and cable landing licenses is similarly permitted by the GATS. We find that the Commission not only is entitled to apply competitive safeguards consistent with U.S. obligations but is obligated to do so under the Reference Paper. In reaching these conclusions, we find persuasive the comments of the Executive Branch, particularly the views of USTR, which has primary responsibility for issuing and coordinating guidance on interpretation of U.S. international trade obligations.[702]

345. The Public Interest Analysis. KDD claims that application of a public interest analysis is precisely the type of entry restriction prohibited by the GATS.[703] Moreover, KDD asserts that the analysis specifically violates the national treatment obligation because the Commission applies a different test, or none at all, to U.S. carriers.[704] Deutsche Telekom, KDD, Sprint and ETNO argue that the public interest analysis violates MFN because it discriminates against foreigners, and violates the requirements of GATS Articles III (Transparency) and VI (Domestic Regulation) because it is vague, unclear and inherently subjective.[705] ETNO and Deutsche Telekom contend that the ability to analyze the public interest or deny a license violates the U.S. market access commitments because the United States has not specifically reserved the right to apply such an analysis in its Schedule of Specific Commitments, as required by Article XVI (Market Access) of the GATS.[706] Furthermore, according to Deutsche Telekom, the public interest analysis is not justified by the Reference Paper and cannot qualify as an exception to GATS obligations under Article XIV (General Exceptions) of the GATS.[707]

346. We conclude that the WTO Basic Telecom Agreement does not affect the Commission's statutory obligation to apply a public interest analysis.[708] The Commission has applied a public interest analysis as part of its regulatory structure since the Communications Act was passed in 1934. In fact, consideration of the public interest is fundamental in carrying out the general powers of the

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[702] 19 U.S.C. § 2171(c)(1) (The USTR "shall issue and coordinate policy guidance to departments and agencies on basic issues of policy and interpretation arising in the exercise of international trade functions including any matters considered under the auspices of the World Trade Organization.").

[703] KDD Comments at 4.

[704] *Id.* at 5; *see also* Government of Japan Comments at 1-2; Telefónica Internacional Reply Comments at 5-6; DT Comments at 10-11; Sprint Comments at 9.

[705] DT Comments at 11-12, 32; KDD Comments at 4; Sprint Comments at 9; ETNO Reply Comments at 2-3; *see also* Government of Japan Comments at 1-2; Telefónica Internacional Reply Comments at 5-6.

[706] DT Comments at 3, 7-8, 12, n.8; ETNO Reply Comments at 2.

[707] DT Comments at 13-14, 16. KDD also argues that the public interest analysis is not justified by the Article XIV exceptions. KDD Comments at 14.

[708] *See* USTR Reply Comments at 5.

Commission.[709] We apply the public interest test in a number of different contexts to domestic and foreign applicants.[710] We thus find unconvincing the arguments that consideration of the public interest violates the U.S. national treatment or the MFN obligation.

347. The argument that a public interest analysis is invalid under GATS Articles III (Transparency) and VI (Domestic Regulation) is equally unconvincing. We agree with AT&T that Article VI does not prohibit all regulatory standards that involve any element of judgment or discretion, but requires that the standard be neutral as regards all parties and applied in an objective manner.[711] We also agree with the FBI's conclusion that the public interest analysis comports fully with Article VI because it does not "nullify or impair" the specific commitments of the United States.[712] Article VI, as noted above, requires that domestic regulations be objective, transparent, impartial, and reasonable. The Commission is not adopting an *ad hoc* approach with respect to foreign carrier entry similar to that it applied before 1995.[713] Rather, this *Order* establishes the parameters of the Commission's review of applications to provide international services. This *Order* spells out in great detail how the public interest test is applied to Section 214 and Section 310 authorizations and cable landing licenses. It provides an explicit description of all the factors the Commission will consider in reviewing license applications and investment authorizations. Moreover, the Commission is subject to the Administrative Procedures Act (APA), which subjects all Commission regulations to judicial review and requires the Commission to follow standard procedures.[714]

348. We also find without merit commenters' complaints about the GATS consistency of the public interest analysis under Article VI(4). The requirements of Article VI(4) regarding domestic licensing are applicable only if the measure — in this case, the public interest analysis — could not have been reasonably expected at the time specific commitments were made. We agree with USTR and the FBI that other WTO Members not only should have expected, but knew that the Commission would continue to consider the public interest.[715] The Commission's intention was made clear to all

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[709] *See* 47 U.S.C. § 303. As the Federal Bureau of Investigation (FBI) points out, under Sections 214 and 309(a), all common carrier radio station license applicants — including U.S.-based and -controlled applicants — are subject to a full-scale public interest review as a condition precedent to obtaining a license. FBI Reply Comments at 2.

[710] *See, e.g.*, 47 U.S.C. §§ 214, 307, 271, 309(a).

[711] AT&T Comments at 15.

[712] FBI Reply Comments at 4.

[713] Prior to the issuance of the *Foreign Carrier Entry Order*, the Commission considered each foreign carrier application for entry on a case-by-case basis.

[714] *See* 5 U.S.C. § 553(b).

[715] USTR Reply Comments at 9.

our negotiating partners in bilateral and multilateral sessions during the negotiations.[716] Thus, even if a WTO Member considers the public interest analysis to be subjective or to lack impartiality, there is no GATS violation since it was abundantly clear that the Commission intended to continue to use it.

349. Article III (Transparency) does not impose any specific obligations with regard to the content of national laws or regulations. It merely requires the publication of national laws and regulations. In fact, the Commission's actions are much more "transparent" than Article III requires. The Commission is required by law to conduct its rulemakings in a very open manner.[717] Consequently, we publish all of our regulations — both as proposals for public comment and as final rules — and request public comment on all applications for licenses, as well as proposals for rulemakings.

350. Deutsche Telekom's argument that the public interest analysis is invalid because it does not fit within one of the exceptions listed in Article XIV (General Exceptions) lacks merit. As shown above, the public interest analysis does not violate any GATS obligations and therefore reference to provisions of the GATS excepting a measure from its application is unnecessary.[718] In addition, since the public interest analysis is consistent with GATS obligations, there is no need to refer to the Reference Paper as justification for application of the analysis.

351. We also disagree that the public interest analysis cannot be maintained because it violates the U.S. market access commitments or is not listed as a limitation in the U.S. Schedule of Specific Commitments. We note USTR's comment that the negotiating history of the GATS shows that, rather than prohibiting all domestic regulation of basic telecommunications services, Article XVI (Market Access) only prohibits WTO Members from maintaining or adopting the types of quantitative or economic-needs based limitations and measures listed in Article XVI (unless such limitations are included in a WTO Member's Schedule of Specific Commitments).[719] We find that because the public interest analysis is not the kind of quantitative or economic-needs based limitation set out in Article XVI, it is not the type of impermissible limitation envisioned by the GATS. Therefore, there is no need for the United States to have included the test as a limitation on its market access commitments in its Schedule of Specific Commitments.[720]

352. Review of Applications under Section 214, Section 310 and the Submarine Cable Landing License Act. AT&T argues that denial of market access to carriers posing risks to

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[716] *Id.*; FBI Reply Comments at 3.

