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

(3) The applicant seeks authority to provide switched basic services over private lines to a country for which the Commission has not previously authorized the provision of switched services over private lines; or

(4) The application is formally opposed by a pleading meeting the following criteria: (i) the caption and text of the pleading make it unmistakably clear that the pleading is intended to be a formal opposition; (ii) the pleading is served upon the other parties to the proceeding; and (iii) the pleading is filed within the time period prescribed for the filing of objections or comments; or

(5) The Commission has informed the applicant in writing, within 28 days after the date of public notice accepting the application for filing, that the application is not eligible for streamlined processing under this section.

(d) Any complete application that is subject to paragraph (c) of this section will be acted upon only by formal written order, and operation for which such authorization is sought may not commence except in accordance with such order. The Commission will issue public notice that the application is ineligible for streamlined processing. Within 90 days of the public notice, the Commission 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.

5. § 63.13 is revised to read as follows:

§ 63.13 Procedures for modifying regulatory classification of U.S. international carriers from dominant to non-dominant.

Any party that desires to modify its regulatory status from dominant to non-dominant for the provision of particular international communications services on a particular route should provide information in its application to demonstrate that it qualifies for non-dominant classification pursuant to § 63.10.

6. § 63.14 is revised to read as follows:

§ 63.14 Prohibition on agreeing to accept special concessions.

(a) Any carrier authorized to provide international communications service under this part shall be prohibited from agreeing to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market, as described in paragraph (c) of this section, and from agreeing to accept special concessions in the future. For purposes of this section, "foreign carrier" is defined in § 63.18(h)(1)(ii).

(b) For purposes of this section and §§ 63.11(c)(2)(ii) and 63.18(i), a special concession is defined as an exclusive arrangement involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services where the arrangement is not offered to similarly situated U.S.-licensed carriers and involves:

(1) operating agreements for the provision of basic services;

(2) distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, such as provisioning and maintenance times; or

(3) any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers.

(c) A U.S. carrier that seeks to enter a special concession with a foreign carrier bears the burden of submitting information, as part of the requirement to file the agreement with the Commission pursuant to § 43.51, sufficient to demonstrate that the foreign carrier 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 makes a showing that the foreign carrier 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 will presumptively be allowed to agree to accept the special concession.

(d) Any party that seeks to defeat the presumption in paragraph (c) of this section shall bear the burden of proof upon any issue it raises as to the ability of the foreign carrier to affect competition adversely in the U.S. market.

7. § 63.17 is amended by revising paragraph (b) to read as follows:

§ 63.17 Special provisions for U.S. international common carriers.

*****

(b) Except as provided in paragraph (b)(4) of this section, a U.S. common carrier, whether a reseller or facilities-based carrier, may engage in "switched hubbing" to countries for which the Commission has not authorized the provision of switched basic services over private lines provided the carrier complies with the following conditions:

(1) U.S.-outbound switched traffic shall be routed over the carrier's authorized U.S. international private lines to a country for which the Commission has authorized the provision of switched services over private lines (i.e., the "hub" country), and then forwarded to the third country only by taking at published rates and reselling the international message telephone service (IMTS) of a carrier in the hub country;

(2) U.S.-inbound switched traffic shall be carried to a country for which the Commission has authorized the provision of switched services over private lines (i.e., the "hub" country) as part of the IMTS traffic flow from a third country and then terminated in the United States over U.S. international private lines from the hub country;

(3) U.S. common carriers that route U.S.-billed traffic via switched hubbing shall tariff their service on a "through" basis between the United States and the ultimate point of origination or termination;

(4) No U.S. common carrier may engage in switched hubbing to or from a third country where it has an affiliation with a foreign carrier unless and until it has received authority to serve that country under § 63.18(e)(1), (e)(2), or (e)(6).

8. § 63.18 is amended to revise paragraph (e)(1)(ii)(A); to redesignate paragraphs (e)(2)(ii)(A) through (C) as paragraphs (e)(2)(ii)(B) through (D) and add new paragraph (e)(2)(ii)(A); to revise paragraph (e)(2)(ii)(C); to revise paragraph (e)(3); to remove paragraphs (e)(3)(i) and (e)(3)(ii); to redesignate paragraphs (e)(3)(i)(A) through (D) as paragraphs (e)(3)(i) through (iv); to revise paragraph (e)(4); to revise paragraph (e)(5); to remove paragraph (h)(4); to redesignate and revise paragraphs (h)(5) through (7) as paragraphs (h)(4) through (6); to add a new paragraph (h)(7); to revise paragraph (h)(8); to revise paragraph (i); and to add paragraph (k) to read as follows:

§ 63.18 Contents of applications for international common carriers.

*****

(e) ***
(1) ***
(i) ***
(ii) ***

(A) Authority to provide services to all international points under this part extends to those countries for which the applicant qualifies for non-dominant regulation as set forth in § 63.10, except in the following circumstance: If an applicant is affiliated with a foreign carrier in a destination market and the Commission has not determined that the foreign carrier lacks sufficient market power in the destination market to affect competition adversely in the U.S. market (see § 63.10(a)), the applicant shall not commence service on any such route until it receives specific authority to do so under paragraph (e)(6) of this section.

*****

(2) ***
(i) ***
(ii) ***

(A) Authority to provide resold services to all international points under this part extends to those countries and services for which the applicant qualifies for non-dominant regulation as set forth in § 63.10, except in the following circumstances, in which case an applicant shall not commence service until it receives specific authority to do so under paragraph (e)(6) of this section:

(*1*) An application to provide switched resold services to a non-WTO Member country where the applicant is affiliated with a foreign carrier; and

(*2*) An application to resell private line services to a destination market where the applicant is affiliated with a foreign carrier and the Commission has not determined that the foreign carrier lacks sufficient market power in the destination market to affect competition adversely in the U.S. market (see § 63.10(a)).

(B) ***

(C) The applicant may resell private line services for the provision of international switched basic services only in circumstances where the Commission has specifically authorized the provision of switched basic services over private lines to the particular country at the foreign end of the private line. In making determinations about particular destination countries, the Commission will follow the policies adopted in IB Docket Nos. 96-261 and 97-142. The Commission will provide public notice of its decisions to authorize the provision of switched basic services over private lines to particular countries.

