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

In the Matter of	)	
	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)	**IB Docket No. 97-142**
	)	
	)	

ORDER ON RECONSIDERATION

Adopted: September 12, 2000 **Released: September 19, 2000**

By the Commission**:**

Paragraph

I. INTRODUCTION AND BACKGROUND

1. On November 25, 1997, the Federal Communications Commission (Commission), pursuant to its authority under the Communications Act of 1934, as amended (the Act), adopted a *Report and Order and Order on Reconsideration*[1] setting forth procompetitive rules and policies regarding foreign participation in the U.S. telecommunications market.[2] In light of the World Trade Organization (WTO) Basic Telecom Agreement and WTO Members' commitments to open markets, the Commission determined in the *Foreign Participation Order* that it served the public interest to adopt rules to open further the U.S. market to competition from foreign companies.[3]

2. The *Foreign Participation Order* modified the Commission's previous rules and policies detailed in the *Foreign Carrier Entry Order*.[4] In the *Foreign Participation Order*, the Commission eliminated application of the "effective competitive opportunities" (ECO) test to WTO Members as a condition of foreign carrier entry into the U.S. market.[5] In lieu of satisfying the ECO test to obtain: (1) section 214 authorizations to provide facilities-based, switched resale, and resold non-interconnected private line service;[6] (2) authorizations to exceed the 25% foreign ownership benchmark;[7] and (3) cable landing licenses,[8] WTO Member applicants need only satisfy an "open entry" standard. The "open entry" standard is a presumption in favor of entry into the U.S. market for foreign applicants from WTO Members that the Commission adopted because of WTO Members' market opening commitments made in the context of the WTO Basic Telecom Agreement, an increasingly competitive environment, and the Commission's improved regulatory tools that permit us to implement a deregulatory approach that

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1 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket Nos. 97-142 and 95-22, Report and Order on Reconsideration, 12 FCC Rcd 23,891 (1997) (*Foreign Participation Order*), *petition for recon. pending*.

2 The Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* The Telecommunications Act of 1996 (the 1996 Act) amends the Communications Act of 1934. Hereinafter, all citations to the Communications Act will be to the relevant section of the United States Code unless otherwise noted. The Communications Act of 1934, as amended, will be referred to herein as the Communications Act or the Act.

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

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

5 The "effective competitive opportunities" (ECO) test required, as a condition of foreign carrier entry into the U.S. market, that there be no legal or practical restrictions on U.S. carriers' entry into the foreign carrier's market. *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3877, para. 6.

6 47 U.S.C. § 214.

7 47 U.S.C. § 310(b)(4).

8 47 U.S.C. §§ 34-39.

presumes entry is in the public interest.[9] Accordingly, carriers from WTO Members are not required to demonstrate that they meet the ECO test.

3. The Commission stated in the *Foreign Participation Order* that, generally, the commitments made by WTO Members, the Commission's regulatory safeguards, and antitrust laws should address competitive concerns resulting from foreign participation by carriers from WTO Members in the U.S. telecommunications market.[10] The Commission's regulatory safeguards include the "No Special Concessions" rule, which prohibits U.S. carriers from entering into exclusive arrangements with foreign carriers that possess sufficient market power in a relevant market on the foreign end of the route to affect competition adversely in the U.S. market, and its dominant carrier safeguards in rule 63.10, which include quarterly reporting requirements regarding provisioning and other carrier activities. However, the Commission further noted that it could not rule out the possibility that entry by a foreign carrier could be so detrimental that safeguards would be ineffective in preventing a foreign carrier from harming competition in the U.S. market.[11] In such circumstances, the Commission would find it necessary to impose conditions on an authorization or, where an application poses a very high risk to competition in the U.S. market, to deny an application. In addition, the Commission concluded that it would accord deference to legitimate national security, law enforcement, foreign policy, and trade concerns raised by other federal agencies in the context of its analyses of whether grant of a particular authorization is in the public interest.[12]

4. The Commission found its new "open entry" standard, in conjunction with enhanced safeguards and WTO Members' commitments, would produce significant consumer benefits through lower prices for existing services and greater service innovation, as well as one-stop shopping resulting from newly-found efficiencies.[13] In addition, the Commission found that the "open entry" standard would better achieve the original goals of the *Foreign Carrier Entry Order*: (1) to promote effective competition in the U.S. telecommunications services market; (2) to prevent anticompetitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their telecommunications markets. By removing the ECO test, the Commission removed unnecessary regulation and barriers to entry that can adversely affect competition and consumers; relied on more effective and targeted safeguards to minimize anticompetitive harms; and encouraged, by example, foreign countries to implement their market opening commitments through the adoption of a deregulatory approach.