[717] *See* Administrative Procedure Act § 4, 5 U.S.C. § 553; 47 C.F.R. §§ 1.411-.429 (governing procedures for rulemakings).

[718] USTR agrees with this analysis. USTR Reply Comments at 12.

[719] *Id.* at 7 n.13 (citing GATS Secretariat, "Initial Commitments in Trade in Services: Explanatory Note," MTN.GNS/W/164 (Sept. 3, 1994)).

[720] *Id.* at 8.

competition that could not be addressed by safeguards is fully consistent with the GATS. Denial in these circumstances would meet the Article VI requirements and would not be contrary to MFN or national treatment obligations. According to AT&T, a licensing decision that is dependent upon a carrier's market power, rather than its national origin, and that is based solely upon the potential adverse impact of that carrier's entry upon competition in the United States, is consistent with MFN.[721] USTR states that nothing in the GATS prohibits the Commission from consideration of competition issues.[722]

353. Sprint, Deutsche Telekom, KDD and ETNO argue that the entry standard relating to Section 214, cable landing licenses and Section 310 potentially does not provide national treatment because the *Notice* is silent as to whether the same standard applies to U.S. carriers.[723] France Telecom makes this same argument with respect to Section 310(b)(4) authorizations below 50 percent.[724] The European Commission objects to the Commission retaining its ability to deny Section 214 and Section 310 authorizations and cable landing licenses in order to protect competition in the U.S. market. It argues that general antitrust law is sufficient to safeguard against anticompetitive practices and that an authorization should not be denied to a carrier that might, at a later date, pose a competitive risk.[725] The European Commission also expresses concern that the standard of a "very high risk to competition" imposes additional burdens on foreign companies, which would be subject to challenge based on unclear conditions and criteria.[726] Deutsche Telekom and the European Commission question the compatibility with MFN of a denial of market access on the basis of foreign affiliation.[727] The European Commission also questions the compatibility with GATS of requiring foreign companies to notify the Commission of investments above ten percent.[728] Deutsche Telekom argues that the Reference Paper does not justify the Commission's proposals because it applies only to domestic carriers.[729] NTT and GTE argue that the Commission should rely on the Reference Paper

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[721] AT&T Comments at 16-17.

[722] USTR Reply Comments at 5.

[723] Sprint Comments at 9, 16; DT Comments at 10-11, 32-33; KDD Comments at 5; ETNO Reply Comments at 3; *see also* GTE Reply Comments at 28.

[724] FT Comments at 25.

[725] European Commission Comments at 2-3.

[726] *Id.* at 4-5. DT agrees, arguing that the standard violates Articles III and VI because there is no objective content to the standard. DT Comments at 11; *see also* Telefónica Internacional Reply Comments at 5.

[727] DT Comments at 9, 32; European Commission Comments at 4; *see also* GTE Comments at 11.

[728] European Commission Comments at 7.

[729] DT Comments at 14.

and on enforcement of WTO Member's commitments through WTO dispute settlement to preserve competition.[730]

354. We agree with USTR that nothing in the WTO Basic Telecom Agreement prohibits the Commission from reviewing and possibly denying applications that pose a risk of anticompetitive harm in the U.S. market.[731] The GATS does not specify a single mechanism for addressing potential anticompetitive practices in the telecommunications services sector.[732] The United States has traditionally relied on regulatory enforcement and antitrust actions, and remains free to do so. We therefore disagree with the European Commission that we must depend on general antitrust law to safeguard against anticompetitive activity. In fact, the Commission's statutory obligation to serve the public interest both encompasses and extends beyond the traditional parameters of review under the U.S. antitrust laws.[733] When the United States entered into the WTO Basic Telecom Agreement, it did so with the understanding that its obligations would be carried out consistent with U.S. law.[734]

355. The standard of review we adopt is fully consistent with the Commission's historical exercise of its mandate to consider the public interest. The Act charges the Commission with "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[735] In carrying out that charge over more than 60 years, the Commission has long considered competition issues in applying the public interest standard.[736] The WTO Basic Telecom Agreement does not alter this responsibility.

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730 NTT Comments at 2; GTE Comments at 10, 13; *see also* DT Comments at 15.

731 USTR Reply Comments at 5.

732 *Id.* at 8.

733 *See e.g., 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).

734 The U.S. final offer in the WTO basic telecom negotiations included a cover note that stated that "foreign investors will receive national treatment in accordance with U.S. law." Communications from the United States, "Conditional Offer" (Feb. 12, 1997).

735 47 U.S.C. § 151.

736 *See, e.g., Policy & Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report & Order, 85 FCC 2d 1 (1980); Second Report & Order, 91 FCC 2d 59 (1982); *recon.* 93 FCC 2d 54 (1983); Third Report & Order, 48 Fed. Reg. 46,791 (1983); Fourth Report & Order, 95 FCC 2d 554 (1983), *vacated*, AT&T v. FCC, 978 F.2d 727 (1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 113 S. Ct. 3020 (1993); *Fifth Report & Order*, 98 FCC 2d 1191 (1984); *Sixth Report & Order*, 99 FCC 2d 1020 (1985), *rev'd*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

We remain concerned with the ability of carriers with market power to leverage that power and engage in anticompetitive conduct in the U.S. market. We expect that the safeguards we propose to apply will be sufficient to prevent anticompetitive behavior.[737] As a result, we are not denying the market access that the United States promised in the WTO Basic Telecom Agreement. We are not willing, however, to foreclose entirely the possibility that if an exceptional case arises in which entry is likely to harm consumers in a concrete way (such as through increased rates or decreased service options) we may protect the U.S. market by denying entry.[738] While the European Commission may be willing to wait until after the harm occurs in its market, nothing in the WTO or the GATS requires that all WTO Members regulate in exactly the same way.

356. We also disagree that the standard we adopt today for Section 214 authorizations erects additional barriers for foreigners or discriminates against foreigners, inconsistent with national treatment obligations. In response to the many concerns that the proposed rules discriminate against foreign applicants, we have clarified in this *Order* that the Section 214 analysis — including the possibility of denial of a license — applies to all applicants, regardless of nationality. Thus it is consistent with U.S. national treatment obligations. To the extent that we differentiate among domestic and foreign carriers with regard to cable landing licenses and foreign investment, such differentiation is based on statutory distinctions founded on national security and law enforcement concerns.

357. Likewise, our procedures to review applications under Section 214 and Section 310 of the Act and the Submarine Cable Landing License Act do not discriminate impermissibly among foreigners in a manner inconsistent with our MFN obligations. In deciding whether a measure accords less favorable treatment within the meaning of GATS Article II (MFN), the analysis focuses not on whether the treatment of like foreign or like domestic suppliers is identical, but rather whether the treatment modifies the conditions of competition in favor of foreign service suppliers of a particular origin or domestic service suppliers.[739] In this case, the Commission is not discriminating among like service suppliers. The Commission is treating similarly all carriers that have the ability to harm competition, whether they are foreign or domestic, and treating carriers that do not have that ability similarly. Examining the ability of a carrier to affect competition in the U.S. market is not an impermissible examination of foreign market conditions, as Deutsche Telekom claims, but an essential factor in our licensing decisions. Rather than modifying the conditions of competition in favor of domestic or certain foreign suppliers, we are making the conditions of competition level by ensuring that dominant carriers cannot adversely distort competition in the U.S. market, whether their ability to do so derives from market power in the United States or foreign markets.

