carriers in circumstances where a grant of the alternative settlement arrangement is consistent with our flexibility policy.⁶⁵² These safeguards require that: (i) alternative settlement arrangements between affiliated carriers and those involved in non-equity joint ventures affecting the provision of basic services must be filed with the Commission and be publicly available and (ii) alternative arrangements affecting more than 25 percent of either the inbound or outbound traffic on a particular route must be filed with the Commission and be publicly available and must not contain unreasonably discriminatory terms and conditions.⁶⁵³ We also note that, in the *Flexibility Order*, we reserved the right to review, and if need be, reject the terms and conditions of all alternative arrangements, regardless of whether they trigger our safeguards, to ensure that they meet our policy objectives and will not have a significant adverse impact on U.S. net settlement payments and resulting traffic volumes.⁶⁵⁴ We retain this right here.

⁶⁵¹ See *Flexibility Order*, 11 FCC Rcd at 20,081-83 ¶¶ 44-48.

⁶⁵² NYNEX LD and SBC seek clarification that the flexibility safeguards will not be affected by our proposal to limit the no special concessions prohibition to apply only to concessions granted by foreign carriers with market power. NYNEX LD Comments at 4; SBC Comments at 2-3; see also Telstra Reply at 7-8. France Telecom, on the other hand, seeks confirmation that under our new flexibility framework, any carrier will be able to exchange traffic on all routes, regardless of its market power. FT Comments at 20. As discussed in note 308 above, the modifications to the No Special Concessions rule we adopt in this *Order* do not affect the application of our flexibility safeguards.

⁶⁵³ *Flexibility Order*, 11 FCC Rcd at 20,081-82 ¶ 45, 20,083-84 ¶ 48. Pursuant to the procedures we adopted in the *Flexibility Order*, a petitioning carrier must state whether an alternative arrangement triggers these safeguards. *Id.* at 20,087 ¶ 58.

⁶⁵⁴ *Flexibility Order*, 11 FCC Rcd at 20,087-88 ¶ 59.

309. We stated in the *Flexibility Order* that, even where the ECO test is not satisfied, we would consider alternative settlement arrangements between a U.S. carrier and a foreign correspondent if the U.S. carrier can demonstrate that deviation from the ISP will promote market-oriented pricing and competition, while precluding the abuse of market power by the foreign correspondent. We noted, for example, that a departure from the ISP would likely be warranted where a non-dominant U.S. carrier seeks to negotiate an alternative arrangement with a foreign entity that does not have market power on the foreign end.⁶⁵⁵ We will also allow the proponent of an alternative settlement arrangement with a carrier from a WTO Member country to make this alternative showing where the presumption in favor of flexibility can be rebutted.

310. We are not persuaded by those commenters that seek a different threshold for allowing alternative settlement arrangements. France Telecom, for example, asserts that a party opposing an alternative settlement arrangement should have to demonstrate that no competing carriers have been licensed. We are concerned that the existence of a carrier in the foreign market that is merely licensed, but that lacks the ability to terminate international traffic and does not serve actual customers, would not have a sufficient presence in the market to afford U.S. carriers a reasonable opportunity to negotiate market-oriented arrangements.

311. We also disagree with AT&T's position that the proponent of an alternative settlement arrangement should have to satisfy the same standards as the ECO test. We find that the presumption we adopt here in favor of flexibility for carriers from WTO Member countries is appropriate because the commitments to competition and fair regulatory treatment made by WTO Member countries represent a transition to competitive telecommunications markets, a trend that we seek to encourage. We believe, moreover, that the standard we adopt for rebutting the flexibility presumption will serve as an effective surrogate for the detailed analysis of market conditions advocated by AT&T. In addition, the standard we adopt alleviates concern expressed by AT&T that obtaining detailed information about competitive conditions in a foreign country would be very difficult for parties opposing an alternative settlement arrangement.⁶⁵⁶