5. Moreover, the Commission determined in the *Foreign Participation Order* that WTO Members' commitments, along with the conditions the Commission adopted in the *Benchmarks Order*, removed the need to maintain the equivalency analysis the Commission imposed on carriers seeking to provide switched services over private lines between the U.S. and WTO Members.[14] The equivalency

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9 *Foreign Participation Order*, 12 FCC Rcd at 23,896, para. 9 and at 23,913-14, paras. 51-52.

10 *Id.* at 23,905-06, para. 32-33.

11 *Id.* at 23,914, para. 52.

12 *Id.* at 23,919, paras. 61-62.

13 *Foreign Participation Order*, 12 FCC Rcd at 23,896-97, para. 10.

14 *International Settlement Rates*, IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19,806 (1997) (*Benchmarks Order*); Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999) (*Benchmarks Reconsideration Order*); *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

analysis required a demonstration similar to the showing required to satisfy the ECO test.[15] The Commission historically applied the equivalency analysis to applications from carriers seeking to provide basic services via resold international private lines or their own facilities-based private lines, known as International Simple Resale (ISR), in order to prevent market distortions through "one-way bypass" of the settlements regime.[16] We found in the *Foreign Participation Order* that there is less potential for one-way bypass as WTO Members implement their market opening commitments. Therefore, pursuant to the Commission's *Benchmarks Order*, the Commission determined that a route between the U.S. and a WTO Member may be approved for the provision of ISR if it can be demonstrated that settlement rates for at least fifty percent of the settled U.S.-billed traffic on the route or routes in question are at or below the relevant benchmark. In order to address remaining concerns about one-way bypass, the Commission adopted a rebuttable presumption in the *Foreign Participation Order* that one-way bypass is occurring if the percentage of outbound traffic relative to inbound traffic increases by ten percent or more in two successive quarterly measurement periods.[17]

6. Additionally, the Commission took other actions in the *Foreign Participation Order*, including: eliminating the application of the ECO test to flexible settlement arrangements that deviate from the international settlements policy, narrowing our "No Special Concessions Rule," revising our dominant carrier safeguards that apply to U.S. carriers with foreign affiliates that possess market power, and streamlining the section 214 application process in most circumstances. The Commission also found that all of these actions are consistent with U.S. obligations under the GATS.[18]

7. With regard to policies toward applications from non-WTO Members, the Commission determined that circumstances still have not changed sufficiently to alleviate the public interest concerns that carriers possessing market power in such countries may engage in anticompetitive behavior. Thus, the Commission chose to continue to apply the ECO test and equivalency analysis in the context of non-WTO Members. In addition to requiring that non-WTO markets satisfy the equivalency test to qualify for ISR on the U.S.- non-WTO route, the Commission also required that non-WTO markets satisfy the condition set forward in the *Benchmarks Order* that settlement rates for at least fifty percent of the settled U.S.-billed traffic on the route or routes in question be at or below the relevant benchmark to qualify for ISR.

8. Since the Commission issued the *Foreign Participation Order*, we have further refined our

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15 *Foreign Carrier Entry Order*, 11 FCC Rcd at 3924-26, paras. 133-138.

16 *See Regulation of International Accounting Rates*, Phase II, CC Docket No. 90-337, First Report and Order, 7 FCC Rcd 559 (1991) (*International Resale Order*); Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992); Third Report and Order and Order on Reconsideration, 11 FCC Rcd 12,498 (1996). One-way bypass occurs when foreign carriers are able to send switched traffic into the U.S. at low rates via ISR, but U.S. carriers are not able to send switched traffic out of the U.S. over ISR and must instead send traffic over the traditional accounting rate system.

17 *Foreign Participation Order*, 12 FCC Rcd at 23,927-28, para. 79. If the Commission finds that one-way bypass is occurring it will take action to prevent further bypass. The Commission may, for example, prohibit carriers from using their authorizations to provide switched service over private lines until settlement rates for at least fifty percent of the settled U.S.-billed traffic on the route are at or below the best practice rate of eight cents that was adopted in the *Benchmarks Order*. *Benchmarks Order*, 12 FCC Rcd 19,924, para. 259.