358. By this *Order*, we are carrying out Section 1 of the Reference Paper, which requires us to maintain measures that would prohibit anticompetitive activity of suppliers, which alone or together,

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[737] *See supra* Section V.

[738] *See supra* Section III.A.

[739] USTR Reply Comments at 10-11.

constitute a "major supplier." We disagree with Deutsche Telekom that a major supplier can only be a domestic carrier.[740] The definition of major supplier does not limit the term to domestic suppliers or to a supplier with control over domestic facilities. Nor does Section 1 limit the requirement to take steps to prevent anticompetitive activities to activities of only domestic suppliers. Rather, the definition of major supplier is neutral and Section 1 focuses on any carrier's ability to act in an anticompetitive manner. Thus, we find unconvincing Deutsche Telekom's arguments.

359. We do not accept the notion that we should depend on other countries' implementation of their commitments in lieu of applying competition factors in our regulatory process. There is nothing in the GATS that requires us to refrain from regulating because other WTO Members have an obligation to regulate. Access to WTO dispute settlement does not eliminate the need for and the appropriateness of our regulation of telecommunications services in order to safeguard competitive opportunities.[741] WTO dispute settlement is an effective remedy, but one that takes some time to obtain. In addition, it is not a remedy that the Commission can seek directly, but depends on Executive Branch action. We have a separate statutory obligation to regulate and enforce our rules that cannot be stayed while the Executive Branch seeks relief in an international tribunal.

360. Finally, we do not accept Deutsche Telekom's argument that we should rely on enforcement of WTO Members' obligations under Articles VIII (Monopolies and Exclusive Service Suppliers) and IX (Business Practices) to prevent anticompetitive actions by foreign dominant carriers.[742] We disagree with Deutsche Telekom's interpretation of these articles of the GATS. In fact, we conclude that Articles VIII and IX provide no adequate remedy for Commission concerns. Article VIII applies only to actions of monopolies. It does not apply in cases where a WTO Member made market access commitments, which the United States along with 68 other WTO Members did. Article IX provides for consultations on unfair business practices but imposes no obligation enforceable in WTO dispute settlement. We agree with USTR's comment that Articles VIII and IX were never intended to place limits on a government's ability to ensure competition in domestic or international markets.[743]

361. We also disagree with the European Commission and Deutsche Telekom's argument that Commission consideration of "actionable misconduct" as a factor in determining the effect on competition of a carrier's entry into the U.S. market is inconsistent with MFN or national treatment obligations.[744] There is nothing in the GATS that prevents the Commission from looking at the

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[740] Deutsche Telekom makes this same argument with respect to the Commission's proposed safeguards. For the reasons discussed here, we find Deutsche Telekom's argument equally unpersuasive with regard to safeguards.

[741] *See id.* at 9.

[742] DT Comments at 15.

[743] *See* USTR Reply Comments at 8.

[744] European Commission Comments at 5; DT Comments at 18.

qualifications of an applicant, including its financial, legal, and technical capabilities, as well as its ability to abide by the law. We intend to look at those factors in connection with all applications, whether foreign or domestic, as we do now in granting licenses to domestic operators.[745]

362. Other Public Interest Factors. The Department of Defense (DOD) and FBI both conclude that the Commission can consider, consistent with the GATS, issues of national security and law enforcement raised by the Executive Branch in determining whether to grant Section 214 and Section 310 authorizations and cable landing licenses.[746] DOD disagrees that national security concerns are subjective, vague and undefined.[747] Sprint, NTT, and France Telecom acknowledge the validity of national security and law enforcement concerns, while GTE notes that these concerns should be implemented in a manner consistent with the GATS.[748] Deutsche Telekom, without offering an explanation, states that the GATS national security exception is narrower than the Commission's proposal.[749]

363. USTR also supports Commission consideration of other public interest factors raised by the Executive Branch, including national security, law enforcement, foreign policy and trade policy concerns.[750] Deutsche Telekom says consideration of these other public interest factors is invalid because the United States did not reserve any such authority in its Schedule of Specific Commitments.[751] Other commenters argue that market access cannot be denied on the basis of foreign policy or trade concerns consistent with GATS obligations.[752]

364. We agree with comments of the Executive Branch and AT&T supporting consideration of other public interest factors, such as national security, law enforcement, foreign policy and trade

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[745] *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1195-97, 1200-03 (1986), *modified*, 5 FCC Rcd 3252 (1990); *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).

[746] DOD Comments at 8; FBI Comments at 2-4; DOD Reply Comments at 4; FBI Reply Comments at 5.

[747] DOD Comments at 4-5.

[748] Sprint Reply Comments at 2; NTT Comments at 2; FT Comments at 5; GTE Comments at 13-16.

[749] DT Comments at 18.

[750] USTR Reply Comments at 6.

[751] DT Comments at 18.

[752] NTT Comments at 2, Reply Comments at 2-3; Government of Japan Comments at 2; DT Comments at 17; FT Comments at 2, 5-6; GTE Comments at 16; KDD Comments at 5; Sprint Comments at 9-10; European Commission Comments at 1; Telefónica Internacional Reply Comments at 7; GTE Reply Comments at 13.

policy concerns. We conclude that nothing in the GATS precludes us from considering such concerns. There is no bar in Article VI (Domestic Regulation) as long as our consideration is objective, transparent, impartial, and reasonable. Nor does the MFN obligation automatically bar consideration of any particular factor. It provides merely that like service suppliers have to receive like treatment. Similarly, the national treatment obligation does not exclude consideration of these other public interest factors. Finally, contrary to Deutsche Telekom's argument that GATS Article XIV *bis* is not broad enough to allow us to consider national security, we note that Article XIV *bis* contains no such limiting language.

365. In a particular case, where we do consider these other public interest factors, we will be mindful of U.S. WTO obligations to the extent that the exemptions in the GATS specifically do not apply.[753] On its face, GATS Article XIV *bis* allows measures to protect essential security interests. Accordingly, we find it difficult to understand Deutsche Telekom's argument that Article XIV *bis* is not broad enough to enable the Commission to review any national security concerns raised by the Executive Branch. We do not expect to receive recommendations from the Executive Branch in connection with these other public interest factors that are inconsistent with U.S. international obligations.[754]

366. Safeguards. AT&T defends the MFN-consistency of the Commission's proposed competition safeguards,[755] citing USTR comments that the Commission is free to take measures to protect competition in the United States.[756] AT&T also argues that the WTO Basic Telecom Agreement plainly recognizes the right of the Commission to prevent anticompetitive practices. AT&T states that Article VI of the GATS recognizes a basic right to regulate, including the adoption and implementation of licensing qualifications designed to achieve legitimate objectives, such as the prevention of anticompetitive conduct. It goes on to say that Section 1.1 of the Reference Paper requires the Commission to maintain measures to prevent carriers with market power from engaging in or continuing anticompetitive practices.[757] Sprint agrees that the proposed safeguards are consistent with MFN because dominant carrier classification does not depend on national identity but on market power.[758]

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[753] *See* GATS Art. XIV and Art. XIV *bis*.