312. Under the procedures adopted in our *Flexibility Order*, U.S. carriers may obtain approval to enter an alternative payment arrangement by filing a detailed petition for declaratory ruling that the alternative payment arrangement is permitted under the criteria for deviating from the ISP adopted in that proceeding.⁶⁵⁷ We adopt minor changes to these procedures to conform to our new standard for permitting flexibility. Where a U.S. carrier seeks approval to enter an alternative arrangement with a carrier from a WTO Member country, the requesting carrier will be required to demonstrate only that the carrier is operating in a WTO Member country rather than a full-fledged ECO showing. The burden would be on opposing parties to show that the foreign carrier that is a party to the alternative

⁶⁵⁵ See *id.* at 20,080 ¶ 40.

⁶⁵⁶ AT&T Comments at 55.

⁶⁵⁷ The petition for declaratory ruling is put on public notice and interested parties are given an opportunity to file a formal opposition within twenty days.

arrangement does not face competition from multiple facilities-based carriers that possess the ability to terminate international traffic and serve actual customers in its home market. The new policies and procedures we adopt here for alternative settlement arrangements with foreign carriers in WTO Member countries will be applied to all flexibility petitions pending before the Commission in any procedural status at the time our new rules become effective.

313. Finally, we note that Telstra urges us to conform the procedural rules that apply to a request for modification of the ISP under Section 64.1001(f) with the procedures that apply to the filing of a petition for declaratory ruling to implement an alternative settlement arrangement.⁶⁵⁸ Specifically, it argues that requests for modification of the ISP should be placed on public notice as petitions for declaratory ruling currently are. We reject Telstra's proposal in this proceeding. Modifications under Section 64.1001 are simply reductions in settlement rates that generally do not raise the broad concerns that are raised by petitions for declaratory ruling to approve alternative settlement arrangements. Further, the parties that might have concerns with the reductions, *i.e.*, those with operating agreements with the same carrier, are given notice of the filing directly by the applicant. Therefore, a public notice would only prove to delay a procedure for approving modifications that is designed to allow expeditious grants in most cases while giving those parties potentially affected a chance to respond. Although we reject Telstra's arguments here, we reserve the right to revisit in the future the whole issue of procedures to implement accounting rate changes.

VI. Procedures

A. Streamlined Application Procedures

Background

314. It has been, and continues to be, our goal to make streamlined procedures available to as many applicants as possible, consistent with ensuring that we can identify and address those applications that present particular risks. The new competitive conditions created by the WTO Basic Telecom Agreement and the rules we adopt here will reduce substantially the ability of any one carrier to distort competition in the U.S. market as a result of an affiliation with a foreign carrier that has market power on the foreign end of a U.S. international route. This situation presents us with an opportunity to reduce our scrutiny of many applications and afford those applications streamlined processing.

315. Our current rules generally permit streamlined processing of Section 214 applications filed by foreign carriers or their U.S. affiliates in circumstances where the foreign carrier is not a facilities-based carrier in the destination market. We proposed in the *Notice* to expand the class of foreign-affiliated applicants eligible for streamlined processing to include some that are affiliated with

⁶⁵⁸ See Telstra Comments at 5-9.

facilities-based carriers.⁶⁵⁹ We invited commenters to submit specific proposals to expand the class of affiliated carriers eligible for streamlined processing, and we specifically proposed to include in that class carriers whose affiliate is from a WTO Member country and that seek to serve that country solely by reselling the switched services of unaffiliated U.S. international carriers.