(D) ***

(3) If applying for authority to provide international switched basic services over resold private lines between the United States and a WTO Member country for which the Commission has not previously authorized the provision of switched services over private lines, the applicant shall demonstrate either that settlement rates for at least 50 percent of the settled U.S.-billed traffic between the United States and the country at the foreign end of the private line are at or below the benchmark settlement rate adopted for that country in IB Docket No. 96-261 or that the country affords resale opportunities equivalent to those available under U.S. law. If applying for authority to provide international switched basic services over resold private lines between the United States and a non-

WTO Member country for which the Commission has not previously authorized the provision of switched services over private lines, the applicant shall demonstrate that settlement rates for at least 50 percent of the settled U.S.-billed traffic between the United States and the country at the foreign end of the private line are at or below the benchmark settlement rate adopted for that country in IB Docket No. 96-261 and that the country affords resale opportunities equivalent to those available under U.S. law. With regard to showing that a destination country affords resale opportunities equivalent to those available under U.S. law, an applicant shall include evidence demonstrating that equivalent resale opportunities exist between the United States and the subject country, including any relevant bilateral or multilateral agreements between the administrations involved. Parties must demonstrate that the foreign country at the other end of the private line provides U.S.-based carriers with:

(i) [formerly paragraph (e)(3)(i)(A)]

(ii) [formerly paragraph (e)(3)(i)(B)]

(iii) [formerly paragraph (e)(3)(i)(C)]

(iv) [formerly paragraph (e)(3)(i)(D)]

(4) Any carrier authorized under this section to acquire and operate international private line facilities other than through resale may use those private lines to provide switched basic services only in circumstances where the Commission has previously authorized the provision of switched services over private lines to the particular country at the foreign end of the private line. The Commission will provide public notice of its decisions to authorize the provision of switched services over private lines to particular countries pursuant to its policies adopted in IB Docket Nos. 96-261 and 97-142. This provision is subject to the following exceptions and conditions:

(i) The applicant shall not initiate such service on a particular route absent a grant of specific authority under paragraph (e)(6) of this section in circumstances where the applicant is affiliated with a carrier in the country at the foreign end of the private line and the Commission has not determined that the foreign carrier lacks sufficient market power in the country at the foreign end of the private line to affect competition adversely in the U.S. market. See § 63.10(a).

(ii) ***

(A) Except as provided in paragraph (e)(4)(ii)(B) of this section, any carrier that seeks to provide international switched basic services over its authorized private line facilities between the United States and a WTO Member country for which the Commission has not previously authorized the provision of switched services over private lines shall demonstrate that settlement rates for at least 50 percent of the settled U.S.-billed traffic between the United States and the country at the foreign end of the private line are at or below the benchmark settlement rate adopted for that country in IB Docket No. 96-261 or that the country affords resale opportunities equivalent to those available under U.S. law. With regard to showing that a destination country affords resale opportunities equivalent to those available under U.S. law, an applicant shall include the information required by paragraph (e)(3) of this section.

(B) ***

(5) If applying for authority to acquire facilities through the transfer of control of a common carrier holding international Section 214 authorization, or through the assignment of another carrier's existing authorization, the applicant shall complete paragraphs (a) through (d) of this section for both the transferor/assignor and the transferee/assignee. Paragraph (g) of this section is not applicable, and only the transferee/assignee needs to complete paragraphs (h) through (k) of this section. At the beginning of the application, the applicant should also include a narrative of the means by which the transfer or assignment will take place. The Commission reserves the right to request additional information as to the particulars of the transaction to aid it in making its public interest determination.

(6) ***

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(h) ***

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(4) Each applicant and carrier authorized to provide international communications service under this part is responsible for the continuing accuracy of the certifications required by paragraphs (h)(1)-(3) of this section. Whenever the substance of any such certification is no longer accurate, the applicant/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. The information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

(5) Any applicant that seeks to operate as a U.S. facilities-based international carrier to a particular country and that is a foreign carrier in that country, or directly or indirectly controls a foreign carrier in that country, or has an affiliation within the meaning of paragraph (h)(1)(i)(B) of this section with a foreign carrier in that country shall provide the following information:

(i) The named foreign country (i.e., the destination foreign country) is a Member of the World Trade Organization; or

(ii) The applicant's affiliated foreign carrier lacks sufficient market power in the named foreign country to affect competition adversely in the U.S. market; or

(iii) The named foreign country provides effective competitive opportunities to U.S. carriers to compete in that country's international facilities-based market. An effective competitive opportunities demonstration should address the following factors:

(A) [formerly paragraph (h)(6)(A)(*1*)]

(B) [formerly paragraph (h)(6)(A)(*2*)]

(C) [formerly paragraph (h)(6)(A)(*3*)]

(D) [formerly paragraph (h)(6)(A)(*4*)]

(6) Any applicant that proposes to resell the international switched or non-interconnected private line services of another U.S. carrier for the purpose of providing international communications services to the named foreign country and that is a foreign carrier in that country, or directly or indirectly controls a foreign carrier in that country, or has an affiliation within the meaning of paragraph (h)(1)(i)(B) of this section with a foreign carrier in the destination country shall provide the following information (see also paragraph (h)(7) of this section):

(i) The named foreign country (i.e., the destination foreign country) is a Member of the World Trade Organization; or

(ii) The applicant's affiliated foreign carrier lacks sufficient market power in the named foreign country to affect competition adversely in the U.S. market; or

(iii) The named foreign country provides effective competitive opportunities to U.S. carriers to resell international switched or non-interconnected private line services, respectively. An effective competitive opportunities demonstration should address the following factors:

(A) [formerly paragraph (h)(7)(A)(*1*)]

(B) [formerly paragraph (h)(7)(A)(*2*)]

(C) [formerly paragraph (h)(7)(A)(*3*)]

(D) [formerly paragraph (h)(7)(A)(*4*)]

(7) Any applicant that proposes to resell the international switched services of an unaffiliated U.S. carrier for the purpose of providing international communications services to the named foreign country and that is a foreign carrier in that country or has an affiliation with a foreign carrier in that

country shall either provide in its application a showing that would satisfy § 63.10(a)(3) or state that it will file the quarterly traffic reports required by § 43.61(c).