18 *Foreign Participation Order*, 12 FCC Rcd at 24,040-53, paras. 344-375.

procompetitive policies in the *ISP Reform Order*.[19] In the *ISP Reform Order*, we determined that the international settlements policy (ISP) is no longer necessary in two circumstances: (1) for settlement arrangements between U.S. carriers and foreign carriers that lack market power, and (2) for settlement arrangements on routes where U.S. carriers are able to terminate at least fifty percent of their U.S. billed traffic at rates that are at least twenty-five percent below the applicable benchmark rate. We also eliminated the flexibility policy that was applied to alternative settlement arrangements,[20] further clarified the "No Special Concessions Rule,"[21] and modified our ISP filing requirements.[22]

9. In addition, the Commission has modified, in its *Benchmarks Reconsideration Order*, one of the competitive carrier safeguards affirmed in the *Foreign Participation Order*.[23] Specifically, in the *Foreign Participation Order*, the Commission affirmed the *Benchmarks Order* condition that the provision of facilities-based switched or private line service to foreign-affiliated markets will only be authorized if the foreign-affiliated carrier on the route offers U.S. carriers a settlement rate that is at or below the relevant benchmark.[24] In the *Benchmarks Reconsideration Order*, the Commission further revised this safeguard by narrowing the condition so that it only applies to those facilities-based switched or private line routes where the foreign-affiliated carrier possesses market power in the foreign destination market.[25]

10. In this order, we address seven petitions requesting clarification and reconsideration of the Commission's decisions in the *Foreign Participation Order* and several comments and replies in response.[26] We find, as we did in the *Foreign Participation Order*, that our competitive safeguards and ability to attach additional conditions to grants of authority, in conjunction with the procompetitive commitments of WTO Members will reduce the danger of anticompetitive conduct resulting from entry of carriers from WTO Members into the U.S. market.[27] With this order, we clarify and amend three of the

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19 *1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket Nos. 98-148 and 95-22, CC Docket No. 90-337 (Phase II), Report and Order and Order on Reconsideration, 14 FCC Rcd 7963 (1999) (*ISP Reform Order*).

20 *Foreign Participation Order*, 12 FCC Rcd at 24,026-30, paras. 302-313.

21 *Id.* at 23,957-58, para. 156.

22 *Id.* at 24,030-36, paras. 314-334.

23 *Benchmarks Reconsideration Order*, 14 FCC Rcd 9256 (1999).

24 *Foreign Participation Order*, 12 FCC Rcd at 23,976, para. 191.

25 *Benchmarks Reconsideration Order*, 14 FCC Rcd at 9270, para. 40.

26 *See* Appendix A (List of Parties).

27 *Foreign Participation Order*, 12 FCC Rcd at 23,896, para. 9. *Id.* at 23,897-98, para. 13 ("[W]e recognize the possibility that circumstances might arise in which our safeguards might not adequately constrain the potential for anticompetitive harm in the U.S. market for telecommunications services. In such rare cases, the Commission reserves the right to attach additional conditions to a grant of authority, and in the exceptional case in which an application poses a very high risk to competition, to deny an application."). *Id.* at 24,023, para. 295 ("We also adopt here a general rule that would enable us to review a carrier's authorization and, if warranted, impose additional requirements in circumstances where it appears that harm to competition is occurring on one or more international routes."). *See also*

(continued….)

Commission's rules, and we deny the petitioners' requests to reconsider certain decisions in the *Foreign Participation Order* for the reasons discussed in that order and herein, as follows:

(a) we affirm the Commission's prior conclusion that we are under no obligation to impose the same entry standard with regard to WTO Members' participation in the U.S. telecommunications market to Bell Operating Company (BOC) entry into in-region interLATA services markets pursuant to section 271;[28]

(b) we affirm, clarify, and revise certain aspects of our prior notification requirement in rule 63.11 to respond to carrier concerns about the purpose of our rule, to reduce the prior notification period to forty-five (45) days, and to exempt certain classes of foreign carriers required to submit prior notification, and we also amend rule 63.09 to define "interlocking directorates" and rule 63.18(e)(3) to cross-reference our prior notification requirements;[29]

(c) we dismiss as moot SBC's request regarding "grooming" arrangements;[30]

(d) we deny SBC's petition that we reconsider language in the *Foreign Participation Order* indicating that the Commission may find submarine cable providers are common carriers because the language was not at issue in the proceeding;[31]