[754] *See* USTR Reply Comments at 6.

[755] *See supra* Section V.

[756] AT&T Reply Comments at 15-16 (citing USTR Comments at 3).

[757] AT&T Comments at 14-16.

[758] Sprint Comments at 20 n.25.

367. Many commenters argue that the safeguards are inconsistent with the GATS.[759] A number of commenters contend that safeguard measures are unnecessary because the Commission can rely on WTO Member commitments to implement the regulatory principles contained in the Reference Paper. If WTO Members fail to implement their commitments, the United States can use the established WTO dispute settlement process to ensure compliance.[760] GTE suggests that the Commission eliminate or modify those proposed safeguards that are redundant of protections offered by other countries' full implementation and enforcement of the Reference Paper.[761] Telstra argues that the Commission should rely on general competitive safeguards and antitrust law.[762] It goes on to say that the Commission's proposal to apply a No Special Concessions rule violates MFN because it differentiates among carriers based on their market power.[763] Telstra and Deutsche Telekom assert that the No Special Concessions rule also violates the national treatment obligation.[764]

368. Cable & Wireless and Deutsche Telekom argue that the proposed dominant carrier safeguards are unnecessary barriers to trade and, therefore, violate Article VI (Domestic Regulation),[765] while ETNO and GTE argue that the safeguards raise national treatment questions.[766] Deutsche Telekom and Telia note that the *Notice* singles out foreign carriers for safeguards, but is silent as to the treatment of U.S.-owned carriers.[767] To comply with the GATS national treatment obligation, Deutsche Telekom says the Commission must impose safeguards on U.S. carriers with an ownership interest in a foreign carrier with market power and dominant U.S. carriers that have an ownership

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[759] *See, e.g.*, DT Comments at 24; ETNO Reply Comments at 3; GTE Comments at 19-20; Government of Japan Comments at 3; C&W Reply Comments at 8; Telefónica Internacional Reply Comments at 2-3, 14-16. Many of the concerns raised by these commenters have been rendered moot by our decision to apply a single tier of dominant carrier safeguards. *See supra* Section V. Other concerns relating to prior approval of additional circuits, prohibitions on joint marketing or customer steering are also moot because of our decision not to impose these types of safeguards.

[760] NTT Comments at 2; GTE Comments at 7-9; Telmex Comments at 6-7; C&W Comments at 5; FT Comments at 11; European Commission Comments at 5; NTT Reply Comments at 3; Telia NA Reply Comments at 6-7.

[761] GTE Comments at 8.

[762] Telstra Reply Comments at 10.

[763] *Id.* at 5. The European Commission also makes the same argument. European Commission Comments at 6.

[764] DT Comments at 29, n.23; Telstra Comments at 5.

[765] C&W Comments at 9; DT Comments at 26-27.

[766] ETNO Reply Comments at 3; GTE Comments at 19.

[767] DT Comments at 25; Telia NA Reply Comments at 8.

interest in a foreign carrier without market power.[768] GTE argues that the Reference Paper cannot be used as a basis for deviating from MFN and national treatment requirements.[769] Deutsche Telekom states that the Reference Paper does not provide authority to regulate a carrier based on its market power in another market.[770] KDD argues that several aspects of the Commission's proposals do not constitute "appropriate" measures pursuant to the Reference Paper but offers no explanation as to why.[771] Finally, ETNO also argues that the Commission cannot adopt safeguards because the United States has not specifically reserved that right in its Schedule of Specific Commitments.[772]

369. We find that the safeguards we adopt in this *Order* are consistent with all of our GATS obligations. The GATS permits a WTO Member to pursue legitimate policy objectives, such as the protection against anticompetitive conduct in the U.S. market.[773] The safeguards we adopt do not render our market access commitments meaningless. In the past two years, we have granted approximately 140 Section 214 authorizations to carriers with foreign ownership. We expect to grant an increasing number of authorizations in the coming years as carriers take advantage of the new market opening rules adopted in this *Order*.

370. Further, we disagree with the arguments that our competition safeguards violate GATS Article VI (Domestic Regulation). Article VI, as noted above, requires that domestic regulations be objective, transparent, impartial, and reasonable. As with the public interest analysis, this *Order* spells out the safeguards and the reasons for them in great detail.[774] It provides an explicit description of when the safeguards will apply that is objective and based on articulated concerns. Moreover, the Commission is subject to the Administrative Procedures Act, which subjects all Commission regulations to judicial review. By law, the Commission cannot act in an arbitrary and capricious manner but must seek public comment and take that comment into account when reaching its decisions.[775]

371. Again, we disagree with the arguments that our safeguards must be scheduled as market access limitations in order to be maintained and are not justified by the Reference Paper. These safeguards, as with the public interest analysis, are not the types of quantitative or economic needs-

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[768] DT Comments at 26 n.21.

[769] GTE Reply Comments at 6; *see also* Telefónica Internacional Reply Comments at 13.

[770] DT Comments at 14.

[771] KDD Comments at 8.

[772] ETNO Comments at 3.

[773] *See* USTR Reply Comments at 5.

[774] *See supra* Section V.

[775] *See* 5 U.S.C. § 553(b).

based limitations envisioned by Article XVI (Market Access) and therefore there is no need for the United States to have included them as limitations on its market access commitment in its Schedule of Specific Commitments.

372. The argument that competition safeguards are not justified by the Reference Paper is equally unconvincing. In fact, the Reference Paper explicitly imposes an obligation on WTO Members which adopted it to take actions to prohibit anticompetitive behavior. The competition safeguards we adopt here are designed to do exactly that — deter anticompetitive behavior by carriers that, alone or together, control "essential facilities or otherwise have the ability to affect the market adversely."[776] We agree with GTE that the Reference Paper does not justify regulation inconsistent with other provisions of the GATS. Since the Reference Paper does not limit measures against anticompetitive conduct to domestic carriers and, as described in this section, the safeguards we adopt are consistent with the GATS, we conclude that we have acted consistently with the Reference Paper.