(8) With respect to regulatory classification under § 63.10, each applicant that certifies that it has an affiliation with a foreign carrier in a named foreign country and that desires to be regulated as non-dominant for the provision of particular international communications services to that country should provide information in its application to demonstrate that it qualifies for non-dominant classification pursuant to § 63.10.

(i) Each applicant shall certify that the applicant has not agreed to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market and will not enter into such agreements in the future. This certification shall be viewed as an ongoing representation to the Commission, and applicants/carriers shall immediately inform the Commission if at any time the representations in their certifications are no longer true. Failure to so inform the Commission will be deemed a material misrepresentation to the Commission. For purposes of this section, "special concession" is defined in § 63.14(b) and "foreign carrier" is defined in paragraph (h)(1)(ii) of this section.

(j) ***

(k) If the applicant desires streamlined processing pursuant to § 63.12, a statement of how the application qualifies for streamlined processing.

9. § 63.21 is amended to revise paragraph (a); to redesignate paragraph (e) as paragraph (h); and to add paragraphs (e), (f), and (g) to read as follows:

§ 63.21 Conditions applicable to international Section 214 authorizations.

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(a) Carriers may not use their authorized facilities-based or resold international private lines for the provision of switched basic services between the United States and a WTO Member country unless and until the Commission has determined that the country at the foreign end of the private line provides equivalent resale opportunities or that settlement rates for at least 50 percent of the settled U.S.-billed traffic between the United States and that country are at or below the benchmark settlement rate adopted for that country in IB Docket No. 96-261. Carriers may not use their authorized facilities-based or resold international private lines for the provision of switched basic services between the United States and a non-WTO Member country unless and until the Commission has determined that the country at the foreign end of the private line provides equivalent resale opportunities and that settlement rates for at least 50 percent of the settled U.S.-billed traffic between the United States and that country are at or below the benchmark settlement rate adopted for that country in IB Docket No. 96-261. *See* § 63.18(e)(3)-(4). If at any time the Commission finds, after an initial determination of compliance for a particular country, that the country no longer provides equivalent resale opportunities or that market distortion has occurred in the routing of traffic between the United States and that country, carriers shall comply with enforcement actions taken by the Commission. This condition shall not apply to a carrier's use of its authorized facilities-based private lines to provide service as described in § 63.18(e)(4)(ii)(B).

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(e) Authorized carriers may not access or make use of specific U.S. customer proprietary network information that is derived from a foreign network unless the carrier obtains approval from that U.S. customer. In seeking to obtain approval, the carrier must notify the U.S. customer that the customer may require the carrier to disclose the information to unaffiliated third parties upon written request by the customer.

(f) Authorized carriers may not receive from a foreign carrier any proprietary or confidential information pertaining to a competing U.S. carrier, obtained by the foreign carrier in the course of its normal business dealings, unless the competing U.S. carrier provides its permission in writing.

(g) The Commission reserves the right to review a carrier's authorization, and, if warranted, impose additional requirements on U.S. international carriers in circumstances where it appears that harm to competition is occurring on one or more U.S. international routes.

(h) *****

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation of Part 64 is amended to read as follows:

Authority: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Public Law 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 226, 228, 254(k) unless otherwise noted.

2. § 64.1001 is amended by revising paragraphs (b), (c), and (d) to read as follows:

§ 64.1001 International settlements policy and modification requests.

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(b) If the accounting rate referred to in § 43.51(e)(1) of this chapter is lower than the accounting rate in effect in the operating agreement of another carrier providing service to or from the same foreign point, and there is no modification in the other terms and conditions referred to in § 43.51(e)(1) of this chapter, the carrier must file a notification letter under paragraph (e) of this section.

(c) If the amendment referred to in § 43.51(e)(2) of this chapter is a simple reduction in the accounting rate, and there is no modification in the other terms and conditions referred to in § 43.51(e)(2) of this chapter, the carrier must file a notification letter under paragraph (e) of this section.

(d) If the operating agreement or amendment referred to in §§ 43.51(e)(1) and (e)(2) of this chapter is not subject to notification under paragraphs (b) and (c) of this section, the carrier must file a modification request under paragraph (f) of this section.

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3. § 64.1002 is revised to read as follows:

§ 64.1002 Alternative settlement arrangements.

(a) A communications common carrier engaged in providing switched voice, telex, telegraph, or packet switched service between the United States and a foreign point may seek approval to enter

APPENDIX D
Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was included in the *Notice of Proposed Rulemaking* in this proceeding.[2] The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3] This analysis also serves as the FRFA for the issues disposed of here on reconsideration of the *Foreign Carrier Entry Order*.[4]

Need for, and Objectives of, the Rules and Policies Adopted Here

2. This *Report and Order and Order on Reconsideration* adopts a liberalized standard for participation by foreign and foreign-affiliated entities in the U.S. telecommunications markets. This open entry standard will apply to the provision of international telecommunications services under Section 214 of the Communications Act, indirect foreign ownership of common carrier radio licensees under Section 310(b)(4), and cable landing licenses under the Submarine Cable Landing License Act. It also revises the Commission's regulatory safeguards governing the provision of international telecommunications services in light of recent changes in the world's telecommunications market and the Commission's liberalized standard for participation by foreign and foreign-affiliated entities. The Commission has deemed these changes appropriate in light of the recent World Trade Organization (WTO) Basic Telecommunications Services Agreement and the worldwide trend toward deregulation and competition in the provision of telecommunications services. Our objective is to increase competition in the U.S. telecommunications markets while minimizing the risk of anticompetitive harm and encouraging foreign governments to open their telecommunications markets. In light of the changed circumstances that will result from the WTO Basic Telecom Agreement and our nearly two years of experience with our current rules on market entry and regulation of foreign-affiliated entities, we find that reducing entry barriers for applicants affiliated with entities from WTO Member countries is the appropriate way to accomplish that objective. The Commission believes that it is no longer necessary to apply the "effective competitive opportunities" (ECO) test developed in the 1995 *Foreign Carrier Entry Order*[5] to countries that are Members of the WTO. Instead, we will rely primarily on

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1 *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et seq.*, was amended by the Contract with America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

2 *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Order and Notice of Proposed Rulemaking, 12 FCC Rcd 7847, 7908–7920 ¶¶ 156–192 (1997) (*Notice*).