316. We also proposed to streamline the Section 214 application of any applicant whose affiliate is a foreign carrier in a WTO Member country that certifies that it would comply with all of the dominant carrier regulations that we proposed in the *Notice*. The carrier would then have the option of later demonstrating to the Commission that it qualifies to be regulated as non-dominant.⁶⁶⁰ We also proposed that Commission staff exercise discretion to afford streamlined processing in circumstances where such an applicant certifies that it would comply with our "basic" dominant carrier safeguards and demonstrates clearly and convincingly that it should not be subject to the "supplemental" safeguards that we proposed in the *Notice*.⁶⁶¹

317. Finally, we proposed to extend streamlined processing to applications for assignments and transfers of control of Section 214 authorizations by defining the class of eligible applicants in the same manner as for initial grants.⁶⁶²

Positions of the Parties

318. Deutsche Telekom states that we should clarify that we will not delay the processing of any Section 214 applications submitted by foreign carriers or their affiliates for "trade or other political reasons" at the request of other U.S. Government bodies or at our own initiative. Delay for those reasons, Deutsche Telekom argues, violates the principles of MFN and National Treatment as well as the GATS requirement that applications be acted upon within a "reasonable period of time."⁶⁶³

319. Deutsche Telekom argues that the streamlined processing standards proposed in the *Notice* discriminate between U.S.-owned and foreign-affiliated carriers in violation of the principle of National Treatment. Deutsche Telekom also argues that the proposals violate the MFN principle in that foreign carriers willing to certify that they will comply with the "supplemental" safeguards will receive immediate streamlined processing while foreign carriers who seek to demonstrate that

⁶⁵⁹ We define "facilities-based carrier" as a carrier that "holds an ownership, indefeasible-right-of-user, or leasehold interest in bare capacity in an international facility, regardless of whether the underlying facility is a common or non-common carrier submarine cable, or an INTELSAT or separate satellite system." 47 C.F.R. § 63.18(h) note 2.

⁶⁶⁰ *Notice* ¶ 135 & n.129.

⁶⁶¹ *Id.* ¶ 136.

⁶⁶² *Id.* ¶ 137.

⁶⁶³ DT Comments at 34.

supplemental safeguards do not apply will encounter delays before it is determined whether they are entitled to streamlined processing.⁶⁶⁴

320. NTT, the Government of Japan, and the European Union state that we should establish either a time limit or a "period of time normally required to reach a decision" for consideration of applications. The commenters cite the Reference Paper and Article VI of the GATS as suggesting the need to do so.

321. BellSouth and SBC do not oppose the streamlining proposals contained in the *Notice* but argue that Bell Operating Companies should not have to meet much more detailed procedures and more stringent tests to enter the same U.S. market on an "in-region" basis pursuant to Section 271 of the Act.⁶⁶⁵

Discussion

322. No commenter submitted specific proposals to expand the class of foreign-affiliated carriers that should be deemed eligible for streamlined processing. In light of the approach we take in this *Order*, we conclude that it is appropriate to streamline the Section 214 applications of carriers that qualify for the presumption of non-dominance under the market share screen discussed in Section V.⁶⁶⁶ Thus, we will streamline those applications that demonstrate clearly that the foreign carrier affiliate has less than a 50 percent market share in the international transport and local access markets in the destination foreign country.⁶⁶⁷ Also, for the reasons expressed in the *Notice*,⁶⁶⁸ we adopt our proposal to afford streamlined processing to the Section 214 application of any applicant whose foreign affiliate is from a WTO Member country if the applicant requests authority only to serve that country solely by reselling the switched services of unaffiliated U.S. international carriers. Finally, we will streamline the Section 214 application of any applicant not otherwise eligible for streamlined processing so long as the applicant's affiliate is a foreign carrier in a WTO Member country and the applicant certifies that it will comply with the dominant carrier regulations we adopt in Section V.C.2. This represents a finding that, in the great majority of cases, our No Special Concessions rule, benchmark condition, and dominant carrier regulations — rather than denying applications — will be sufficient to prevent anticompetitive effects in the U.S. market. We also adopt our proposal to streamline applications for assignments and transfers of control of Section 214 authorizations in circumstances where an initial

⁶⁶⁴ DT Comments at 35.

⁶⁶⁵ BellSouth Comments at 6-7; SBC Comments at 7.

