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

In the Matter of	)	
	)	
Reform of Rules and Policies on Foreign Carrier Entry Into the U.S. Telecommunications Market	))	IB Docket No. 12-299

REPORT AND ORDER

Adopted: April 22, 2014 **Released: April 22, 2014**

By the Commission:

I. INTRODUCTION

1. In this Report and Order, we eliminate the effective competitive opportunities test (ECO Test) that applies to international section 214 applications and cable landing license applications filed by foreign carriers or their affiliates that have market power in countries that are not members of the World Trade Organization (WTO). Instead, we will consider such applications using a significantly less burdensome application filing and review process. This approach will continue to allow us to promote and protect competition in the international telecommunications service market, encourage liberalization of telecommunications markets through WTO membership, prevent anticompetitive conduct in the provision of international services or facilities, and take into account important interests related to national security, law enforcement, foreign policy and trade policy. We make similar changes with respect to notifications of foreign carrier affiliations filed by authorized U.S. carriers and cable landing licensees.

II. BACKGROUND

A. Application of the ECO Test

2. The ECO Test is a set of criteria first adopted in the 1995 *Foreign Carrier Entry Order*[1] as a condition of entry into the U.S. international telecommunications services market by foreign carriers that possess market power on the foreign end of a U.S.-international route on which they seek to provide service pursuant to section 214 of the Communications Act of 1934, as amended (the "Act").[2] The ECO Test currently applies only to foreign carriers that have market power in a non-WTO Member country and requires such carriers or certain of their affiliates to demonstrate in their applications that there are no legal or practical restrictions on U.S. carriers' entry into the foreign carrier's market.[3] The Commission designed the ECO Test to serve three stated goals for the regulation of U.S. international telecommunications services: to promote effective competition in the U.S. telecommunications service market; to prevent anticompetitive conduct in the provision of international services or facilities; and to

[1] *See Market Entry and Regulation of Foreign-Affiliated Entities,* IB Docket 95-22, Report and Order, 11 FCC Rcd 3873 (1995) (*Foreign Carrier Entry Order*).

[2] Any party seeking to provide common carrier telecommunications services between the United States, its territories or possessions, and a foreign point must request authority by application pursuant to section 214(a) of the Act, 47 U.S.C. § 214(a), and section 63.18 of the Commission's rules, 47 C.F.R. § 63.18.

[3] The ECO Test that applies to international section 214 authority applications filed by foreign carriers or certain of their affiliates is codified in section 63.18(k)(3) of the Commission's rules, 47 C.F.R. § 63.18(k)(3).

encourage foreign governments to open their telecommunications markets.[4] The ECO Test applies to (1) Commission review of applications for international section 214 authority filed by foreign carriers or certain of their affiliates; (2) notifications of foreign carrier affiliations filed by authorized U.S.-international carriers;[5] (3) Commission review of applications for submarine cable landing licenses filed by foreign carriers or certain of their affiliates; and (4) notifications of foreign carrier affiliations filed by U.S. cable landing licensees.[6]

3. The Commission adopted the ECO Test in response to concerns that foreign carriers with market power seeking to enter the U.S. international services market could use their foreign market power to benefit themselves and/or their U.S. affiliates, to the disadvantage of unaffiliated U.S. carriers and, ultimately, U.S. consumers.[7] In the Commission's view, "full facilities-based competition on the foreign end of a U.S. international route is ultimately the most potent safeguard against anticompetitive effects from the entry of a foreign carrier in the U.S. international services market."[8] At the time it adopted the ECO Test, only a handful of the world's telecommunications markets were open to competition by U.S. carriers.[9]

4. In the 1997 *Foreign Participation Order,*[10] the Commission replaced the ECO Test with an open entry standard for applicants from WTO Member countries but retained the ECO Test with respect to foreign carriers with market power in non-WTO Member countries. The Commission found

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[4] *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, *Market Entry and Regulation of Foreign-Affiliated Entities,* IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23894, ¶ 5 (1997) (*Foreign Participation Order*) (citing *Foreign Carrier Entry Order*, 11 FCC Rcd at 3877, ¶ 6).

[5] 47 C.F.R. § 63.11.

[6] 47 C.F.R. § 1.768.

[7] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3880, ¶ 15. As the Commission has observed on numerous occasions, foreign market power can be abused with or without a U.S. affiliate, but a vertically integrated carrier or an ownership affiliation between a U.S. carrier and a foreign carrier creates a *heightened* ability and incentive to engage in anticompetitive behavior. *See*, *e.g.*, *Foreign Participation Order*, 12 FCC Rcd at 23954, ¶ 147. In other contexts, the Commission has more recently said that vertical integration by a firm with market power may, but does not necessarily, result in anticompetitive harm. *See Third Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, IB Docket No. 09-16, Third Report, 26 FCC Rcd 17284, 17349, ¶ 163 (2011). In the *Foreign Participation Order*, the Commission explained that firms with market power in an upstream input market can engage in discrimination in a downstream end-user market by favoring one downstream entity at the expense of its competitors. *Id.* at 23952, ¶ 145. For example, where the upstream firm possesses market power in a foreign country's international transport market (including cable landing station access and backhaul facilities), it can engage in discrimination in a downstream end-user market, such as the U.S. market for international telecommunications services, which requires that U.S. authorized carriers have the ability to terminate their traffic on the foreign end of a U.S. international route. *Id*. at 23951-52, ¶¶ 144-145. Where the upstream foreign carrier possesses market power on the foreign end of the route, the downstream competitors have few, if any, alternative sources for the upstream input. *Id*. at 23952, ¶ 145. Where the upstream foreign carrier possesses market power on the foreign end of the route *and* is authorized to provide U.S. international service under section 214 of the Act (enabling it to provide U.S.-billed service on an end-to-end basis unlike its U.S. competitors), the Commission has found that the foreign carrier has a heightened ability and incentive to discriminate against its unaffiliated U.S. competitors – for example, by delaying the delivery of a necessary input to its U.S. rivals while continuing to provide the input to its own U.S. affiliate on a timely basis. *Id*. at 23953, ¶ 146.

[8] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3880, ¶ 16. *See also Foreign Participation Order*, 12 FCC Rcd at 23954-55, ¶ 148; *Regulation of International Common Carrier Services*, CC Docket No. 91-360, Report and Order, FCC 92-463, 7 FCC Rcd 7331, 7332, ¶ 6 (1992) (*International Services Order*).

[9] *See Foreign Participation Order*, 12 FCC Rcd at 23894-95, ¶ 5.