373. We also conclude that our decision to adopt a No Special Concessions rule[777] is consistent with all U.S. international obligations. Contrary to what Telstra argues, the No Special Concessions rule does not discriminate among services and service suppliers of different countries nor, contrary to other arguments, does it discriminate between U.S. and foreign-owned carriers. The fact that a universally applied condition will have different effects on different carriers does not automatically render it illegitimate under the GATS.[778] Rather, the question is whether the proposed safeguards alter the competitive conditions for some suppliers in contrast to others. Because the No Special Concessions rule applies to all similarly situated U.S. carriers in their dealings with foreign carriers with market power in the destination market, the rule does not alter the competitive conditions for those similarly situated carriers. In light of the requirement not to discriminate among like service suppliers, we cannot accept SOSCo's suggestion that we relax the safeguards for carriers from WTO Members that have adopted the Reference Paper.[779]

374. Since we do not adopt our proposal to differentiate among carriers based on the extent of competition in their home market, we need not respond to comments that such differentiation is inconsistent with the GATS. We have clarified that the dominant safeguards apply to all carriers, whether foreign or domestic, that are affiliated with a foreign carrier that possesses market power on the foreign end of a U.S. international route. Contrary to the contentions of the European Commission and Deutsche Telekom, we can distinguish among foreign carriers, among domestic carriers and between foreign and domestic carriers based on their market power consistent with our MFN and national treatment obligations. The distinction is not based on nationality but on objective economic analysis. We emphasize that this analysis focuses on whether a carrier's market power in an

[776] Reference Paper, Section 1.1.

[777] *See supra* Section V.B.1.

[778] *See* USTR Reply Comments at 11.

[779] *See* SOSCo Comments at 8.

input market -- whether U.S. or foreign -- enables it to adversely impact competition in a relevant downstream U.S. market. The same logic applies in the international services market as in the domestic market.

375. We find that the conditions we adopt in this *Order* are necessary to deter anticompetitive conduct in the U.S. market for international services. As we discuss in Section V, distortion of competition in the U.S. market is not merely hypothetical. We have eliminated those safeguards not necessary to deter anticompetitive conduct, thus applying the minimum regulatory measures necessary to achieve our procompetitive market-opening objectives. As a result, we conclude that the safeguards conditions contained in this *Order* are consistent with U.S. international obligations, including those contained in the GATS.

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

376. We have pending several petitions for reconsideration of the *Foreign Carrier Entry Order* and one issue raised in the *Flexibility* proceeding.[780] We address the majority of those issues in this *Order* because of their close relationship with the substance of IB Docket No. 97-142.

377. Cable and Wireless seeks reconsideration of our decision in the *Foreign Carrier Entry Order* to apply an ECO analysis to foreign-affiliated carriers seeking prior approval to add circuits on routes that they are already authorized to serve on a dominant carrier basis. In Section V.C.2.b.(ii) above, we conclude that we will no longer require as a general rule that foreign-affiliated carriers regulated as dominant on particular routes seek prior approval of circuit additions and discontinuances. We also decline, in that Section, to apply a prior approval requirement specifically to dominant foreign-affiliated carriers that obtained their Section 214 authorizations to serve a non-WTO Member country prior to adoption of the ECO test.

378. MCI and BTNA ask that we impose a requirement that carriers entering into non-equity business relationships with foreign carriers either file those agreements or otherwise notify the Commission of their execution. In Section V.C.2.a above, we decide to continue our regulatory treatment of non-equity relationships and decide not to impose a requirement such as that requested by MCI and BTNA.

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[780] BT North America Inc. Petition for Reconsideration (IB Docket No. 95-22) [hereinafter BTNA Petition]; Cable & Wireless, Inc., Petition for Reconsideration (IB Docket No. 95-22) [hereinafter CWI Petition]; MCI Telecommunications Corporation Petition for Reconsideration (IB Docket No. 95-22) [hereinafter MCI Petition]; Telefónica Larga Distancia de Puerto Rico, Inc., Petition for Reconsideration (IB Docket No. 95-22) [hereinafter TLD Petition]; WorldCom, Inc., Petition for Reconsideration (IB Docket No. 95-22) [hereinafter WorldCom Petition]; *see also* Reply Comments of NYNEX Corp., Regulation of International Accounting Rates (CC Docket No. 90-337) [hereinafter NYNEX *Flexibility* Reply Comments]; *Regulation of International Accounting Rates*, CC Docket No. 90-337, Phase II, Fourth Report and Order, 11 FCC Rcd 20,063, 20,072 ¶ 23 n.25 (1996) (*Flexibility Order*), *recon. pending*.

379. TLD seeks reconsideration of our decision to apply the ECO test to destination markets where an affiliation results only from an affiliated foreign carrier's (or its holding company's) control of a third country's dominant carrier while not applying the ECO test where an affiliation results only from a U.S. carrier's ownership of a foreign carrier. BTNA, too, seeks reconsideration of our decision not to apply the ECO test where a U.S. carrier has an interest in a foreign carrier. This issue is moot in WTO Member countries because of our decision in Section III.B above no longer to apply the ECO test as part of our Section 214 public interest analysis when the applicant's foreign affiliate is from a WTO Member country. In Section IV.B above, we declare that we will henceforth apply the ECO test to U.S. carriers' interests in foreign countries' dominant carriers but that we will continue to apply the ECO test to third-country carriers.

380. NYNEX urges the Commission to eliminate our equivalency requirement as a condition of the resale of private lines for the provision of switched basic services by any carrier that is not affiliated with a foreign carrier having market power at the foreign end.[781] NYNEX argues that eliminating that requirement would enable such a carrier to compete for U.S.-bound traffic by offering lower rates to customers in the foreign country. The resulting competitive pressure, NYNEX argues, could force the dominant carrier to lower its own rates for service to the United States and negotiate a lower accounting rate on the U.S. route.

381. We decline to adopt NYNEX's suggestion. NYNEX concedes that its proposal would increase the net settlements deficit, and we observe that it also would not put downward pressure on settlement rates. Although the scenario NYNEX presents might increase retail competition in the foreign market, it would be at the expense of U.S. IMTS ratepayers because, without allowing U.S.-outbound traffic to be carried over private lines, there would be no offsetting benefit to U.S. consumers. We recognize that such arrangements may be beneficial in some circumstances, and our *Flexibility* policies will allow some such arrangements subject to case-by-case Commission scrutiny. We decline, however, to adopt a general rule favoring arrangements that would increase the settlements deficit without putting downward pressure on settlement rates. We will therefore continue to require the showings we describe in this *Order* before allowing any carrier, including a carrier not affiliated with a carrier with market power in the destination market, to provide switched services over interconnected private lines.

382. MCI, in its petition, states that the Commission erred in not permitting U.S. facilities-based carriers to provide switched services over private lines, interconnected to the public switched network at one end only, in circumstances where the foreign half-circuit is provided by a foreign carrier with which the U.S. carrier has a correspondent relationship.[782] As we stated in our *Flexibility*

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[781] NYNEX makes this argument in its reply comments in the *Flexibility* proceeding. NYNEX *Flexibility* Reply Comments at 9. (NYNEX recognizes the dangers in allowing a carrier with market power in the foreign country to route U.S.-bound traffic over private lines.) Because its request was outside the scope of that proceeding, we incorporated it into the *Foreign Carrier Entry Order* reconsideration proceeding. *See Flexibility Order*, 11 FCC Rcd at 20,072 ¶ 23 n.25.