⁶⁶⁶ See *supra* ¶¶ 232-233; see also *supra* ¶ 161.

⁶⁶⁷ The applicant should provide the information described *supra* in paragraph 163.

⁶⁶⁸ *Notice* ¶¶ 130-137.

Section 214 application filed by the assignee or transferee would be eligible for streamlined processing.⁶⁶⁹

323. Because we cannot envision a circumstance in which an indirect foreign investment by an investor from a WTO Member country in a common carrier radio licensee that does not result in a transfer of control will pose a very high risk to competition,⁶⁷⁰ we conclude that we can streamline Section 310(b)(4) requests as well. When we receive applications that implicate only Section 310(b)(4), we will include those applications in the International Bureau's streamlined process. This will include (1) any petition for declaratory ruling that it would not serve the public interest to deny a Title III common carrier license to a particular entity; (2) permission for an existing common carrier radio licensee to exceed 25 percent indirect foreign ownership; and (3) permission to increase a licensee's level of non-controlling indirect foreign ownership when permission to exceed 25 percent has already been granted. It will not include applications that also involve an assignment of license or a transfer of control, which are evaluated under Section 310(d). It will also not include any initial licensing applications, which involve service-specific rules and other portions of Title III of the Act.

324. Pursuant to Section 63.20 of our rules, petitions to deny must contain specific allegations of fact sufficient to show that a grant of the application would not serve the public interest, convenience, and necessity.⁶⁷¹ In all circumstances, Commission staff will have the discretion to deem an application ineligible for streamlined processing either because it raises market power concerns or because an Executive Branch agency raises concerns with respect to issues within its expertise.

325. We disagree with Deutsche Telekom's assertion that the streamlined processing standards violate the principles of MFN and national treatment. We will treat all U.S. and foreign carriers with affiliations that raise similar market power concerns alike. Indeed, we note that the International Bureau did not afford streamlined processing to initial international Section 214 applications filed by affiliates of several Bell Operating Companies (BOCs) seeking to provide service originating in out-of-region states.⁶⁷² These applications raised the issue of whether the BOC affiliates could leverage the market power of their local exchange carrier affiliates in their in-region states to gain

⁶⁶⁹ In order to streamline applications for assignments and transfers of control, we must receive the information described in Section 63.18(h) of our rules regarding the assignee's or transferee's affiliates. See 47 C.F.R. § 63.18(h). The current rule inadvertently omitted paragraph (h) from the list of information required. We here amend Section 63.18(e)(5) of our rules to require that applicants provide this necessary information.

⁶⁷⁰ See *supra* ¶ 112.

⁶⁷¹ 47 C.F.R. § 63.20.

⁶⁷² See, e.g., *NYNEX Long Distance Co., Ameritech Communications, Inc., Bell Atlantic Communications, Inc., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Provide International Services from Certain Parts of the United States to International Points through Resale of International Switched Services*, Order, Authorization and Certificate, 11 FCC Rcd 8685 (Int'l Bur. 1996).

market power in the provision of international service originating from out-of-region states. Thus, non-streamlined processing has been, and continues to be, necessary in circumstances where we must evaluate applications in order to protect the U.S. market from anticompetitive effects. In any event, we note that nearly every applicant whose affiliate is from a WTO Member country will be able to obtain streamlined approval of its Section 214 authorizations by choosing, where necessary, to certify that it will comply with dominant carrier regulation for its traffic along an affiliated route. As we stated in the *Notice*,⁶⁷³ these carriers can later petition the Commission to remove dominant carrier regulation.