[10] *Foreign Participation Order*, 12 FCC Rcd 23891.

that the market opening commitments in the WTO Agreement on Basic Telecommunications Services (WTO Basic Telecommunications Agreement), an increasingly competitive environment, and the Commission's own improved regulatory tools enabled it to adopt a deregulatory approach for foreign carriers possessing market power in a WTO Member country.[11] At the same time, the Commission found that circumstances that existed when it adopted the *Foreign Carrier Entry Order* had "not changed sufficiently with respect to countries that are not members of the WTO."[12] The Commission adopted, as a factor in its public interest analysis, a rebuttable presumption that section 214 and cable landing license applications filed by foreign carriers or their affiliates from WTO Member countries "do not pose concerns that would justify denial of the application on competition grounds."[13] The Commission's presumption, however, is limited to competition issues; it does not apply to questions regarding national security, law enforcement, foreign policy or trade policy concerns, and such questions are resolved in the same manner regardless of the WTO status of the carrier's home country. The Commission accords deference to Executive Branch agencies in identifying and interpreting issues of concern related to these matters.[14]

5. *Section 214 ECO Test*. The ECO Test that applies to international section 214 authority applications filed by foreign carriers or certain of their affiliates is codified in section 63.18(k) of the Commission's rules.[15] If an applicant is a foreign carrier or an affiliate of a foreign carrier,[16] and if the foreign carrier has market power[17] in a non-WTO Member country, and the applicant seeks authority to serve that country from the United States, the applicant must demonstrate that there are effective competitive opportunities for U.S. carriers in that foreign country. In particular, the applicant must demonstrate: (1) the legal ability of U.S. carriers to enter the foreign market and provide facilities-based and/or resold international services, in particular international message telephone service;[18] (2) the existence of reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities, for termination and origination of international services, or for the provision of the relevant resale service;[19] (3) the existence of competitive safeguards in the foreign country to protect against anticompetitive practices;[20] (4) the existence of an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other safeguards;[21] and (5) any other factors the applicant deems relevant to the ECO Test demonstration.[22]

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[11] The WTO Basic Telecommunications Agreement entered into force on February 5, 1998. *See* http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited April 17, 2014).

[12] *Foreign Participation Order*, 12 FCC Rcd at 23898, 23944, ¶¶ 15, 124.

[13] *Id*. at 23913, ¶ 50.

[14] *Id*. at 23919-21, ¶¶ 61-66.

[15] 47 C.F.R. § 63.18(k)(3).

[16] Section 63.18(j) of the rules identifies the U.S.-foreign carrier affiliations to which the ECO Test applies.

[17] *See Foreign Carrier Entry Order,* 11 FCC Rcd at 3917, ¶ 116. *See also* 47 C.F.R. § 63.09(f).

[18] 47 C.F.R. §§ 63.18(k)(3)(i), (ii). The Commission examines whether the foreign destination market offers effective competitive opportunities for U.S. carriers to provide the service(s) being applied for under section 214 – whether facilities-based and/or resold switched or private line services.

[19] 47 C.F.R. § 63.18(k)(3)(iii).

[20] 47 C.F.R. §§ 63.18(k)(3)(iv)(A), (B), (C).

[21] 47 C.F.R. § 63.18(k)(3)(v).

[22] 47 C.F.R. § 63.18(k)(3)(vi).

6. *Section 214 Foreign Carrier Affiliation Notifications*. In addition to international section 214 authority applications, the Commission also applies the ECO Test in the context of its rules requiring authorized U.S.-international carriers to notify the Commission of their foreign carrier affiliations. Under section 63.11 of the Commission's rules, authorized U.S.-international carriers have a continuing obligation to notify the Commission of foreign carrier affiliations acquired after the Commission grants their section 214 authorizations.[23] Generally, carriers may file their notifications within 30 days of consummating a transaction.[24] Certain transactions, however, require the U.S. carrier to notify the Commission forty-five days before consummation.[25] The notification must demonstrate either that the foreign carrier lacks market power in the non-WTO Member country or that the non-WTO Member country offers effective competitive opportunities to U.S. carriers to provide services similar to the services that the foreign carrier or its affiliate is authorized to provide in the United States under section 214.[26] Section 63.11 further provides that, if the U.S. carrier cannot make either showing, or the U.S. carrier is notified by the Commission that the affiliation may otherwise harm the public interest under Commission rules and policies, the Commission may impose conditions necessary to address any public interest harms or may proceed to an immediate revocation hearing.[27]

7. *Cable Landing License ECO Test Criteria*. The Commission applies the ECO Test to applications for submarine cable landing licenses filed by foreign carriers,[28] an analysis similar but not identical to the analysis for international section 214 applications. The Commission elaborated on the ECO Test that applies to submarine cable applications filed by foreign carriers or their affiliates in its 1997 *Telefonica Licensing Order*.[29] In that order, the Commission emphasized that the analysis it "applies to applications under the Cable Landing License Act is similar but not identical" to its analysis under section 214 of the Communications Act.[30] It stated that, in determining whether effective opportunities exist in a foreign destination market, the Commission examines whether U.S. carriers have the legal, or *de jure*, ability to hold ownership interests in submarine cables landing in the market (that is, interests in the foreign end of the international cable), and, if so, whether other factors give U.S. carriers the practical, or *de facto*, ability to hold ownership interests in cable facilities in the destination market.[31] The Commission initially took this approach in individual cases, and concluded later in the *Foreign Participation Order* that it would continue to apply an ECO Test as part of its analysis under section 2 of the Cable Landing License Act.[32] In the *Foreign Participation Order,* the Commission also explained that it would consider other public interest factors consistent with its discretion under the Cable Landing

[23] 47 C.F.R. § 63.11.

[24] 47 C.F.R. § 63.11(b).

[25] 47 C.F.R. § 63.11(a),(b). The foreign carrier affiliation notification need not be filed before consummation of the transaction if (1) the Commission has previously determined that the foreign carrier lacks market power in the destination market, or (2) the foreign carrier owns no facilities in the destination market. *Id*.

[26] 47 C.F.R. § 63.11(g)(2).

[27] *Id.*

[28] *See* Pub. Law No. 8, 67th Congress, 42 Stat. 8 (1921); 47 U.S.C. §§ 34-39 (the "Cable Landing License Act"). *See also* Exec. Order No. 10530 § 5(a) (May 10, 1954), reprinted as amended in 3 U.S.C. § 301 (Executive Order No. 10530).