3 *See* 5 U.S.C. § 604.

4 *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*); *see also id.* at 3994 app. C (Final Regulatory Flexibility Analysis).

5 *See id.* at 3882–94 ¶¶ 22–55.

regulatory safeguards and benchmark settlement rates to reduce the potential for anticompetitive conduct in the U.S. market. We revise some of those safeguards in this *Order*.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. No comments were submitted specifically in response to the IRFA. Nevertheless, we have considered, in developing these rules and policies, any potential significant economic impact on small entities. We have attempted to minimize the burdens imposed on all entities, including small entities, in order to promote participation by new entrants in the U.S. telecommunications markets.

4. NextWave raised comments in response to the *Notice* specific to the impact of our policy toward indirect foreign investment in C-block and F-block licensees. Those blocks, known as "entrepreneur" blocks, are reserved for small businesses and entrepreneurs. NextWave states that it and other entrepreneurial carriers are dependent on financing from a variety of sources, including foreign investment, and that access to foreign capital is vital to their financial viability.[6] NextWave argues that indirect foreign investment in C-block and F-block licensees presents "no conceivable risk to competition" because those licenses are held by entrepreneurs who are new entrants into the markets.[7] NextWave proposes that, for that reason, the Commission should conclude that indirect foreign investment in C-block and F-block personal communications systems (PCS) licensees by any entity whose home market is a WTO Member country serves the public interest and should not be subject to prior Commission approval. NextWave also urges the Commission, in the alternative, to establish an expedited process and timetable for addressing applications to exceed the 25 percent benchmark for indirect foreign ownership of common carrier wireless licensees.

5. Telephone and Data Systems (TDS) proposed that the Commission permit without prior approval any amount of indirect foreign ownership of common carrier radio licensees held in the form of registered securities when the foreign investor is not a carrier and comes from one of the 64 other WTO Member countries that has committed to enforce fair rules of competition for basic telecommunications. Under TDS's proposal, the Commission would continue to require prior approval for investors from other WTO Member countries, for investors from non-WTO countries, and from all foreign carriers. TDS suggested that we scrutinize filings with the Securities and Exchange Commission to monitor foreign ownership of registered securities and that we rely on revocation, instead of prior approval, to protect the public interest pursuant to Section 310(b)(4). TDS states that adoption of its proposal would significantly reduce burdens on common carrier radio licensees, who currently must research the nationalities of their individual shareholders in order to remain in compliance with the restrictions on foreign ownership.

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

6. We received no comments in response to our estimates in the IRFA of the number of small entities to which the proposed rules would apply. We conclude that the IRFA's estimates are the best available estimates of the number of small entities that the rules we adopt here will affect and that

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[6] NextWave Comments at 4.

[7] *Id.* at 6.

those estimates are sufficiently useful in enabling us to attempt to minimize the economic impact of our rules on small entities.

7. The RFA generally defines *small entity* as having the same meaning as the terms *small business*, *small organization*, and *small governmental jurisdiction* and defines *small business* as having the same meaning as the term *small business concern* under section 3 of the Small Business Act unless the Commission has developed one or more definitions that are appropriate for its activities.[8] The Small Business Act defines *small business concern* as one that (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[9]

8. The rules adopted in this *Order* apply only to entities providing international common carrier services pursuant to Section 214 of the Communications Act; entities providing domestic or international wireless common carrier, aeronautical enroute, or aeronautical fixed services under Section 309 of the Act; and entities licensed to construct and operate submarine cables under the Cable Landing License Act.

9. Because the small incumbent local exchange carriers (LECs) subject to these rules are either dominant in their fields of operations or are not independently owned and operated, consistent with our prior practice, they are excluded from the definitions of *small entity* and *small business concern*.[10] Accordingly, our use of the terms *small entities* and *small businesses* does not encompass small incumbent LECs. Out of an abundance of caution, however, for the purposes of this FRFA, we will consider small incumbent LECs to be within this analysis, where a small incumbent LEC is any incumbent LEC that arguably might be defined by the SBA as a "small business concern."[11]

a. Section 214 International Common Carrier Services

10. Entities providing international common carrier service pursuant to Section 214 of the Act fall into the SBA's Standard Industrial Classification (SIC) categories for Radiotelephone Communications (SIC 4812) and Telephone Communications, Except Radiotelephone (SIC 4813). The SBA's definition of *small entity* for those categories is one with fewer than 1,500 employees.[12]

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[8] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[9] Small Business Act, 15 U.S.C. § 632.

[10] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15,499, ¶¶ 1328–1330, 1342 (1996), *partial stay granted, Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996), *vacated in part and affirmed in part*, 120 F.3d 753 (8th Cir. 1997).

[11] *See id.*

[12] 13 C.F.R. § 121.201.

We discuss below the number of small entities falling within these two subcategories that may be affected by the rules adopted in this *Order*.

11. The most reliable source of information regarding the number of international common carriers is the data that we collect annually in connection with the *Telecommunications Industry Revenue: Telecommunications Relay Service Fund Worksheet Data* (*TRS Worksheet*). In 1995, 445 toll carriers filed TRS fund worksheets. We believe that between 50 and 200 carriers failed to file TRS fund worksheets. We believe also that fewer than 10 toll carriers had 1,500 or more employees. Thus, at most 635 international carriers would be classified as small entities. Many TRS filers, however, are affiliated with other carriers, and therefore the number of aggregated carriers is far fewer than the preceding estimate. Of the 445 toll filers, 239 reported no carrier affiliates. Adding 50 non-filers gives a lower estimate of 289 international carriers that would be classified as small entities. Thus, our best estimate of the total number of small entities is between 289 and 635. We are unable at this time to estimate with greater precision the number of international carriers that would qualify as small business entities under the SBA's definition. While not all of these entities may have provided international service in 1995, we expect that many of these entities will seek to do so in the future, as will additional entrants into the market.

b. Title III Common Carrier Services

12. *Cellular licensees.* Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. The closest applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies (SIC 4812). The most reliable source of information regarding the number of cellular services carriers nationwide of which we are aware appears to be the data that the Commission collects annually in connection with the *TRS Worksheet*.[13] According to the most recent data, 792 companies reported that they were engaged in the provision of cellular services.[14] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of cellular services carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 792 small cellular service carriers.