326. BellSouth's and SBC's comments take issue with the Commission's approach to implementing Section 271(d)(3) of the Act, which sets forth basic statutory provisions that govern the Commission's approval or denial of BOC applications to provide in-region interLATA services. The issues they raise are beyond the scope of this proceeding. We discuss above BellSouth's argument that it is irrational to apply different standards to foreign or foreign-affiliated carriers than we apply to BOCs.⁶⁷⁴

327. We agree with commenters who suggest that we establish a period of time normally required to reach a decision on an application. Our streamlined process, by which we expect to grant the great majority of applications, will continue to follow the procedure described in Section 63.12 of our rules.⁶⁷⁵ After an initial review, an application deemed acceptable for filing and eligible for streamlined processing is listed on a public notice as streamlined. Applicants whose applications are listed on such a public notice may commence operations on the 36th day following the public notice unless notified by the Commission within 28 days after the date of the public notice that the application is not eligible for streamlined processing. It will therefore normally take 35 days to reach a decision on an application from the date the International Bureau places the application on public notice.

328. We now amend Section 63.12 to provide for situations where an application is deemed ineligible for streamlined processing. In those cases, we will issue a public notice that the application has been removed from the streamlined process. Within 90 days of the public notice, we will issue an order acting upon the application or provide public notice that, because the application raises questions of extraordinary complexity, an additional 90-day period for review is needed. Each successive 90-day period may be so extended, subject to this high standard. This procedure should reassure applicants and potential applicants that their applications will be handled expeditiously and should give them guidance on the amount of time within which they may expect a decision on an application even if an application is deemed ineligible for streamlined processing.

⁶⁷³ *Notice* ¶ 135 n.129.

⁶⁷⁴ *See supra* ¶ 58.

⁶⁷⁵ 47 C.F.R. § 63.12.

329. Parties should be aware that we intend to apply the rules and policies adopted in this *Order* to all applications pending before the Commission in any procedural posture at the time they become effective.⁶⁷⁶

B. Notifications of Foreign-Carrier Affiliations

Background

330. Paragraph (b) of Section 63.11 of the Commission's rules requires that any U.S. international carrier that knows of a planned investment by a foreign carrier of a 10 percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier shall notify the Commission 60 days prior to the acquisition of the interest.⁶⁷⁷ Paragraph (e) provides that, where the Commission finds that the planned investment by the foreign carrier raises a substantial and material question of fact as to whether the investment serves the public interest, convenience and necessity, the U.S. carrier shall not consummate the investment until it has submitted an application under Section 63.18.

331. In the *Notice*, we proposed to maintain the Section 63.11(b) prior notification requirement for U.S. carriers with planned investments by foreign carriers (and their affiliated companies) regardless of whether or not the foreign carrier is from a WTO Member country.⁶⁷⁸ We stated that we could not rule out the possibility that a particular investment might present a very high threat of anticompetitive harm.

Discussion

332. In light of the approach we take in this *Order*, we conclude that we can revise our rules to require fewer investments in authorized carriers to be reported to the Commission. The European Union is concerned that the existing requirement could result in a disguised market access barrier. We find that a foreign carrier's investment in an authorized carrier will very rarely raise any public interest

⁶⁷⁶ See *Notice* ¶¶ 44, 74, 152. Telstra urges the Commission to waive the ECO test before the effective date of this *Order* for applications filed by carriers from WTO Member countries that already permit U.S. companies to provide facilities-based international services. See *Telstra Comments* at 3. We deny Telstra's specific request because we believe it could create the potential for anticompetitive effects if implemented without the safeguards contained elsewhere in this *Order*, but we note that our existing framework permits a showing that effective competitive opportunities will be available in the near future. See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3891 ¶ 46; e.g., *MAP Mobile Communications*, 12 FCC Rcd 6109 (1997).

⁶⁷⁷ 47 C.F.R. § 63.11(b). The provision applies also to planned investments by any entity "that directly or indirectly controls or is controlled by a foreign carrier, or that is under direct or indirect common control with a foreign carrier." See *Notice* ¶ 141. Section 63.11(b) also requires that the notification certify to certain information specified in Section 63.11(c).