[29] *See Telefonica Larga Distancia de Puerto Rico, Inc.*, Memorandum Opinion and Order, FCC 97-127, 12 FCC Rcd 5173, 5181-85, ¶¶ 23-33 (1997) (*Telefonica Licensing Order*). When the *Telefonica Licensing Order* was released on May 2, 1997, the Commission's ECO Test applied to all countries. As noted, the *Foreign Participation Order* eliminated application of the ECO Test to WTO Member countries. *See supra* ¶ 4.

[30] *Telefonica Licensing Order*, 12 FCC Rcd at 5183, ¶ 27.

[31] *Id.* at ¶ 29.

[32] *See Foreign Participation Order,* 12 FCC Rcd at 23496, ¶ 130.

License Act that may weigh in favor of or against grant of a license, including any national security, law enforcement, foreign policy or trade policy concerns that may be raised by a particular application.[33]

8. *Submarine Cable Foreign Carrier Affiliation Notifications*. The Commission additionally applies the ECO Test in the context of its rules requiring U.S. cable landing licensees to notify the Commission of their foreign carrier affiliations. Under section 1.768 of the Commission's rules, U.S. cable landing licensees have a continuing obligation to notify the Commission of an affiliation with a foreign carrier authorized to operate in a destination market where the U.S.-licensed cable lands.[34] In certain circumstances, cable landing licensees have an obligation to obtain prior approval before acquiring an affiliation with a foreign carrier authorized to operate in a market where the U.S.-licensed cable lands.[35] Furthermore, this obligation extends to licensees acquiring an entity that owns or controls a cable landing station in that market. Where a U.S.-licensed cable lands in a non-WTO Member country and the U.S. cable landing licensee proposes to acquire an affiliation with a foreign carrier in that non-WTO Member country, the U.S. licensee must demonstrate in its notification either that the foreign carrier lacks market power in that country or that there are effective competitive opportunities for U.S.-licensed companies to land and operate submarine cables in that country. If the licensee is unable to make either showing, then the Commission may impose conditions on the authorization or proceed to an authorization revocation hearing.[36]

B. Notice of Proposed Rulemaking

9. The Commission initiated this proceeding in light of developments in international telecommunications since it adopted the ECO Test in 1995 and of the limited application of the test in the following 17 years.[37] As discussed in the *NPRM*, between 1996 and 1998, the Commission acted upon only four section 214 applications, one merger order, and one petition for declaratory ruling that required a section 214 ECO Test determination.[38] Since the policies and rules adopted in the *Foreign Participation Order* went into effect in 1998, the Commission has only received one section 214 application, two foreign carrier affiliation notifications, and one cable landing license application requiring ECO Test determinations.[39] In addition, since 1998, when the WTO Basic Telecommunications Agreement went into effect, WTO Membership has grown from 132 to 159 Members.[40] There are also 24 WTO Observers

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[33] *See Foreign Participation Order*, 12 FCC Rcd at 23919-21, ¶¶ 61-66.

[34] 47 C.F.R. § 1.768.

[35] 47 C.F.R. §§ 1.768(a), (b). The foreign carrier affiliation notification need not be filed before consummation of the transaction if (1) the Commission has previously determined that the foreign carrier lacks market power in the non-WTO destination market of the cable, or (2) the foreign carrier owns no facilities in the market. *Id*.

[36] 47 C.F.R. § 1.768(g)(2).

[37] *Reform of Rules and Policies on Foreign Carrier Entry Into the U.S. Telecommunications Market,* Notice of Proposed Rulemaking, IB Docket No. 12-299, 27 FCC Rcd 12765 (2012) (*NPRM*).

[38] *See NPRM*, 27 FCC Rcd at 12768, ¶ 8.

[39] *See id.* at ¶ 8. The Commission granted the cable landing license and section 214 applications. *See Telefonica International Wholesale Services USA, Inc.*, Order and Authorization, DA 14-83, 29 FCC Rcd 496 (Int'l Bur. 2014) (*Telefonica PCCS Licensing Order*); *TA Resources N.V., Application for International Section 214 Authorization and Determination that Aruba Provides Effective Competitive Opportunities to U.S. Carriers,* IB Docket No. 10-228, Order and Authorization, 26 FCC Rcd 15978 (Int'l Bur. 2011) (*TA Resources Order*). The country involved in both foreign carrier affiliation notifications joined the WTO, so an ECO Test determination was not necessary. Thus, the Commission has needed to apply the ECO Test only eight times in the 19 years following its adoption.

[40] *See* http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited April 17, 2014). Accession to the WTO is a process of negotiation that begins with a formal written request for membership by the applicant government and is followed by a submission of a memorandum on the foreign trade regime of the country applicant to the designated working party (basically, any WTO Member country can decide to be a member of the working party). Multilateral and bilateral negotiations between the applicant and interested working party members then

(continued....)

that are in the process of joining, or acceding to, the WTO.[41] The European Union (EU) also is a member.[42] Although approximately one-fifth of all countries are WTO Observers or other non-WTO Member countries that have not opened up their markets pursuant to WTO accords, the WTO Observers and non-WTO Member countries collectively represent only about one percent of the world's gross domestic product (GDP).[43]

10. In the *NPRM*, the Commission noted that the detailed ECO Test requirements were designed to be applied to countries that could support advanced regulatory regimes, but that most of the remaining non-WTO Member countries are smaller countries and may be without resources to support a regulatory framework that meets all of the detailed ECO Test requirements.[44] The most recent actions taken in applying the ECO Test in consideration of an unopposed section 214 application and an unopposed cable landing license application show that a non-WTO Member country may have a relatively open market even if its regulatory regime does not fully satisfy the ECO Test with the precision originally anticipated by our rules.[45]

11. In view of these considerations, the Commission proposed to either (1) eliminate the ECO Test from the Commission's section 214 rules, or (2) modify the ECO Test criteria for section 214 authority applications and cable landing licenses, including their respective foreign carrier affiliation notifications, and to codify these modified ECO Tests in the Commission rules.[46] Comment was sought on the costs and benefits of eliminating the ECO Test, and to what extent retention of the ECO Test criteria is necessary to protect competition. The Commission emphasized that it would retain other Commission policies designed to protect competition and the public interest.[47] The Commission also highlighted that it would continue to coordinate all applications for section 214 authority and cable landing licenses, and foreign affiliation notifications, that involve foreign carrier entry or investment from foreign carriers from both WTO and non-WTO Member countries with the appropriate Executive Branch

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result in a draft of the applicant's membership terms (Protocol of Accession), which is presented to either the General Council or the Ministerial Conference for adoption. The approval of the accession package, which includes acceptance of terms by the applicant party, takes approximately four months. The applicant government then becomes a full member of the WTO. The process of accession can take two years or longer. *Id*.