(e) we deny KDD's request that we revisit its proposed test for market power because the Commission fully considered and rejected a similar proposal in the *Foreign Participation Order*;[32]

(f) we deny both KDD's request that the Commission eliminate the application of dominant carrier safeguards to U.S. carriers affiliated with foreign carriers that possess market power,[33] and PanAmSat's petition that we reconsider two of the dominant carrier safeguards on the basis that the Commission fully considered and rejected petitioners' arguments in the underlying order;[34]

(g) we find that we are neither obligated, nor do we consider this order to be the proper forum, to consider J. Gregory Sidak's request that we extend our deregulatory approach under

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47 C.F.R. § 63.21(g) (the Commission reserves the right to review a carrier's authorization and impose conditions where there is competitive harm on U.S. international routes).

[28] *See* discussion *infra* Part II.A. 47 U.S.C. § 271.

[29] *See* discussion *infra* Part II.B. 47 C.F.R. § 63.11.

[30] *See* discussion *infra* Part II.C.

[31] *See* discussion *infra* Part II.D.

[32] *See* discussion *infra* Part II.E.

[33] *See* discussion *infra* Part II.F.1.

[34] *See* discussion *infra* Part II.F.2.

section 310(b)(4) to broadcast licenses based upon the fact that the Commission eliminated from consideration the amendment of our rules for broadcast licenses in the *NPRM*,[35] and therefore, petitioner's request was not at issue in the *Foreign Participation Order*;[36]

(h) we deny MCI's request that we condition switched resale authorizations to serve foreign-affiliated markets on the foreign carrier offering U.S. authorized carriers a settlement rate for the affiliated route that is at or below the relevant benchmark rate because the Commission fully considered and rejected Petitioner's request in the underlying order;[37] and

(i) we deny the petition of ARINC and reaffirm our conclusion that some aeronautical enroute and fixed services are basic telecommunications services under the WTO Basic Telecom Agreement.[38]

II. DISCUSSION

A. Scope of Entry Standard

1. Background

11. In the *Foreign Participation Order*, the Commission concluded that foreign carriers are subject to the same public interest standard enumerated in the Act as U.S. carriers and that this approach favors neither foreign nor domestic applicants.[39] The Commission concluded that the measures applied to protect against misuse of market power, in either a foreign or domestic context, may differ based upon the source and potential impact of the harm.[40] Therefore, the Commission's presumption in favor of entry by WTO Members applies only to competitive concerns that may arise because of a foreign carrier's market power in a foreign market.[41] The Commission determined that such entry would not pose a competitive threat absent a showing that our safeguards and potential conditions attached to grants of authority are not sufficient.[42]

12. Regarding BellSouth's argument, raised in the underlying order, that the same measures should apply to BOC entry into in-region interLATA markets, the Commission determined in the *Foreign Participation Order* that there is "nothing irrational about applying different entry standards to address

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35 *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 (1997) (*NPRM*).

36 *See* discussion *infra* Part II.G. 47 U.S.C. § 310(b)(4).

37 *See* discussion *infra* Part II.H.

38 *See* discussion *infra* Part II.I.

39 *Foreign Participation Order*, 12 FCC Rcd at 23,916-17, paras. 57-58.

40 *Id.* at 23,916, para. 57.

41 *Id.*

42 *Id.*

different risks of competitive harm."[43] Though entry by both may be analogous in a general sense, the Commission found that application by a carrier from a WTO Member to enter the U.S. international services market poses neither the same likelihood nor the potential degree of harm that entry by a BOC into in-region interLATA long distance services does.[44] The Commission referred in the *Foreign Participation Order* to its reasoning in the *BT/MCI Merger Order* that a U.K. carrier would not likely be a significant market participant in the U.S.-U.K. outbound international calling market; whereas, the BOCs would be significant market participants because of unique capabilities and incentives they possess.[45] The Commission explained in the *Foreign Participation Order* that the BOCs have capabilities and incentives such as operational infrastructure, brand name recognition, reputation among U.S. consumers, and existing customer relationships that foreign applicants will not likely possess among U.S. consumers. Therefore, the Commission concluded in the *Foreign Participation Order* that BOC entry into in-region interLATA markets poses a greater risk of competitive harm than does WTO Member entry into the U.S. international services market.[46]

2. Discussion

13. We deny BellSouth's petition to reconsider the Commission's decision not to extend the same "open entry" standard and presumptions that it applies to WTO Members' participation in the U.S. international telecommunications market to the context of BOC entry into the U.S. long distance market.[47] The arguments BellSouth sets forth in support of applying the same standard are largely the same as those raised, considered, and rejected previously in this docket.[48]