13. *220 MHz Radio Services.* Because the Commission has not yet defined a small business with respect to 220 MHz radio services, we will utilize the SBA's definition applicable to radiotelephone companies — i.e., an entity employing less than 1,500 persons.[15] With respect to the 220 MHz services, the Commission has proposed a two-tiered definition of small business for purposes

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

[14] *Id.*

[15] 13 C.F.R. § 121.201, SIC 4812.

of auctions: (1) for Economic Area (EA) licensees,[16] a firm with average annual gross revenues of not more than $6 million for the preceding three years, and (2) for regional and nationwide licensees, a firm with average annual gross revenues of not more than $15 million for the preceding three years.[17] Since this definition has not yet been approved by the SBA, we will utilize the SBA's definition applicable to radiotelephone companies. Given the fact that nearly all radiotelephone companies employ fewer than 1,000 employees,[18] with respect to the approximately 3,800 incumbent licensees in this service, we will consider them to be small businesses under the SBA definition.

14. *Common Carrier Paging.* The Commission has proposed a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging services. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, i.e., an entity employing fewer than 1,500 persons.[19] At present, there are approximately 74,000 Common Carrier Paging licensees. We estimate that the majority of common carrier paging providers would qualify as small businesses under the SBA definition.

15. *Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers such as paging companies. The closest applicable definition under the SBA rules is for radiotelephone (wireless) companies. The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that the Commission collects annually in connection with the *TRS Worksheet*. According to the most recent data, 117 companies reported that they were engaged in the provision of mobile services.[20] Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under the SBA's definition. Consequently, we estimate that fewer than 117 mobile service carriers are small entities.

16. *Broadband Personal Communications Services (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has defined *small entity* in the auctions for Blocks C and F as an entity

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

[17] *Id.*

[18] *See* U.S. Bureau of the Census, U.S. Department of Commerce, *1992 Census of Transportation, Communications, and Utilities, UC92-S-1*, Subject Series, Establishment and Firm Size, Tbl. 5, Employment Size of Firms; 1992, SIC 4812 (issued May 1995).

[19] 13 C.F.R. § 121.201, SIC 4812.

[20] *Id.*

that has average gross revenues of less than $40 million in the three previous calendar years.[21] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenue of not more than $15 million for the preceding three calendar years.[22] These regulations defining *small entity* in the context of broadband PCS auctions have been approved by the SBA. No small business within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small businesses won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully; therefore, there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning bidders and the 93 qualifying bidders in the D, E, and F Blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules.

17. *Narrowband PCS.* The Commission does not know how many narrowband PCS licenses will be granted or auctioned, as it has not yet determined the size or number of such licenses. Two auctions of narrowband PCS licenses have been conducted for a total of 41 licenses, out of which 11 were obtained by small businesses owned by members of minority groups and/or women. Small businesses were defined as those with average gross revenues for the prior three fiscal years of $40 million or less.[23] For purposes of this FRFA, the Commission is utilizing the SBA definition applicable to radiotelephone companies, i.e., an entity employing less than 1,500 persons.[24] Not all of the narrowband PCS licenses have yet been awarded. There is therefore no basis to determine the number of licenses that will be awarded to small entities in future auctions. Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees[25] and that no reliable estimate of the number of prospective narrowband PCS licensees can be made, we assume, for purposes of the evaluations and conclusions in this FRFA, that all the remaining narrowband PCS licenses will be awarded to small entities.

18. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small business specific to the Rural Radiotelephone Service, which is defined in Section 22.99 of the

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

[22] *See id.*

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

[24] 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812.

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

Commission's Rules.[26] A significant subset of the Rural Radiotelephone Service is BETRS, or Basic Exchange Telephone Radio Systems (the parameters of which are defined in Sections 22.757 and 22.759 of the Commission's Rules). Accordingly, we will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing fewer than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them have fewer than 1,500 employees.[27]

19. *Air-Ground Radiotelephone.* The Commission has not adopted a definition of small business specific to the Air-Ground Radiotelephone Service, which is defined in Section 22.99 of the Commission's Rules.[28] Accordingly, we will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing fewer than 1,500 persons.[29] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA definition.

20. *Specialized Mobile Radio Licensees (SMR).* Pursuant to Section 90.814(b)(1) of our rules, the Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz Specialized Mobile Radio (SMR) licenses to firms that had revenues of less than $15 million in each of the three previous calendar years. This regulation defining "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.[30] We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations or how many of these providers have annual revenues of less than $15 million. We do know that one of these firms has over $15 million in revenues. We assume that all of the remaining existing extended implementation authorizations are held by small-entities, as that term is defined by the SBA. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected includes these 60 small entities.

21. *Microwave Video Services.* Microwave services includes common carrier,[31] private operational fixed, and broadcast auxiliary radio services. At present, there are 22,015 common carrier

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[26] 47 C.F.R. § 22.9.

[27] 13 C.F.R. § 121.201, SIC 4812.

[28] *Id.*

[29] *Id.*

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

[31] 47 C.F.R. § 101 *et seq.* (formerly part 21 of the Commission's rules).

licensees. Inasmuch as the Commission has not yet defined *small business* with respect to microwave services, we will utilize the SBA's definition applicable to radiotelephone companies — i.e., an entity with less than 1,500 employees.[32] Although some of these companies may have more than 1,500 employees, we are unable at this time to estimate with greater precision the number of common carrier microwave service providers that would qualify under the SBA's definition. We therefore estimate that there are fewer than 22,015 small common carrier licensees in the microwave video services.

22. *Offshore Radiotelephone Service.* This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.[33] At present, there are approximately 55 licensees in this service. Some of those licensees are common carriers. We are unable at this time to estimate the number of licensees that would qualify as small under the SBA's definition.

23. *Local Multipoint Distribution Service (LMDS).* The Commission has so far licensed only one licensee in this service, and that licensee is not providing service as a common carrier. There will be a total of 986 LMDS licenses.[34] Licensees will be permitted to decide whether to provide common carrier service, and we have no way of estimating how many will choose to do so. Because there will be no restrictions on the number of licenses a given entity may acquire, we have no way of estimating how many total licensees there will be. We also cannot estimate the number of common carrier licensees that will qualify as small entities.