[41] *See* http://www.wto.org/english/thewto_e/acc_e/acc_e.htm (last visited April 17, 2014).

[42] *See id.*; *see also* http://www.state.gov/s/inr/rls/4250.htm (U.S. Department of State list of 195 independent states in the world) (last visited April 17, 2014).

[43] The Commission derived this estimate by comparing the aggregate GDP for WTO Members to the aggregate GDP for WTO Observers and non-WTO Member countries, using 2011 GDP information from the World Bank Development Indicators Database, http://databank.worldbank.org/data/views/variableselection/selectvariables.aspx?source=world-development-indicators, accessible at http://data.worldbank.org/data-catalog (last visited March 26, 2014).

[44] *See NPRM*, 27 FCC Rcd at 12770, ¶ 11.

[45] *See supra* note 39.

[46] *See NPRM*, 27 FCC Rcd at 12771, ¶ 14.

[47] Specifically, commenters were asked to address whether the Commission's dominant carrier safeguards and reporting requirements in sections 63.10 and 1.767 of the rules, 47 C.F.R. §§ 63.10(c), (d), (e), and 47 C.F.R. § 1.767(l), respectively, and the "no special concessions" rules in sections 63.14 and 1.767 of the rules, 47 C.F.R. § 63.14 and 47 C.F.R. § 1.767(g)(5), provide adequate protection against anticompetitive strategies that foreign carriers with market power can use to discriminate in favor of certain U.S. carriers, including their own affiliates, or whether additional safeguards are necessary to protect U.S. carriers from competitive harm in their provision of U.S. international services and facilities on routes between the United States and non-WTO Member countries. *See NPRM*, 27 FCC Rcd at 12772, ¶ 18.

agencies and accord deference to their views in matters related to national security, law enforcement, foreign policy, or trade policy that may be raised by a particular transaction.[48]

C. Comments

12. AT&T filed comments in response to the *NPRM* supporting modification of the ECO Test as proposed in the *NPRM*, and proposing to expand the section 214 ECO Test to add a requirement that "U.S. carriers have the right to own capacity on submarine cables landing in the foreign country and the ability to access such capacity at submarine cable stations operated by foreign dominant carriers" in the applicant's country.[49] Instead of eliminating the ECO Test, AT&T supports the alternative set out in the *NPRM* to modify the test by (1) retaining the requirement that U.S. carriers have the "legal right to obtain a controlling interest in a facilities-based carrier in the country to originate and terminate international traffic in the country"[50] and (2) eliminating certain criteria that the Commission considers to determine whether there are practical effective competitive opportunities for U.S. carriers to enter the foreign market, such as the requirement that applicants show that the foreign destination market has an effective regulatory framework that pertains to legal requirements, interconnection arrangements and other safeguards.[51]

13. The United States Trade Representative (USTR) supports the Commission's proposal in this proceeding to eliminate the ECO Test applied to applications for section 214 authorizations and cable landing licenses, subject to the same conditions that it requested in supporting the Commission action in the *Foreign Ownership Second Report and Order*,[52] which eliminated the distinction between WTO and non-WTO Member investment in the Commission's review of foreign ownership in common carrier and certain aeronautical licensees under section 310(b) of the Act.[53] In the foreign ownership proceeding, USTR sought to ensure that Executive Branch agencies, and, in particular, USTR, continue to receive notice of applications and retain the ability to file comments in opposition to applications where trade policy issues are implicated.[54]

III. DISCUSSION

14. In this Report and Order, we eliminate the ECO Test, which has applied to international section 214 applications and cable landing license applications filed by foreign carriers or their affiliates that have market power in non-WTO Member countries, and to notifications filed by authorized U.S. carriers or cable landing licensees affiliated with, or seeking to become affiliated with, a foreign carrier having market power in a non-WTO country that the U.S. carrier or a cable landing licensee is authorized

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[48] *Id.*at 12770-71, ¶ 13. *See also Foreign Participation Order,* 12 FCC Rcd at 23918, ¶ 59, 23919-21, ¶¶ 61-66.

[49] AT&T Comments at 7.

[50] *Id*. at 6.

[51] *Id*. at 7.

[52] *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act, as Amended*, IB Docket No. 11-133, Second Report and Order, 28 FCC Rcd 5741, 5754-55, ¶ 21 (2013) (*Foreign Ownership Second Report and Order*).

[53] Letter from Christine Bliss, Assistant United States Trade Representative For Services and Investment, USTR, to Marlene H. Dortch, Secretary, FCC, IB Docket No. 12-299 (filed March 27, 2013) *citing* Letter from Christine Bliss, Assistant United States Trade Representative For Services and Investment, USTR, to Marlene H. Dortch, Secretary, FCC, IB Docket No. 11-133 (filed Nov. 8, 2012) (2012 USTR Letter).

[54] *See* 2012 USTR Letter (USTR supported the elimination of the distinction between WTO and non-WTO Member investment in the Commission's treatment of foreign ownership in common carrier licensees and the controlling U.S. parents of common carrier and certain aeronautical licensees under section 310(b) of the Act, provided that the Executive Branch agencies, and, in particular, USTR, continued to receive notice of applications and retained the ability to file comments in opposition to applications that implicate trade policy issues). *See also Foreign Ownership Second Report and Order,* 28 FCC Rcd at 5754-55, ¶ 21.

to serve. We conclude that retention of the ECO Test is no longer necessary to protect competition, and we find that elimination of unnecessary requirements will reduce regulatory burdens and enhance our ability to expeditiously review foreign entry that may be advantageous to U.S. consumers. We will retain other Commission policies designed to protect competition and the public interest, *i.e.*, the dominant carrier safeguards and reporting requirements,[55] and the "no special concession" rules.[56] We also will provide an opportunity for public comment, and in evaluating applications or notifications, the Commission will retain the ability to request additional information from the applicant in response to concerns raised by USTR or any interested party, or as a result of its own public interest analysis.[57] This approach will enable us to address any specific concerns that may arise with a particular non-WTO market and potentially effectuate changes in that market related to those concerns, rather than requiring such information from all such applicants. In this manner we will continue the Commission policy of promoting effective competition in the U.S. telecommunications service market.