[782] MCI Petition at 8-11.

Order,[783] MCI has misunderstood our rule. Our current rule is properly read to permit U.S. facilities-based carriers to offer switched services over international private lines that are interconnected to the public switched network at one end only, provided that the U.S. carrier corresponds with a foreign carrier that resells rather than owns the foreign half-circuit. That is, the U.S. facilities-based carrier may carry switched traffic over its private lines interconnected at one end where the foreign correspondent with which the U.S. carrier is interchanging switched traffic is not the owner of the underlying foreign private line half-circuit. This rule is a limited exception to our general rule on the provision of switched services over international private lines.

383. BTNA and WorldCom filed petitions for reconsideration related to this limited exception to our rule on the provision of switched services over international private lines.[784] We defer these requests to the pending *Flexibility Order* reconsideration proceeding, CC Docket No. 90-337, because of their integral relationship to the issues in that proceeding. In the meantime, carriers wishing to enter into arrangements of the sort described by those parties may file requests to approve alternative settlement arrangements under our *Flexibility* policies.[785]

IX. Administrative Matters

384. The Commission has reviewed its rules governing the provision of international telecommunications services by authorized carriers and has amended the rules to reflect both the policy decisions made in this *Order* and necessary technical corrections. Technical corrections not discussed in the text of this *Order* are minor corrections to conform our rules to current practice and were justified in earlier rulemaking proceedings. We also eliminate provisions of Section 63.13 of the Commission's rules that are no longer necessary. We therefore find good cause to conclude that notice and comment procedures are unnecessary.[786] The amendments appear in Appendix C to this *Order*. Carriers should review these rule changes.

385. The analysis pursuant to the Regulatory Flexibility of 1980, 5 U.S.C. § 608, is contained in Appendix D.

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[783] *See Flexibility Order*, 11 FCC Rcd at 20,072 ¶ 23 n.25.

[784] *See* BTNA Petition at 2-4; WorldCom Petition; *see also* AT&T Opposition to Petitions for Reconsideration (IB Docket No. 95-22) at 2-6; Response of Sprint to Petitions for Reconsideration (IB Docket No. 95-22) at 3-4; Impsat Comments (IB Docket No. 95-22) at 3; BTNA Reply to Opposition to Petitions for Reconsideration (IB Docket No. 95-22) at 2-4; Reply of WorldCom (IB Docket No. 95-22) at 1-3.

[785] *See* 47 C.F.R. § 64.1002.

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

386. *Paperwork Reduction Act of 1995 Analysis.* This *Report and Order* contains new and modified information collections. As part of the Commission's continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this *Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from date of publication of this *Order* in the Federal Register. Comments may address the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Written comments on the proposed and/or modified information collections must be submitted on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information concerning the information collections contained in the Report and Order contact Judy Boley at 202-418-0214.

X. Ordering Clauses

387. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 2, 4(i), 201, 203, 205, 214, 303(r), 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201, 205, 214, 303(r), 309, 310, and the Submarine Cable Landing License Act, 47 U.S.C. §§ 34-39, the policies, rules, and requirements discussed herein ARE ADOPTED and Parts 43 and 63 of the Commission's rules, 47 C.F.R. pts. 43, 63, ARE AMENDED as set forth in Appendix C.

388. IT IS FURTHER ORDERED that authority is delegated to the Chief, International Bureau and the Chief, Common Carrier Bureau, as specified herein, to effect the decisions as set forth above.

389. IT IS FURTHER ORDERED that the petitions for reconsideration in IB Docket No. 95-22 ARE GRANTED in part, DENIED in part, and DEFERRED in part as set forth herein.

390. IT IS FURTHER ORDERED that the Commission's Office of Managing Director shall send a copy of this *Report and Order and Order on Reconsideration*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

391. IT IS FURTHER ORDERED that the policies, rules, and requirements established in this decision shall take effect thirty days after publication in the Federal Register or in accordance with the requirements of 5 U.S.C. § 801(a)(3) and 44 U.S.C. § 3507. The Commission will publish a document at a later date announcing the effective date. The Commission reserves the right to reconsider the effective date of this decision if the WTO Basic Telecom Agreement does not take effect on January 1, 1998.

Federal Communications Commission

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A
Lists of Commenters and Reply Commenters in IB Docket No. 97-142

Commenters

Aeronautical Radio, Inc. (ARINC)
Ameritech
AT&T Corporation (AT&T)
BellSouth Corporation
BT North America Inc. (BTNA)
Cable & Wireless, plc (C&W)
Department of Defense (DOD)
Deutsche Telekom AG & Deutsche Telekom, Inc. (DT)
European Union, Delegation of the European Commission (European Commission)
FaciliCom International, L.L.C. (FaciliCom)
Federal Bureau of Investigation (FBI)
France Telecom (FT)
Frontier Corporation (Frontier)
Guatemala
GTE Service Corporation (GTE)
Indus, Inc. (Indus)
Embassy of Japan (Japan)
Kokusai Denshin Denwa Co., Ltd. (KDD)
MCI Telecommunications Corporation (MCI)
NextWave Personal Communications, Inc. (NextWave)
New T&T Hong Kong Ltd.
Nippon Telegraph and Telephone Corporation (NTT)
Pacific Communications Services Company (Pacific Communications)
NYNEX Long Distance Company (NYNEX LD)
PanAmSat Corporation (PanAmSat)
SBC Communications (SBC)
Shell Offshore Service Company (SOSCo)
Societe Internationale de Telecommunications Aeronautiques (SITA)
Sprint Communications Company, L.P. (Sprint)
Telecom Finland, Ltd. (Telecom Finland)
Telecommunication Authority of Singapore (TAS)
Telefónica Internacional de Espana, S.A. (Telefónica Internacional)
Telephone and Data Systems, Inc.
Telefonos de Mexico, S.A. de C.V. (Telmex)
Telstra, Inc. (TI)
United States Telephone Association (USTA)
United States Trade Representative (USTR)
US West, Inc.
Viatel, Inc.
WinStar Communications, Inc. (WinStar)
Wireless Cable Association International, Inc. (WCA)
WorldCom, Inc.