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

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

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[32] 13 C.F.R. § 121.201, SIC 4812.

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

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

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

c. Aeronautical Enroute and Aeronautical Fixed Licenses

27. The Commission has not adopted a definition of small business specific to the aeronautical enroute and aeronautical fixed services. Accordingly, we will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing fewer than 1,500 persons.[35] There are 45 licensees providing aeronautical enroute and aeronautical fixed services, including Aeronautical Radio Inc. (ARINC) and its affiliates. All of the licensees are small businesses except ARINC, which has approximately 2,000 employees. We therefore conclude that there are 44 small businesses providing aeronautical enroute and aeronautical fixed services.

d. Submarine Cable Landing Licenses

28. The new rules and policies adopted in this *Order* will affect all holders of and future applicants for cable landing licenses, whether or not they operate their cables as common carriers. It is difficult to estimate how many applications for cable landing licenses will be filed in coming years, but that number will likely increase if we adopt our proposal to lower the barriers to granting licenses for cables to WTO Member countries. Since 1992, there have been approximately 40 applications for cable landing licenses. The total number of licensees is difficult to determine, because many licenses are jointly held by several licensees. Our rules will also permit more current licensees to accept additional investment from entities from WTO Member countries.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

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

30. An applicant for a Section 214 authorization or a cable landing license will no longer be required to show either that an affiliated foreign carrier lacks market power or that the destination country provides effective competitive opportunities (ECO) to U.S. carriers so long as it shows that the destination country is a Member of the World Trade Organization. Similarly, entities holding or

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[35] *Id.*

seeking to hold common carrier wireless licenses or aeronautical enroute or aeronautical fixed licenses that have more than 25 percent indirect foreign investment will not need to demonstrate that the home markets of the foreign investor or investors from WTO Members offer effective competitive opportunities for U.S. investors in the analogous service sector. *See supra* Section III.

31. Authorized international common carriers will no longer be required to notify the Commission before accepting investments by foreign carriers (or their affiliates) between 10 percent and 25 percent. We have retained a requirement that authorized carriers notify the Commission before accepting investment greater than 25 percent. We have added a requirement that authorized carriers notify the Commission before they (or their affiliates) acquire a direct or indirect controlling interest in a foreign carrier; previously, those interests were subject only to a post hoc notification requirement. We continue to require authorized carriers to notify the Commission within 30 days after acquiring a direct or indirect interest greater than 25 percent in a foreign carrier if the acquisition of that interest has not otherwise been reported. *See supra* Section VI.B.

32. We have narrowed the application of our "No Special Concessions" rule, which prohibits carriers from entering into exclusive arrangements with foreign carriers. That rule will now apply only to carriers' dealings with foreign carriers that have sufficient market power in their home markets to adversely affect competition in the U.S. market. *See supra* Section V.B.1. Carriers wishing to enter into alternative settlement arrangements with foreign carriers operating in WTO Member countries will presumptively be allowed to do so. That presumption may be overcome where an opponent demonstrates that there are not multiple facilities-based carriers operating in the foreign carrier's market. *See supra* Section V.E.

33. To ensure fair competition among authorized carriers and to be consistent with our policy governing the confidentiality of competing carrier information, all U.S. carriers will be prohibited from receiving proprietary or confidential information about competing U.S. carriers obtained by any foreign carrier in the course of its regular business dealings with the competing U.S. carrier, unless the U.S. carrier provides specific written permission. *See supra* Section V.B.2.a. We will also require U.S. carriers desiring to make use of foreign-derived customer proprietary network information (CPNI) pertaining to a specific U.S. customer to first obtain approval from that customer and notify that customer that the customer may require the carrier to disclose the CPNI to unaffiliated third parties. *See supra* Section V.B.2.b.

34. An authorized carrier affiliated with a foreign carrier will be subject to additional requirements. Its authorization to serve the affiliated market will be conditioned on the foreign affiliate's offering to all U.S.-licensed carriers a settlement rate at or below the benchmark adopted for that country in the Commission's recent *Benchmarks Order*.[36] Foreign-affiliated carriers classified as dominant are subject to additional reporting, recordkeeping, and compliance requirements. In this *Order*, we substantially reduce the initial showing that a foreign-affiliated carrier must make in order to be presumptively classified as non-dominant by adopting a presumption that a foreign carrier with less than 50 percent market share in certain relevant terminating markets does not have sufficient market power to affect competition adversely in the U.S. market. We remove existing dominant carrier requirements that we find to be unnecessarily burdensome and adopt a narrowly tailored

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[36] *International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280 (rel. Aug. 18, 1997) (*Benchmarks Order*).

dominant carrier framework designed to address specific concerns of anticompetitive behavior. We replace the requirement that dominant carriers file tariffs on fourteen days' advance notice with a one-day advance notice requirement, and we will accord these tariff filings a presumption of lawfulness. We will no longer require foreign-affiliated carriers to obtain Commission approval before adding or discontinuing circuits on the dominant route. We require dominant carriers to provide service on the affiliated route through a corporation that is separate from its foreign affiliate, maintain separate books of account, and not jointly own switching or transmission facilities with its foreign affiliate. Carriers regulated as dominant will be required to file quarterly traffic and revenue reports, provisioning and maintenance reports, and circuit status reports on the dominant affiliated route. We decline to adopt the proposal in the *Notice* to ban exclusive arrangements involving joint marketing, customer steering, and the use of foreign market telephone customer information. *See supra* Section V.C.2.

35. Finally, we impose a reporting requirement on switched resellers that are affiliated with a foreign carrier that has sufficient market power on the foreign end of a route to affect competition adversely in the U.S. market. We will require these resellers to file quarterly traffic and revenue reports for their switched resale traffic on the affiliated route. *See supra* Section V.C.1.b.

Federal Rules that May Duplicate, Overlap, or Conflict with the Rules Adopted Here

36. None.

Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

37. We have taken significant steps to minimize the procedural burdens imposed on all affected entities. The application of the rules we adopt in this *Order* does not vary depending on the size of the entities involved. Some regulations may be more burdensome on large carriers than on small carriers because large carriers may be more likely to be dominant or to operate on a facilities basis than are small carriers. That is, small carriers may be more likely to operate as resellers of switched international services, which are less likely to be subject to our most stringent regulation.