15. In the 1997 *Foreign Participation Order*, the Commission stated that "continuing to apply the ECO Test to non-WTO Member countries may encourage some of those countries to take unilateral or bilateral steps toward opening their markets to competition and may provide incentives for them to join the WTO."[58] AT&T believes that the rationale for the policy that existed in 1997 continues to exist today,[59] and contends that the policy continues to provide incentives for countries that remain outside the WTO to liberalize telecom markets.[60] AT&T also states that some WTO countries have limited or no competition in basic telecom services, and argues that these countries will have more leverage to resist international pressure to remove market restrictions in future trade negotiations if carriers from non-WTO Member countries that maintain such restrictions are allowed to enter the U.S. market without joining the WTO.[61]

16. We agree that our policies should encourage liberalization of telecommunications markets through WTO membership and other means. As AT&T notes, liberalization of telecommunications markets in all countries is important because competitive telecommunications markets stimulate the provision of high quality, low cost communications and the spread of information and communications technology which benefits U.S. consumers and all U.S. industries competing in the global marketplace.[62] As the Commission has long recognized, greater liberalization in foreign markets is the long-term solution to the risk that foreign market power may be leveraged into the U.S. international services market to the detriment of competition and U.S. consumers.[63] But we do not believe, as AT&T

[55] 47 C.F.R. §§ 63.10(c), (d), (e), and 47 C.F.R. § 1.767(l).

[56] 47 C.F.R. § 63.14 and 47 C.F.R. § 1.767(g)(5).

[57] For example, section 63.18(k) currently requires an applicant to make a showing in its application regarding the existence of reasonable and nondiscriminatory interconnection in a non-WTO destination market in which the applicant has market power. 47 C.F.R. § 63.18(k). Under the revised rules we adopt herein, the applicant will not need to make such a showing in its application, although the Commission may request such information if, in a particular case, an inquiry is warranted as to whether the applicant's home market is open to entry for U.S. international carriers and cable landing licensees.

[58] *See Foreign Participation Order,* 12 FCC Rcd 23944-45, ¶ 125.

[59] AT&T Comments at 1-6.

[60] *Id.*

[61] *Id.*

[62] AT&T Comments at 4.

[63] *See Foreign Participation Order*, 12 FCC Rcd at 23954, ¶ 148 (citing *International Services Order*, 7 FCC Rcd at 7332, ¶ 6, and *Foreign Carrier Entry Order*, 11 FCC Rcd at 3880, ¶ 16). The Commission has determined that such leveraging is not possible in U.S. *domestic* common carrier wireless markets. *See Foreign Ownership Second Report and Order*, 28 FCC Rcd at 5756, ¶ 24, *Foreign Participation Order*, 12 FCC Rcd at 23940, ¶ 112. By contrast, when a foreign carrier from a non-WTO Member country has market power in that country, there is the

(continued....)

asserts, that retaining the ECO test in today's environment is the best approach to furthering that liberalization. We find, instead, that the Commission's goal to promote effective competition in the U.S. international telecommunications services and facilities market will be better served at this time by eliminating the ECO Test for all applicants and seeking additional information only in response to concerns raised by a particular application.[64] USTR supports the Commission's effort to eliminate the ECO Test subject to coordination of applications,[65] which will provide USTR an opportunity to make a judgment as to whether or not the non-WTO country at issue supports an open market. Our approach here provides for such continued coordination.

17. Since the policies and rules adopted in the *Foreign Participation Order* went into effect in 1998, WTO Membership has continued to grow, and, as noted above, WTO Observer countries (those countries in the process of accession to the WTO) and non-WTO Member countries collectively represent only about one percent of the world's gross domestic product.[66] During that time, the Commission has received only four applications requiring ECO Test determinations[67] and no U.S. carrier or company has filed comments as to whether any anticompetitive problems exist or may exist for U.S. companies in entering the relevant market of the applicant. The most recent actions taken by the Commission in applying the ECO Test in consideration of an unopposed section 214 application and an unopposed cable landing license application placed the applicants, who, like other applicants, do not necessarily represent or speak on behalf of their home market government, in a difficult position of having to make a showing as to whether their home market government supports an open market or not, when, perhaps, a better solution would have been to have the U.S. expert agency on such trade matters, the USTR, or U.S. carriers that have tried to enter that market, play a more prominent role in that determination. We find the approach we adopt in this proceeding that requires us to analyze individual applications taking into consideration trade and competitive concerns raised by the USTR, other government agencies, and commenters, shifts the burden of such a demonstration to the more knowledgeable source.

18. Going forward, our public interest analysis of applications will provide the opportunity, as needed, to review whether U.S. carriers have the legal ability to offer international facilities-based services in the destination country, to obtain a controlling interest in a facilities-based carrier in that country to originate and terminate international traffic (*i.e.*, IMTS) in that market, or to own or lease submarine cable capacity in that market. We would also review, as needed, the ability of U.S. carriers to compete effectively in the market of an applicant from a non-WTO Member country seeking authorization to provide international services in the United States, but we do not find it necessary to retain the ECO Test as part of this review. As noted, in considering potential areas of concern in our review of any particular application, we will coordinate with the USTR, which is in the best position to determine whether a non-WTO country supports open entry, and other appropriate agencies as necessary.

19. We find that we can effectively analyze potential market barriers on an as-needed basis, rather than through a formal test, to make a public interest determination as to whether U.S. carriers are experiencing competitive problems in a particular market, and whether the public interest would be served by authorizing the foreign carrier to enter the U.S. market. In contrast to our approach to applicants from WTO-member countries, however, the approach we adopt here in the non-WTO context does not carry the presumption in favor of market entry that we apply in the WTO context. Thus, the

(Continued from previous page)
potential for anticompetitive conduct by that carrier in the market for *international* telecommunications services between the United States and the non-WTO Member country.

[64] *See supra* ¶¶ 13, 14 and note 56 (for example, where USTR raises trade policy concerns, a commenter alleges unfair competition not addressed by the dominant carrier safeguards, or the Commission is otherwise presented with information that raises competition concerns).

[65] *See supra* ¶ 13.

[66] *See supra* ¶ 9, note 43.