⁶⁷⁸ *Notice* ¶ 143.

issues unless it creates an affiliation pursuant to Section 63.18(h)(1)(i) of the Commission's rules. We therefore conclude that we need not require authorized carriers to notify the Commission before accepting total foreign carrier investments of 25 percent or less. That is, we amend Section 63.11(b) to raise the level of foreign carrier investment (whether by a single carrier or by multiple carriers that are parties to a contractual relationship) that requires prior notification from 10 percent to greater than 25 percent.⁶⁷⁹

333. Notifications pursuant to Section 63.11(b) will give the Commission the opportunity to evaluate new affiliations under the entry standards that we adopt in this *Order* in order to determine whether it continues to serve the public interest to allow the authorized carrier to serve the markets where it has an affiliation with a foreign carrier. The notifications will give us the opportunity to impose any conditions that we might deem necessary in a particular case. We might, for example, find in a particular case that an affiliation raises anticompetitive concerns that must be addressed by imposing our benchmarks condition or the dominant safeguards we adopt here.

334. In order to implement the standards that we adopt in this *Order*, including our decision to apply our entry policies (whether the open entry policies for WTO Members or the ECO test for non-WTO Members) to U.S. carriers' investments in foreign carriers, we find that it is necessary to require an authorized carrier to notify the Commission 60 days before it, or a company that owns more than 25 percent of it, acquires a direct or indirect controlling interest in a foreign carrier.⁶⁸⁰ We now amend Section 63.11(b) to add this requirement.

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

Background

335. In the *Notice*, we described the results of the WTO Basic Telecom Agreement and the obligations imposed on WTO Members by the GATS.⁶⁸¹ We proposed a new standard for foreign carrier entry in light of these results and obligations. Many commenters addressed the consistency of our proposed rules with the GATS. In order to put these comments — and our responses — in context, we provide a brief description of GATS obligations.

⁶⁷⁹ See *infra* Appendix C (to be codified at 47 C.F.R. § 63.11(a)). We retain our policy, however, of scrutinizing investments of 25 percent or less that present a significant potential impact on competition in the U.S. market for international telecommunications services. See *Foreign Carrier Entry Order*, 11 FCC Rcd at 3906 ¶ 89.

⁶⁸⁰ These affiliations previously have been reported to the Commission by the authorized carrier pursuant to paragraphs (a) and (c) of Section 63.11.

⁶⁸¹ *Notice* ¶¶ 20-24.

336. The GATS is composed of three major components. The first component consists of general obligations and disciplines which apply to all WTO Members. The second component is comprised of specific commitments relating to market access, national treatment, and other commitments, which are embodied in individual WTO Member Schedules of Specific Commitments.⁶⁸² The final component sets out exemptions from the general obligations embodied in Lists of Article II (Most-Favored-Nation (MFN)) Exemptions.⁶⁸³

337. The most important of the general obligations and disciplines that apply to all WTO Members is the requirement in Article II of the GATS to accord MFN treatment to like services and service suppliers of all other WTO Members, no matter what specific commitments a WTO Member has made. MFN is essentially a nondiscrimination rule that requires each WTO Member to treat like services and service suppliers from all other WTO Members similarly.⁶⁸⁴ In addition to the MFN obligation, all WTO Members undertake transparency obligations in accordance with Article III (Transparency) of the GATS, which requires prompt publication of all laws and regulations applicable to the provision of services.⁶⁸⁵

338. Many WTO Members, including the United States, undertook specific commitments with respect to market access and national treatment as a result of the WTO negotiations on basic telecommunications. GATS Article XVI (Market Access) requires each WTO Member to accord services and service suppliers of any other WTO Member treatment no less favorable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule and to refrain from imposing certain types of quantitative restrictions, economic needs tests or local incorporation requirements, in those sectors where the WTO Member has undertaken specific market access commitments.⁶⁸⁶ This means that a Member may not maintain limits such as the number of service suppliers or the corporate form in which a service can be provided, unless the Member has

⁶⁸² The Schedules of Specific Commitments form an integral part of the GATS pursuant to Article XX of the GATS. The Schedules containing commitments on basic telecommunications services are available on the WTO web page at www.wto.org.