38. The revisions to our policies toward evaluating Section 214 and cable landing license applications will significantly reduce burdens on many current and potential international common carriers. A foreign-affiliated carrier seeking to serve an affiliated route will no longer be required to show either that its affiliate lacks market power or that the destination country provides effective competitive opportunities (ECO) to U.S. carriers so long it shows that the destination country is a Member of the World Trade Organization. We believe this to be a minimal burden for most small entities and a significantly lesser burden than the detailed showings required to demonstrate either that the affiliate lacks market power or that the destination country provides ECO. The ECO test, in particular, has proven to be unusually burdensome both on applicants and on the Commission.

39. Similarly, the revisions to our policy toward evaluating Section 310(b)(4) requests by common carrier radio licensees and aeronautical licensees to accept indirect foreign investment greater than 25 percent will significantly reduce the burdens on licensees (and prospective licensees) seeking to accept investment from entities in WTO Member countries. Those applicants will no longer be required to show that the home market of the investor offers effective competitive opportunities for U.S. investors in the analogous service sector. This will make those applications much simpler and less time-consuming and, more importantly, will make it much easier for licensees to accept foreign

investment and for prospective licensees to plan their business affairs. Common carrier radio licensees will continue to be required to seek Commission approval before accepting indirect foreign investment above a level for which they have previously received Commission approval.

40. We have taken steps to facilitate entry into the U.S. market for international telecommunications services by small carriers. Small carriers often enter the market, at least initially, by reselling the switched services of other authorized international carriers. In this *Order*, we change our procedural rules to afford streamlined processing to any applicant whose foreign affiliate is from a WTO Member country if the applicant requests authority to serve that country solely by reselling the switched services of unaffiliated U.S. international carriers. We also will streamline process the Section 214 application of any foreign-affiliated applicant whose affiliate is from a WTO Member and that demonstrates clearly and convincingly that the foreign affiliate has less than a 50 percent market share in certain relevant terminating markets in the destination foreign country. In addition, we will streamline process the Section 214 application of any applicant whose affiliate is from a WTO Member and is not otherwise eligible for streamlined processing if the applicant certifies that it will comply with our dominant carrier regulations. Streamlined applications, unless they are removed from the streamlined process, are granted 35 days from the date they are placed on public notice. *See supra* Section VI.A.

41. In revising our regulations that apply to authorized international common carriers, we have developed a targeted approach designed to monitor and detect anticompetitive behavior in the U.S. market without imposing regulations that are more burdensome than necessary. In doing so, we have attempted to minimize burdens on entities that are unlikely to pose a threat to competition. We also have removed restrictions on whole categories of activities that we have concluded do not pose a threat to competition in the developing competitive marketplace. Our approach relies in large part on reporting requirements, rather than restrictions on capacity changes or service options, to prevent affiliated carriers from causing competitive harms in the U.S. international services market.

42. We have significantly reduced the scope of our rule that prohibits carriers from entering into certain exclusive arrangements with foreign carriers. Our "No Special Concessions" rule will now prohibit accepting certain specified arrangements only from foreign carriers that have sufficient market power in their home markets to adversely affect competition in the U.S. market. We adopt a presumption that foreign carriers with less than 50 percent market share in the relevant terminating markets do not have such sufficient market power. We anticipate that delineating those arrangements that are subject to the prohibition and adopting this presumption will significantly clarify the circumstances in which authorized carriers will be permitted to accept special concessions from foreign carriers. This more targeted rule also will allow authorized carriers substantially more flexibility in arranging their business affairs.

43. Carriers wishing to enter into alternative settlement arrangements with foreign carriers operating in WTO Member countries will presumptively be allowed to do so. This presumption may be overcome by a demonstration that there are not multiple facilities-based carriers operating in the foreign carrier's market. We expect to allow alternative settlements more as a rule than as an exception, and the issue of whether there are multiple facilities-based carriers operating in the foreign market will be less burdensome than the issue of whether the foreign market offers effective competitive opportunities, which is the standard being replaced.

44. We have declined, in this *Order*, to adopt certain proposals in the *Notice* that would have restricted the business strategies of carriers classified as dominant. Instead, we will impose reporting requirements that will enable us to detect and deter anticompetitive behavior. We have declined to adopt proposals in the *Notice* to ban exclusive arrangements involving joint marketing, customer steering, and the use of foreign market telephone customer information. We have found that such proscriptive safeguards would be unduly burdensome and could unnecessarily impede business activities. We choose to rely instead on the general prohibition on accepting special concessions combined with additional reporting and disclosure requirements, instead of proscriptive safeguards, for carriers with foreign affiliations. We have also relieved carriers of the requirement to notify the Commission of investments by foreign carriers of 10 percent or more; they now must report an investment by a foreign carrier only when that investment exceeds 25 percent. We conclude that none of the safeguards we impose specifically on carriers classified as dominant will impose significant economic burdens.

45. We have also declined to impose on switched resellers a condition that their foreign affiliates maintain settlement rates at or below the benchmark settlement rates we adopted in the *Benchmarks Order*. We find that such a condition would be unnecessarily burdensome inasmuch as resellers have less ability to engage in anticompetitive conduct than facilities-based carriers and we have a greater ability to detect anticompetitive conduct by switched resellers. Imposing a benchmark condition on switched resellers would impose significant economic impact on resellers, many of whom are small entities, that could prevent some new entrants from entering the U.S. market and affect the ability of existing carriers to provide service. To address concerns about traffic distortions related to resale, however, we have decided to impose a requirement on switched resellers that are affiliated with a carrier that has sufficient market power to affect competition adversely in the U.S. market. We will require those resellers to file quarterly traffic and revenue reports for their traffic on the affiliated route in order to enable the Commission to determine whether switched resellers are engaging in anticompetitive conduct.