[67] *See NPRM*, 27 FCC Rcd at 12768, ¶ 8. *See also supra* note 39.

regulatory framework will continue to encourage non-WTO Member countries to seek WTO membership and should not be interpreted by either WTO or non-WTO Members as a signal that they can resist pressure to liberalize their markets. This approach is also compatible with the continuing exercise of our authority to condition or disallow foreign entry into the U.S. market that poses a risk of harm to national security, is contrary to foreign policy or trade interests, or raises law enforcement concerns.[68] Additionally, apart from the application process, we will maintain existing policy and rules designed to protect against anticompetitive behavior in the U.S. market by foreign carriers with market power in non-WTO Member countries.[69] As proposed in the *NPRM*, we continue to apply the dominant carrier safeguards and reporting requirements in sections 63.10 and 1.767 of the rules, and the "no special concessions" rules in sections 63.14 and 1.767 of the rules, which help prevent certain anticompetitive strategies that foreign carriers can use to discriminate among their U.S. carrier correspondents.[70] Finally, by eliminating unnecessary requirements, reducing the burden of information preparation, and focusing our review on issues that are raised by the application before us, we expect to enhance our ability to expeditiously review the relevant applications.

A. Section 214 Applications and Foreign Ownership Notifications

20. We no longer will apply the ECO Test to (1) section 214 applications filed by foreign carriers or their affiliates that have market power in non-WTO countries they seek to serve and (2) notifications filed by an authorized U.S. carrier affiliated with or seeking to become affiliated with a foreign carrier that has market power in a country in which the U.S. carrier is authorized to serve. As described in the *NPRM*, instead of requiring all such applicants from non-WTO Member countries to demonstrate compliance with the ECO Test, we will closely analyze only those applications where competitive issues are raised concerning U.S. carriers experiencing competitive problems in that market, and will determine whether the public interest would be served by authorizing a foreign carrier with market power to enter the U.S. market.

21. Under this approach, we will continue to require a foreign carrier applicant for a section 214 authorization or a U.S. carrier filing a foreign affiliation notification to provide the information set out in our rules to establish its qualifications to receive such authorization or to identify its foreign affiliation.[71] The applicant or notifying carrier will provide information to enable us to determine whether it is, or is seeking to become affiliated with, a foreign carrier with market power in a non-WTO Member country. If the applicant is itself, or is affiliated with, a foreign carrier with market power in the proposed non-WTO Member destination country, then the application will not be eligible for streamlined processing, and will be placed on 28-day public notice pursuant to our rules.[72] Foreign carrier affiliation notifications will continue to require a 45-day notification prior to consummation of the transaction, where an authorized U.S.-international carrier notifies the Commission of an intended affiliation with a foreign carrier with market power in a non-WTO Member country for which the U.S. carrier is authorized to provide U.S.-international service. U.S. carriers will have an opportunity to file comments on such applications and notifications as to whether they are experiencing problems in entering the market of the relevant non-WTO Member country. We also will consult with USTR and other agencies as to any anticompetitive problems that may exist for U.S. companies in the home market of the applicant.

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[68] We will continue to coordinate with Executive Branch agencies applications for both WTO and non-WTO Member countries for national security, law enforcement, foreign policy and trade policy concerns. *See NPRM,* 27 FCC Rcd at 12766, ¶ 4, citing *Foreign Participation Order,* 12 FCC Rcd at 23919-21, ¶¶ 61-66.

[69] *See NPRM,* 27 FCC Rcd at 12770-71, ¶ 13.

[70] *See NPRM*, 27 FCC Rcd at 12772, ¶ 18; 47 C.F.R. §§ 63.10(c), (d), (e); 63.14, and 1.767(g)(5) and (l).

[71] 47 C.F.R. § 63.18 lists the content requirements that apply to section 214 applications. *See also* 47 C.F.R § 63.11 regarding foreign affiliation notifications.

[72] 47 C.F.R. § 63.20(b).

22. Our existing rules permit us to seek additional information, from the applicant, the USTR, or other entities, relating to U.S. carrier ability to enter the foreign market.[73] If an issue arises regarding possible concerns over whether U.S. carriers can legally enter the foreign market to provide telecommunications services, we may request additional information from these sources, including the applicant or carrier filing the notification. We may seek additional information including, but not limited to, the ability of U.S. carriers to obtain a controlling interest in a carrier in the foreign country, the existence of competitive safeguards in the foreign country to protect against anticompetitive practices, the existence of reasonable and nondiscriminatory interconnection arrangements, and whether U.S. cable licensees have the right to enter the market of the non-WTO country and own or access capacity on submarine cables landing in that country.[74] Through this approach, we will be able to assess the ability of U.S. carriers to effectively compete in a particular market based on comments on the application or notification, coordination with other government agencies, or other information that may become available to us. We then can make a determination and take action in a manner appropriate to the market in question. If we should find that U.S. carriers are experiencing competitive problems in the home market of a foreign carrier section 214 applicant, we could deny the application or impose conditions on the authorization that address the problems we find. If, in reviewing a foreign carrier notification of affiliation with a carrier that has market power in a non-WTO Member country, we should find that the affiliation may harm the public interest, we could impose conditions on the authorized U.S. carrier to address the harms or proceed to an authorization revocation hearing.

B. Cable Landing Licenses and Foreign Ownership Notifications

23. We take a similar approach of eliminating the ECO Test as a formal requirement for cable landing license applications and notifications of foreign carrier affiliation by submarine cable licensees. To ensure that we receive sufficient information to assess whether further such applications and notifications require a closer review,[75] we are modifying our rules to require that that an applicant or notification filer from a non-WTO Member country demonstrate whether or not it has market power in the non-WTO Member country where the cable lands. In the case of a cable landing license application, if the demonstration reveals that the applicant is itself, or is affiliated with, a foreign carrier with market power in the proposed cable's non-WTO Member destination country, then, pursuant to existing rules, the application will not be eligible for streamlined processing.[76] With respect to notifications, the disclosure of market power in the non-WTO Member country will trigger the existing 45-day waiting period before the transaction can be consummated.[77]

24. Applications not subject to streamlining are placed on public notice for 28 days and the Commission has 90 days to act on them, subject to extension of this period.[78] This period provides an opportunity for U.S. cable licensees to comment and indicate specific problems that they have in owning and operating cables facilities in the country where the cable lands. In addition to investigating allegations of such problems, we will coordinate comments that are filed with appropriate Executive Branch agencies and impose, if necessary, appropriate conditions on the license.

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[73] *See* 47 C.F.R. § 63.51.

[74] *See*, *e.g.*, AT&T Comments at 7.

[75] As noted in paragraph 7 above, the ECO Test applicable to cable landing licenses and notifications was never set forth in the Commission's rules, but rather was announced in the *Telefonica Licensing Order*, 12 FCC Rcd at 5181-85, ¶¶ 23-33. Today, we incorporate into the Commission's rules the filing requirements for cable landing license applications and notifications from parties with market power in non-WTO countries.