⁶⁸³ The Annex on Article II Exemptions specifies the conditions under which a WTO Member is exempted from its MFN obligations under paragraph 1 of Article II. The United States excluded from its market access commitments and national treatment obligations and took an MFN exemption for the provision of direct-broadcast satellite services, direct-to-home satellite services and digital audio radio satellite services.

⁶⁸⁴ Article II of the GATS requires WTO Members to accord "to services and service suppliers of any other [WTO] Member treatment no less favorable than that it accords to like services and service suppliers of any other country."

⁶⁸⁵ See GATS art. III.

⁶⁸⁶ A quantitative restriction is a cap on the number of permitted suppliers; an economic needs test is a limitation on the number of service suppliers based on an assessment of whether the market will be able to absorb new service suppliers without harm to existing service suppliers.

specifically listed such limitations in its Schedule.⁶⁸⁷ Article XVII (National Treatment) is a nondiscrimination rule that requires a WTO Member to treat like services and service suppliers from other WTO Members no less favorably than it treats its own services and service suppliers.⁶⁸⁸ Under GATS Articles II (MFN) and XVII (National Treatment), treatment of domestic and foreign service suppliers need not be identical to accord MFN or national treatment. The critical aspect of an MFN or national treatment analysis is whether the treatment accorded modifies the conditions of competition in favor of certain foreign or domestic suppliers.⁶⁸⁹ Thus, dissimilar treatment can be consistent with MFN or national treatment obligations if it does not put the foreign supplier at a competitive disadvantage to another foreign supplier or a domestic supplier.

339. Those WTO Members that undertook market access commitments in basic telecommunications services also became subject to the requirements relating to domestic regulation of those services contained in Article VI (Domestic Regulation). Pursuant to Article VI(1), in sectors where specific commitments are undertaken, domestic regulation must be administered in a reasonable, objective and impartial manner. Article VI(4) provides that a WTO Member could be in contravention of its commitments if it applies measures that are not based on objective and transparent criteria, are more burdensome than necessary or that restrict the supply of the service. A WTO Member arguing, however, that a measure does contravene Article VI(4) also must show that application of the measure could not have been reasonably expected at the time specific commitments were made.⁶⁹⁰

340. The United States and 54 other countries also undertook additional specific commitments as a result of the negotiations in accordance with Article XVIII of the GATS.⁶⁹¹ These additional commitments are the procompetitive regulatory principles contained in a document known as the

⁶⁸⁷ USTR Reply Comments at 7.

⁶⁸⁸ Article XVII states that "[i]n the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers."

⁶⁸⁹ See USTR Reply Comments at 11 n.16.

⁶⁹⁰ Article VI(5)(a) states that a Member "shall not apply licensing and qualification requirements and technical standards that nullify or impair [its] specific commitments in a manner which . . . could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made." See also USTR Reply Comments at 9.

⁶⁹¹ Article XVIII states that "Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule."

"Reference Paper."⁶⁹² The Reference Paper contains principles relating to competition safeguards, interconnection, universal service, transparency of licensing criteria, independence of the regulator and allocation of scarce resources. The relevant provisions for purposes of this *Order* refer to competition safeguards and licensing. Section 1 of the Reference Paper obligates a WTO Member to "maintain appropriate measures for the purposes of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices."⁶⁹³ With regard to licensing, the Reference Paper requires that all licensing criteria and the terms and conditions of individual licenses be made publicly available.⁶⁹⁴

341. The GATS also allows for exceptions to a WTO Member's obligations. Where these exceptions apply, a WTO Member may act inconsistently with its MFN, national treatment or market access commitments or any other GATS obligation. Article XIV (General Exceptions) establishes a limited set of exceptions, including for measures necessary to protect public morals and order, protect human and animal health or secure compliance with nondiscriminatory laws and regulations.⁶⁹⁵ Article XIV *bis* (Security Exceptions) permits a WTO Member to deviate from its GATS obligations in order to protect its national security interests or to carry out any obligations under the U.N. Charter to maintain international peace and security.⁶⁹⁶

⁶⁹² The Reference Paper was distributed by the WTO Secretariat but never formally issued as a WTO document. The text has been published in 36 I.L.M. 367 (1997). Another ten countries either agreed to adopt the Reference Paper principles in the future or inscribed their own regulatory principles in their Schedules.