Reply Commenters

Aeronautical Radio, Inc. (ARINC)
AirTouch Communications, Inc.
AT&T Corporation (AT&T)
Cable & Wireless, plc (C&W)
Department of Defense (DOD)
European Public Telecommunications Network Operators Association (ETNO)
Federal Bureau of Investigation (FBI)
GTE Service Corporation (GTE)
Kokusai Denshin Denwa Co., Ltd. (KDD)
MCI Telecommunications Corporation (MCI)
Department of Commerce, National Telecommunications and Information Administration (NTIA)
Nippon Telegraph and Telephone Corporation (NTT)
NYNEX Long Distance Company (NYNEX LD)
SBC Communications Inc. (SBC)
J. Gregory Sidak (Sidak)
Societe Internationale de Telecommunications Aeronautiques (SITA)
Sprint Communications Company, L.P. (Sprint)
Telecommunications Resellers Association (TRA)
Telefónica Internacional de Espana, S.A. (Telefónica Internacional)
Telia North America, Inc. (Telia NA)
Telstra, Inc. (Telstra)
United States Telephone Association (USTA)
United States Trade Representative (USTR)
Viatel, Inc. (Viatel)

APPENDIX B
Petitions for Reconsideration in IB Docket No. 95-22

Petitions for Reconsideration or for Clarification

BT North America Inc. Petition for Reconsideration (BTNA Petition)
Cable & Wireless, Inc., Petition for Reconsideration (CWI Petition)
MCI Telecommunications Corporation Petition for Reconsideration (MCI Petition)
Telefónica Larga Distancia de Puerto Rico, Inc., Petition for Reconsideration (TLD Petition)
WorldCom, Inc. Petition for Clarification or, in the Alternative, for Reconsideration (WorldCom Petition)

Subsequent Filings

AT&T Corp. Opposition to Petitions for Reconsideration (AT&T Opposition)
MCI Telecommunications Corporation Opposition (MCI Opposition)
Response of Sprint to Petitions for Reconsideration (Sprint Response)
Opposition of WorldCom, Inc. (WorldCom Opposition)

BTNA Reply to Opposition to Petition for Reconsideration (BTNA Reply)
CWI Reply to Opposition to Petition for Reconsideration (CWI Reply)
Comments of Impsat USA Inc. on WorldCom's Petition and AT&T's Opposition Thereto (Impsat Comments)
TLD Reply to Oppositions to Petition for Reconsideration (TLD Reply)
Reply of WorldCom, Inc. (WorldCom Reply)

APPENDIX C
Final Rules

Parts 43 and 63 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) is amended as follows:

PART 43 – REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

1. The authority citation for Part 43 continues to read as follows:

   Authority: 47 U.S.C. 154; Telecommunications Act of 1996, Public Law 104-104, Sections 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted. 47 U.S.C. 211, 219, 220 as amended.

2. § 43.51 is amended by revising paragraph (d) to read as follows:

§ 43.51 Contracts and concessions.

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(d) Any U.S. carrier that interconnects an international private line to the U.S. public switched network, at its switch, including any switch in which the carrier obtains capacity either through lease or otherwise, shall file annually with the Chief of the International Bureau a certified statement containing the number and type (e.g., a 64-kbps circuit) of private lines interconnected in such a manner. The certified statement shall specify the number and type of interconnected private lines on a country specific basis. The identity of the customer need not be reported, and the Commission will treat the country of origin information as confidential. Carriers need not file their contracts for such interconnections, unless they are specifically requested to do so. These reports shall be filed on a consolidated basis on February 1 (covering international private lines interconnected during the preceding January 1 to December 31 period) of each year. International private lines to countries for which the Commission has authorized the provision of switched basic services over private lines at any time during a particular reporting period are exempt from this requirement.

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3. § 43.61 is amended by revising paragraph (c) to read as follows:

§ 43.61 Reports of international telecommunications traffic.

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(c) Each common carrier engaged in the resale of international switched services that has an affiliation with a foreign carrier that has sufficient market power on the foreign end of an international route to affect competition adversely in the U.S. market and that collects settlement payments from U.S. carriers shall file a quarterly version of the report required in paragraph (a) of this section for its switched resale services on the dominant route within 90 days from the end of each calendar quarter.

For purposes of this paragraph, "affiliation" is defined in § 63.18(h)(1)(i) and "foreign carrier" is defined in § 63.18(h)(1)(ii).

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PART 63 – EXTENSION OF LINES AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. The authority citation for Part 63 continues to read as follows:

   Authority: Sections 1, 4(i), 4(j), 201-205, 218 and 403 of the Communications Act of 1934, as amended, and Section 613 of the Cable Communications Policy Act of 1984, 47 U.S.C. 151, 154(i), 154(j), 201-205, 218, 403, 533 unless otherwise noted.

2. § 63.10 is revised to read as follows:

§ 63.10 Regulatory classification of U.S. international carriers.

(a) Unless otherwise determined by the Commission, any party authorized to provide an international communications service under this part shall be classified as either dominant or non-dominant for the provision of particular international communications services on particular routes as set forth in this section. The rules set forth in this section shall also apply to determinations of regulatory status pursuant to §§ 63.11 and 63.13. For purposes of paragraphs (a)(1) through (a)(3) of this section, "affiliation" and "foreign carrier" are defined as set forth in § 63.18(h)(1)(i) and (ii), respectively. For purposes of paragraphs (a)(2) and (a)(3) of this section, the relevant markets on the foreign end of a U.S. international route include: international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services on the foreign end of a particular route.

(1) A U.S. carrier that has no affiliation with, and that itself is not, a foreign carrier in a particular country to which it provides service (i.e., a destination country) shall presumptively be considered non-dominant for the provision of international communications services on that route;

(2) Except as provided in paragraph (a)(4) of this section, a U.S. carrier that is, or that has or acquires an affiliation with a foreign carrier that is a monopoly provider of communications services in a relevant market in a destination country shall presumptively be classified as dominant for the provision of international communications services on that route; and

(3) A U.S. carrier that is, or that has or acquires an affiliation with a foreign carrier that is not a monopoly provider of communications services in a relevant market in a destination country and that seeks to be regulated as non-dominant on that route bears the burden of submitting information to the Commission sufficient to demonstrate that its foreign affiliate lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. If the U.S. carrier demonstrates that the foreign affiliate lacks 50 percent market share in the international transport and the local access markets on the foreign end of the route, the U.S. carrier shall presumptively be classified as non-dominant.

(4) A carrier that is authorized under this part to provide to a particular destination country a particular international communications service, and that provides such service solely through the resale of an unaffiliated U.S. facilities-based carrier's international switched services (either directly or

indirectly through the resale of another U.S. resale carrier's international switched services), shall presumptively be classified as non-dominant for the provision of the authorized service. The existence of an affiliation with a U.S. facilities-based international carrier shall be assessed in accordance with the definition of affiliation contained in § 63.18(h)(1)(i), except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(b) Any party that seeks to defeat the presumptions in paragraph (a) of this section shall bear the burden of proof upon any issue it raises as to the proper classification of the U.S. carrier.

(c) Any carrier classified as dominant for the provision of particular services on particular routes under this section shall comply with the following requirements in its provision of such services on each such route:

(1) File international service tariffs on one day's notice without cost support;

(2) Provide services as an entity that is separate from its foreign carrier affiliate, in compliance with the following requirements:

(i) The authorized carrier shall maintain separate books of account from its affiliated foreign carrier. These separate books of account do not need to comply with Part 32 of this chapter; and

(ii) The authorized carrier shall not jointly own transmission or switching facilities with its affiliated foreign carrier. Nothing in this section prohibits the U.S. carrier from sharing personnel or other resources or assets with its foreign affiliate;

(3) File quarterly reports on traffic and revenue, consistent with the reporting requirements authorized pursuant to § 43.61, within 90 days from the end of each calendar quarter;

(4) File quarterly reports summarizing the provisioning and maintenance of all basic network facilities and services procured from its foreign carrier affiliate or from an allied foreign carrier, including, but not limited to, those it procures on behalf of customers of any joint venture for the provision of U.S. basic or enhanced services in which the authorized carrier and the foreign carrier participate, within 90 days from the end of each calendar quarter. These reports should contain 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;

(5) In the case of an authorized facilities-based carrier, file quarterly circuit status reports within 90 days from the end of each calendar quarter in the format set out by the § 43.82 annual circuit status manual, with two exceptions: activated or idle circuits must be reported on a facility-by-facility basis; and the derived circuits need not be specified in the three quarterly reports due on June 30, September 30, and December 31. For purposes of this paragraph, "facilities-based carrier" is defined in § 63.18 note 2.