[76] *See* 47 C.F.R. § 1.767(k)(3).

[77] *Review of Commission Consideration of Applications under the Cable Landing License Act*, IB Docket No. 00-106, *Report and Order*, 16 FCC Rcd 22167, 22187, ¶ 40 (2001).

[78] *See* 47 C.F.R. § 1.767(i).

25. In sum, this approach is individualized, enabling the Commission to gauge when an application or notification requires particular scrutiny, and thus affording the agency the ability and flexibility to be responsive when carriers or other commenters raise allegations about anticompetitive conduct in a particular market, and to be administratively efficient when no such concerns are expressed.

IV. CONCLUSION

26. In this Report and Order, we eliminate the ECO Test, which has applied to Commission review of international section 214 and cable landing license applications, and to notifications filed by authorized U.S. carriers and cable landing licensees of affiliation with a foreign carrier having market power in a non-WTO Member country that the U.S. carrier or cable landing licensee is authorized to serve. In doing so, we simplify the application filing and review process for applications filed by foreign carriers having market power in non-WTO Member countries for entry into the U.S. market for the provision of facilities and services. Under this approach, we retain other regulatory safeguards as well as the ability to consider relevant competition issues in assessing the public interest under section 214 of the Act and the Cable Landing License Act. We also will coordinate with Executive Branch agencies to protect national security and take into account law enforcement, foreign policy and trade policy considerations.

27. By eliminating unnecessary requirements, reducing the burden of preparing information, and focusing our review on information necessary and relevant to issues that are raised by the application before us, we expect the actions taken here to enhance our ability to expeditiously review foreign entry that may be advantageous to U.S. consumers. In addition, these actions will not result in new costs. No increase in mandated expenditures will result, and there will be no harm to our ability to carry out important continuing policy aims such as fostering competition in telecommunications services and protecting national security and related interests.

V. PROCEDURAL ISSUES

A. Final Regulatory Flexibility Certification

28. The Regulatory Flexibility Act of 1980, as amended (RFA),[79] requires that a final regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[80] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[81] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[82] A "small business concern" is one which: (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).[83]

29. In this Report and Order, the Commission decides to eliminate the ECO Test that currently applies to review of applications for international section 214 authority and cable landing

[79] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[80] 5 U.S.C. § 605(b).

[81] 5 U.S.C. § 601(6).

[82] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 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 definitions(s) in the Federal Register."

[83] 15 U.S.C. § 632.

licenses. It also eliminates the ECO Test as it applies to notifications filed by authorized U.S. carriers and cable landing licensees of an affiliation with a foreign carrier with market power in a non-WTO Member country. Instead of applying an ECO Test to these applications, the Commission will apply a simplified approach to the filing and review of section 214 applications, cable landing license applications, and notifications from authorized U.S.-international carriers and cable landing licensees. The Commission maintains its ability to seek additional information from the applicant and notification filer as needed if an inquiry is warranted as to whether an applicant's home market is open to entry for U.S. international carriers and cable landing licensees. This approach will reduce unnecessary regulatory costs and burdens where only limited investigation is necessary in connection with an application. Under this approach, the Commission continues to maintain other regulatory safeguards under section 214 of the Communications Act and under the Cable Landing License Act, as well as to maintain existing coordination arrangements with Executive Branch agencies to protect national security and take into account law enforcement, foreign policy and trade policy considerations.

30. From a historical perspective, the Commission has had little need to apply the ECO Test since its adoption in 1995. As noted in paragraph 9 above, the Commission has taken only eight actions applying the ECO Test in the 19 years since its adoption. While we cannot project exactly how many foreign carriers, or affiliates of foreign carriers with market power in non-WTO Member countries, may in the future seek entry into the U.S. telecommunications market, there is nothing in the record to suggest that there will be significantly more such carriers than there have been in the past. Therefore, we certify that the requirements of this Report and Order will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the Report and Order, including this certification, to the Chief Counsel for Advocacy of the SBA.[84] This final certification will also be published in the Federal Register.[85]

B. Final Paperwork Reduction Act of 1995 Analysis

31. This Report and Order contains modified information collection requirements, subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.[86] It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.[87]

32. In this present document, we have assessed the effects of the elimination of the ECO Test that applies to review of certain applications filed by foreign carriers having market power in non-WTO Member countries for entry into the U.S. market for the provision of services and facilities. We find that elimination of the ECO Test and use of the more simplified approach we adopt here will allow us to continue to ensure that U.S. carriers have the ability to enter non-WTO destination markets and compete on the same terms and conditions as applicants from these markets. Further, the actions we take in this Report and Order will result in less burden on applicants and reduce the processing requirements on Commission staff.

33. Written comments must be submitted by the public, OMB, and other interested parties on the proposed and/or modified information collections on or before 60 days after the date of publication in

[84] 5 U.S.C. § 605(b).

[85] *Id.*

[86] The Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat 163 (1995) (codified in 44 U.S.C. §§ 3501-3520).

[87] *NPRM*, 26 FCC Rcd at 11744, ¶ 84; 76 Fed. Reg. 65472, 65479 (Oct. 21, 2011).

the Federal Register of the Report and Order. In addition to filing comments with the Secretary, Marlene H. Dortch, a copy of any comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554 or via the Internet to Judith.BHerman@fcc.gov, and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via the Internet to Kim_A._Johnson@omb.eop.gov.

C. Congressional Review Act

34. The Commission will include a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A).

VI. ORDERING CLAUSES

35. IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i) and (j), 201-205, 208, 211, 214, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201-205, 208, 211, 214, 303(r), and 403, and the Cable Landing License Act, 47 U.S.C. §§ 34-39 and Executive Order No. 10530, section 5(a), this Report and Order IS ADOPTED, and the policies, rules, and requirements discussed herein ARE ADOPTED, and Parts 1 and 63 of the Commission's rules, 47 C.F.R. Parts 1 and 63, ARE AMENDED as set forth in Appendix A.

36. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*

37. IT IS FURTHER ORDERED that the policies, rules, and requirements established in this decision shall take effect thirty (30) days after publication in the Federal Register, except for Sections 1.767(a)(8), 1.768(g)(2), 63.11(g)(2), and 63.18, which contains modified information collection requirements that require approval by the Office of Management and Budget under the PRA. The Federal Communications Commission will publish a document in the Federal Register announcing such approval and the relevant effective date.