⁶⁹³ "Major supplier" is defined in the Reference Paper as a "supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market." Anticompetitive practices include (a) engaging in anticompetitive cross-subsidization; (b) using information obtained from competitors with anticompetitive results; and (c) not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

⁶⁹⁴ The Reference Paper also requires that the period of time normally required to reach a decision concerning an application for a license be made publicly available. The Government of Japan, the European Commission, and NTT all requested the Commission to establish time limits for review of an application. We have done so in this *Order*. See *supra* Section VI.A.

⁶⁹⁵ Article XIV states that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement. . . ."

⁶⁹⁶ Article XIV *bis* states that "[n]othing in this Agreement shall be construed . . . (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests . . . or (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

342. The United States committed to provide market access to all basic telecommunications services and national treatment to service suppliers of WTO Members.⁶⁹⁷ In addition, as noted above, the United States incorporated the Reference Paper into its Schedule of Specific Commitments.

Positions of the Parties

343. The Office of the U.S. Trade Representative (USTR) asserts that the proposals contained in our *Notice* are consistent with U.S. commitments under the WTO Basic Telecom Agreement.⁶⁹⁸ USTR agrees that the Commission can apply the public interest test, as proposed, and that no WTO Members participating in the WTO basic telecom negotiations can claim surprise at its continued use.⁶⁹⁹ USTR and other Executive Branch agencies also support consideration of competition issues and other public interest factors, as well as imposition of competition safeguards. Many other commenters, however, contend that these U.S. commitments prohibit the Commission not only from applying the ECO test, but also from applying a public interest analysis generally or safeguards to applicants from or affiliated with carriers from WTO Members.⁷⁰⁰ As described below, they argue that the proposed rules violate U.S. obligations regarding market access, domestic regulation, transparency, MFN, and national treatment, and that application of the public interest test and safeguards are not otherwise permitted by the Reference Paper or the general exceptions to the GATS. Further, the European Commission and Deutsche Telekom complain that the *Notice* fails to present evidence that the rules are consistent with the GATS.⁷⁰¹

Discussion

344. We consider carefully but find unpersuasive arguments that the measures we adopt today violate U.S. obligations under the GATS or any other international agreement to which the United States is a party. Although we do not believe we are required to explain the GATS-consistency of our proposals, as argued by the European Commission and Deutsche Telekom, we take this opportunity to do so. We conclude that a public interest analysis is a valid exercise of U.S. domestic regulatory authority, required by the Communications Act and consistent with U.S. international obligations. Our implementation of the public interest test with respect to Section 214 and Section 310 authorizations

⁶⁹⁷ The U.S. Schedule of Specific Commitments limits direct access to INTELSAT and Inmarsat to Comsat for the provision of basic telecommunications services and limits direct foreign ownership of a common carrier radio license to 20 percent. In addition, the United States made no market access commitments and took an MFN exception for direct-broadcast satellite services, direct-to-home satellites services and digital audio radio satellite services.

⁶⁹⁸ USTR Comments at 2, Reply Comments at 14.

⁶⁹⁹ USTR Reply Comments at 9.

⁷⁰⁰ See, e.g., European Commission Comments at 2-5; DT Comments at 5-19, 22-31; KDD Comments at 3-7, 7-11.

⁷⁰¹ European Commission Comments at 2; DT Comments at 7.