46. In the *Notice*, we sought comment on whether to adopt, as an additional dominant carrier safeguard, some level of structural separation between a U.S. carrier and its affiliated foreign carrier. We adopt here a requirement that a foreign-affiliated U.S. international carrier regulated as dominant provide service in the U.S. market through a corporation that is separate from the foreign affiliate, maintain separate books of account, and not jointly own switching and transmission facilities with its foreign carrier affiliate. We find that, without such separation, discrimination, cost-misallocation, and the possibility of a predatory price squeeze by such a foreign-affiliated carrier would have the potential to cause substantial harm to consumers, competition, and production efficiency in the U.S. international services market. These requirements will not impose a significant burden on such carriers because most foreign-affiliated carriers operating in the United States do so in a manner that is consistent with the requirements we adopt here. We have considered imposing more stringent structural separation requirements but have found them to be unnecessary and to potentially impose a significant burden on foreign-affiliated carriers that operate in the U.S. market.

47. We are unable to adopt NextWave's proposal to state that indirect foreign investment in C-block and F-block PCS licensees by any entity whose home market is a WTO Member country serves the public interest and will not be subject to prior Commission approval. We have found that prior approval is necessary in all instances of indirect foreign investment in excess of 25 percent because of the need to review such investments for national security, law enforcement, foreign policy, and trade concerns as well as for the exceptional case that poses a very high risk to competition. We

do, however, adopt NextWave's alternative proposal to establish an expedited process and timetable for addressing those applications: These applications will generally be added to the International Bureau's streamlined process and usually granted within 35 days from the date the International Bureau places the application on public notice. We expect that application of our open entry standard and streamlined process will both minimize procedural burdens on small entities and present substantial new opportunities for obtaining foreign capital. *See supra* Section III.D.

48. We are unable to adopt TDS's proposal to disregard investments in common carrier radio licensees by non-carriers held as publicly traded securities. We accept the concerns of Executive Branch agencies that a prior approval process is necessary for all investments and that even small investments in publicly traded securities could, if aggregated, nevertheless create a degree of control or influence over a licensee that would be contrary to U.S. national security or law enforcement interests. *See supra* Section III.D.

49. We have also decided not to adopt a policy that a common carrier radio licensee need not seek Commission approval before accepting increases in indirect foreign ownership once they have obtained Commission authority to exceed 25 percent indirect foreign ownership. We have determined that every such increase requires Commission review in order to consider the effect of the ownership on national security and law enforcement interests. *See supra* Section III.D.

50. We conclude that these steps we have taken to minimize significant economic impact on small entities will advance the small business goals of Section 257 of the Act, as added by the Telecommunications Act of 1996.

Report to Congress

51. The Commission will send a copy of this *Report and Order and Order on Reconsideration*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A summary of this *Report and Order and Order on Reconsideration*, and a copy of this FRFA, will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

STATEMENT OF FCC CHAIRMAN WILLIAM E. KENNARD
November 25, 1997

Re: Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142

Re: Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, IB Docket No. 96-111

Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations, CC Docket No. 93-23

COMMUNICATIONS SATELLITE CORPORATION Request for Waiver of Section 25.131(j)(1) of the Commission's Rules as it Applies to Services Provided via the INTELSAT K Satellite, File NO. ISP-92-007

These items illustrate what I have stressed since my first day as Chairman as the principles that should guide the work of this agency, the three Cs: competition, community and common sense. They promote competition by opening up our telecommunications and satellite markets to foreign participation, ensuring that U.S. consumers will be confronted with an expanding array of choices and lower prices. They promote community by establishing a framework that should make it easier and cheaper for people around the world to communicate and exchange ideas. The items takes a common sense approach to opening our markets. They replace a process that has, to this point, been extremely burdensome administratively -- the process of authorizing foreign participation in our markets -- with a streamlined process that nonetheless gives us the ability to protect against the potential for anti-competitive harm where necessary.

Over the past two years, the United States has led a revolution in the telecommunications sector. On the domestic front, the Telecommunications Act of 1996 delivered a clear and compelling blueprint for competition in telecommunications services. Internationally, the Commission acted decisively to reform the antiquated system for delivering international services. At the same time, the United States challenged the nations of the world to build a global communications network that brings the world together through communications and creates global opportunities.

In February of this year, the United States reached a historic agreement with 68 other countries to open markets for basic telecommunications services around the world.

Today, the Commission considers rules governing foreign entry into the U.S. telecommunications and satellite markets in response to the landmark agreement on telecommunications negotiated under the auspices of the World Trade Organization (WTO). In that agreement, countries representing 90 percent of the $600 billion global market for basic telecommunications services have pledged to open their markets to international competition. Equally as important, almost all the participants bound themselves to observe a set of pro-competitive regulatory principles that closely follow the Congressional vision of free competition, fair rules, and effective enforcement enacted in the Telecommunications Act. In light of the market opening and regulatory commitments contained in the WTO Basic Telecom Agreement, we expect to see a widespread shift away from the monopoly provision of telecommunications and satellite services and toward competition, open markets and transparent regulation.

The rules we consider today will open the U.S. telecommunications and satellite markets to foreign investment and entry by foreign carriers. Such entry will introduce new sources of competition in the telecom and satellite markets in the United States and attract much needed investment capital. Increased competition will benefit American consumers by producing lower prices, greater service choice and innovation. Our market-opening actions will also assist the U.S. telecommunications and satellite industries in their efforts to expand beyond our borders. As the world's leaders in telecommunications, our providers and manufacturers are well-equipped to take advantage of the foreign market opportunities that will follow on the heels of the actions we take today. For example, the U.S. satellite industry holds 34 percent of the world satellite market. Finally, the rules we approve today make sense by establishing clear and understandable standards for entry, with streamlined procedures for most applicants and safeguards to prevent foreign carriers with market power from distorting competition in the U.S. market.

Our actions today once again put the United States in a leadership role of prompt and efficient implementation of U.S. commitments in the WTO Basic Telecom Agreement. We will be watching closely implementation by other countries. We expect that U.S. carriers will begin to

enter and compete in previously closed foreign markets. We will know that the revolution we started is successful if, in a few years, most of the world's traffic is carried between countries where competition has replaced monopolies, prices decline for international phone calls, and those lower prices translate into a significant increase in the size of the world's international services market. I also expect to see a dramatic increase in the number of people who have access to a telephone around the world. Our own experience shows that competition takes some time to flourish. The WTO Basic Telecom Agreement is the beginning of the revolutionary journey to competition in many countries. With the adoption of the rules we are considering today, the U. S. will continue to spearhead that revolution.