38. IT IS FURTHER ORDERED that this proceeding, IB Docket No. 12-299, IS HEREBY TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

Parts 1 and 63 of the Commission rules are amended as follows:

Part 1 – PRACTICE AND PROCEDURE

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

AUTHORITY: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(j), 160, 201, 225, and 303.

2. Section 1.767 is amended by revising paragraph (a)(8) to read as follows:

§ 1.767 Cable Landing Licenses.

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(a)(8) For each applicant:

(i) The place of organization and the information and certifications required in §§63.18(h) and (o) of this chapter;

(ii) A certification as to whether or not the applicant is, or is affiliated with, a foreign carrier, including an entity that owns or controls a cable landing station, in any foreign country. The certification shall state with specificity each such country;

(iii) A certification as to whether or not the applicant seeks to land and operate a submarine cable connecting the United States to any country for which any of the following is true. The certification shall state with specificity the foreign carriers and each country:

(A) The applicant is a foreign carrier in that country; or

(B) The applicant controls a foreign carrier in that country; or

(C) There exists any entity that owns more than 25 percent of the applicant, or controls the applicant, or controls a foreign carrier in that country.

(D) Two or more foreign carriers (or parties that control foreign carriers) own, in the aggregate, more than 25 percent of the applicant and are parties to, or the beneficiaries of, a contractual relation (e.g., a joint venture or market alliance) affecting the provision or marketing of arrangements for the terms of acquisition, sale, lease, transfer and use of capacity on the cable in the United States; and

(iv) For any country that the applicant has listed in response to paragraph (a)(8)(iii) of this section that is not a member of the World Trade Organization, a demonstration as to whether the foreign carrier lacks market power with reference to the criteria in §63.10(a) of this chapter.

NOTE TO PARAGRAPH (a)(8)(iv): Under §63.10(a), the Commission presumes, subject to rebuttal, that a foreign carrier lacks market power in a particular foreign country if the applicant demonstrates that the foreign carrier lacks 50 percent market share in international transport facilities or services, including cable landing station access and backhaul facilities, intercity facilities or services, and local access facilities or services on the foreign end of a particular route.

NOTE TO SECTION 1.767: The terms "affiliated" and "foreign carrier," as used in this section, are defined as in § 63.09 of this chapter except that the term "foreign carrier" also shall include any entity that owns or controls a cable landing station in a foreign market. The term "country" as used in this section refers to the foreign points identified in the U.S. Department of State list of Independent States of the World and its list of Dependencies and Areas of Special Sovereignty. *See* http://www.state.gov.

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3. Section 1.768 is amended by revising paragraph (g)(2) to read as follows:

§ 1.768 Notification by and prior approval for submarine cable landing licensees that are or propose to become affiliated with a foreign carrier.

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(g) ***
(2) In the case of a prior notification filed pursuant to paragraph (a) of this section, the authorized U.S. licensee must demonstrate that it continues to serve the public interest for it to retain its interest in the cable landing license for that segment of the cable that lands in the non-WTO destination market. Such a showing shall include a demonstration as to whether the foreign carrier lacks market power in the non-WTO destination market with reference to the criteria in §63.10(a) of this chapter. In addition, upon request of the Commission, the licensee shall provide the information specified in §1.767(a)(8). If the licensee is unable to make the required showing or is notified by the Commission that the affiliation may otherwise harm the public interest pursuant to the Commission's policies and rules under 47 U.S.C. 34 through 39 and Executive Order No. 10530, dated May 10, 1954, then the Commission may impose conditions necessary to address any public interest harms or may proceed to an immediate authorization revocation hearing.

NOTE TO PARAGRAPH (g)(2): Under §63.10(a), the Commission presumes, subject to rebuttal, that a foreign carrier lacks market power in a particular foreign country if the applicant demonstrates that the foreign carrier lacks 50 percent market share in international transport facilities or services, including cable landing station access and backhaul facilities, intercity facilities or services, and local access facilities or services on the foreign end of a particular route.

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

4. The authority citation for part 63 continues to read as follows:

AUTHORITY: Sections 1, 4(i), 4(j), 10, 11, 201-205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 201-205, 214, 218, 403, and 571, unless otherwise noted.

5. Section 63.11 is amended by revising paragraph (g)(2) to read as follows:

§ 63.11 Notification by and prior approval for U.S. international carriers that are or propose to become affiliated with a foreign carrier.

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(g) ***
(2) In the case of a prior notification filed pursuant to paragraph (a) of this section, the U.S. authorized carrier must demonstrate that it continues to serve the public interest for it to operate on the route for which it proposes to acquire an affiliation with the foreign carrier authorized to operate in the non-WTO Member country. Such a showing shall include a demonstration as to whether the foreign

carrier lacks market power in the non-WTO Member country with reference to the criteria in §63.10(a) of this chapter. If the U.S. authorized carrier is unable to make the required showing in §63.10(a), the U.S. authorized carrier shall agree to comply with the dominant carrier safeguards contained in section 63.10(c), effective upon the acquisition of the affiliation. If the U.S. authorized carrier is notified by the Commission that the affiliation may otherwise harm the public interest pursuant to the Commission's policies and rules, then the Commission may impose conditions necessary to address any public interest harms or may proceed to an immediate authorization revocation hearing.

NOTE TO PARAGRAPH (g)(2): Under §63.10(a), the Commission presumes, subject to rebuttal, that a foreign carrier lacks market power in a particular foreign country if the applicant demonstrates that the foreign carrier lacks 50 percent market share in international transport facilities or services, including cable landing station access and backhaul facilities, intercity facilities or services, and local access facilities or services on the foreign end of a particular route.

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6. Section 63.18 is amended by revising paragraph (k), redesignating paragraph (q) as (r), and adding new paragraph (q), to read as follows:

§ 63.18 Contents of applications for international common carriers.

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(k) For any country that the applicant has listed in response to paragraph (j) of this section that is not a member of the World Trade Organization, the applicant shall make a demonstration as to whether the foreign carrier has market power, or lacks market power, with reference to the criteria in §63.10(a) of this chapter.

NOTE TO PARAGRAPH (k): Under §63.10(a), the Commission presumes, subject to rebuttal, that a foreign carrier lacks market power in a particular foreign country if the applicant demonstrates that the foreign carrier lacks 50 percent market share in international transport facilities or services, including cable landing station access and backhaul facilities, intercity facilities or services, and local access facilities or services on the foreign end of a particular route.

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(q) Any other information that may be necessary to enable the Commission to act on the application.

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