(d) A carrier classified as dominant under this section shall file an original and two copies of each report required by paragraphs (c)(3), (c)(4), and (c)(5) of this section with the Chief, International Bureau. The carrier shall include with its filings separate computer diskettes for the reports required by paragraphs (c)(3) and (c)(5), in the format specified by the section 43.61 and section 43.82 filing manuals, respectively. The carrier shall also file one paper copy of these reports, accompanied by the appropriate computer diskettes, with the Commission's copy contractor. The transmittal letter accompanying each report shall clearly identify the report as responsive to the appropriate paragraph of § 63.10(c).

3. § 63.11 is amended by revising the section heading and text to read as follows:

§ 63.11 Notification by and prior approval for U.S. international carriers that have or propose to acquire an affiliation with a foreign carrier.

(a) Any carrier authorized to provide international communications service under this part shall notify the Commission sixty days prior to the consummation of either of the following acquisitions of direct or indirect controlling interests in or by foreign carriers:

(1) acquisition of a direct or indirect controlling interest in a foreign carrier (as defined in § 63.18(h)(1)(ii)) by the authorized carrier, or by any entity that directly or indirectly controls the authorized carrier, or that directly or indirectly owns more than 25 percent of the capital stock of the authorized carrier; or

(2) acquisition of a direct or indirect interest in the capital stock of the authorized carrier by a foreign carrier or by an entity that directly or indirectly controls a foreign carrier where the interest would create an affiliation within the meaning of § 63.18(h)(1)(i)(B).

(b) Any carrier authorized to provide international communications service under this part that becomes affiliated with a foreign carrier within the meaning of § 63.18(h)(1) that has not previously notified the Commission pursuant to this section or § 63.18 shall notify the Commission within thirty days after acquiring the affiliation. In particular, acquisition by an authorized carrier (or by any entity that directly or indirectly controls, is controlled by, or is under direct or indirect common control with the authorized carrier) of a direct or indirect interest in a foreign carrier that is greater than 25 percent but not controlling is subject to this paragraph but not to paragraph (a).

(c) The notification required under paragraphs (a) and (b) of this section shall contain a list of the affiliated foreign carriers named in paragraphs (a) and (b) of this section and shall state individually the country or countries in which the foreign carriers are authorized to provide telecommunications services to the public. It shall additionally specify which, if any, of these countries is a Member of the World Trade Organization; which, if any, of these countries the U.S. carrier is authorized to serve under this part; what services it is authorized to provide to each such country; and the FCC File No. under which each such authorization was granted. The notification shall certify to the information specified in this paragraph.

(1) The carrier also should specify, where applicable, those countries named in paragraph (c) of this section for which it provides a specified international communications service solely through the resale of the international switched services of U.S. facilities-based carriers with which the resale carrier does not have an affiliation. Such an affiliation is defined in § 63.18(h)(1)(i), except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(2) The carrier shall also submit with its notification:

(i) The ownership information as required to be submitted pursuant to § 63.18(h)(2); and

(ii) A "special concessions" certification as required to be submitted pursuant to § 63.18(i).

(d) In order to retain non-dominant status on the affiliated route, the carrier notifying the Commission of a foreign carrier affiliation under paragraph (a) or (b) of this section should provide information to demonstrate that it qualifies for non-dominant classification pursuant to § 63.10.

(e) After the Commission issues a public notice of the submissions made under this section, interested parties may file comments within 14 days of the public notice.

(1) In the case of a notification filed under paragraph (a) of this section, the Commission, if it deems it necessary, will by written order at any time before or after the submission of public comments impose dominant carrier regulation on the carrier for the affiliated routes based on the provisions of § 63.10.

(2) The Commission will, unless it notifies the carrier in writing within 30 days of issuance of the public notice that the investment raises a substantial and material question of fact as to whether the investment serves the public interest, convenience and necessity, presume the investment to be in the public interest. If notified that the investment raises a substantial and material question, then the carrier shall not consummate the planned investment until it has filed an application under § 63.18 and submitted the information specified under § 63.18(h)(5) or (6) as applicable, and § 63.18(h)(7)-(8), as applicable, and the Commission has approved the application by formal written order.

(f) All authorized carriers are responsible for the continuing accuracy of certifications with regard to affiliations with foreign carriers made under this section and under § 63.18. Whenever the substance of any such certification is no longer accurate, the carrier shall as promptly as possible, and in any event within thirty days, file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided, *except that* the carrier shall immediately inform the Commission if at any time the representations in the "special concessions" certification provided under paragraph (c)(2)(ii) of this section or § 63.18(i) are no longer true. *See* § 63.18(i). This information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

Note: "Control" as used in this section includes actual working control in whatever manner exercised and is not limited to majority stock ownership.

4. § 63.12 is revised to read as follows:

§ 63.12 Processing of international Section 214 applications. .

(a) Except as provided by paragraph (c) of this section, a complete application seeking authorization under § 63.18 shall be granted by the Commission 35 days after the date of public notice listing the application as accepted for filing.

(b) Issuance of public notice of the grant shall be deemed the issuance of § 214 certification to the applicant, which may commence operation on the 36th day after the date of public notice listing the application as accepted for filing, but only in accordance with the operations proposed in its application and the rules, regulations, and policies of the Commission.

(c) The streamlined processing procedures provided by paragraphs (a) and (b) of this section shall not apply where:

(1) The applicant has an affiliation within the meaning of § 63.18(h)(1)(i) with a foreign carrier in a destination market, and the Commission has not yet made a determination as to whether that foreign carrier lacks sufficient market power in that destination market to affect competition adversely in the U.S. market, unless the applicant clearly demonstrates in its application at least one of the following:

(i) The applicant qualifies for a presumption of non-dominance under § 63.10(a)(3);

(ii) The affiliated destination market is a WTO Member country and the applicant qualifies for a presumption of non-dominance under § 63.10(a)(4); or

(iii) The affiliated destination market is a WTO Member country and the applicant agrees to be classified as a dominant carrier to the affiliated destination country under § 63.10, without prejudice to its right to petition for reclassification at a later date; or

(2) The applicant has an affiliation within the meaning of § 63.18(h)(1)(i) with a dominant U.S. carrier whose international switched or private line services the applicant seeks authority to resell (either directly or indirectly through the resale of another reseller's services), unless the applicant