14. BellSouth contends that "the Commission's reasoning on this issue is specious, and its conclusion is wrong," and that entry by firms controlling local facilities brings the same consumer benefits, regardless of whether those local facilities are foreign or domestic.[49] If the Commission can rely on WTO Member commitments to open markets, along with competitive safeguards, then, BellSouth argues, the Commission should logically rely on the U.S. Government's market opening measures in the Telecommunications Act of 1996 and the Commission's domestic safeguards to presume BOC entry is in the public interest under section 271.[50]

15. Moreover, BellSouth argues that the Commission's reliance on two distinctions between the circumstances is misplaced. First, BellSouth disagrees with the Commission's reasoning that BOCs are likely to become "significant" market participants in the long distance market, while foreign carriers will

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43 *Id.* at 23,917-18, para. 58.

44 *Id.*

45 *Id.*; *see Merger of MCI Communications Corporation and British Telecommunications plc*, GN Docket No. 96-245, 12 FCC Rcd 15,351 (*BT/MCI Merger Order*), 12 FCC Rcd at 15,400, para. 128.

46 *Foreign Participation Order*, 12 FCC Rcd at 2317-18, para. 58.

47 BellSouth Petition. *See also* SBC Comments; BellSouth Reply.

48 *Foreign Participation Order*, 12 FCC Rcd at 2317-18, para. 58.

49 BellSouth Petition at 2, 4; SBC Comments at 8.

50 BellSouth Petition at 4.

not likely become significant participants in the outbound international calling markets from the U.S. to their home countries because, BellSouth argues, the Commission has already concluded that BOCs are unlikely to become "dominant" long distance providers in the *BOC Non-Dominance Order*.[51] Second, BellSouth protests the Commission's reliance on the fact that separate statutory provisions apply to BOC entry and argues that foreign carrier entry creates a distinction without a difference.[52] According to BellSouth, section 271 contains the same public interest test present in section 214(a) and other parties cannot point to differences in the language, legal application, or intent of those public interest tests.[53]

16. The Commission fully considered and rejected BellSouth's arguments in the *Foreign Participation Order*.[54] Section 271 provides a separate procedural vehicle by which BOCs may attain in-region interLATA authority. Through section 271, the BOCs must satisfy the statutory requirements set forward in that section as a result of the unique market position they hold and their potential ability to engage in anticompetitive behavior.[55] Specifically, the BOCs possess certain capabilities and control over local facilities in the U.S. that generally increase the potential harm that they may leverage that bottleneck control into their in-region, interLATA interexchange markets and engage in anticompetitive cross-subsidization or discrimination. Thus, this market power over local facilities requires different measures from those we apply to foreign carriers that possess market power in foreign markets and seek to enter the U.S. marketplace.[56] Neither the WTO nor the *Foreign Participation Order* provides any basis for the BOCs to avoid the specific requirements contained in section 271. Recognizing that there are differences in the nature of, and competitive risks associated with, these fundamentally different circumstances,[57] we agree with MCI and TRA that we are not obligated to apply identical public interest presumptions to clearly non-analogous situations.[58]

17. Therefore, we find that BellSouth presents no new information or arguments for us to revisit our conclusion that the public interest presumption we established in the *Foreign Participation Order* does not apply with regard to BOC entry into in-region interLATA markets. Furthermore, we note that the Commission has separately addressed the nature of its public interest analysis in its evaluations of BOC applications under section 271 in the *Second BellSouth Louisiana Order* and the *Bell Atlantic New York Section 271 Authorization.*[59]

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51 *Id.* at 5-6; SBC Comments at 9.

52 BellSouth Petition at 6-7.

53 BellSouth Reply at 6.

54 *Foreign Participation Order*, 12 FCC Rcd at 23,917-18, para. 58.

55 AT&T Comments at 10-11.

56 *Foreign Participation Order*, 12 FCC Rcd at 23,916-17, para. 57.

57 TRA Comments at 2.

58 *Id.* at 3; MCI Comments at 7

59 *Application of BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20,599 (1998) (*Second BellSouth Louisiana Order*). *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-*

(continued….)

B. Affiliation Notification Procedures

1. Background

18. In the *Foreign Participation Order*, the Commission revised rule 63.11, which imposes a continuing obligation on U.S.-authorized carriers to notify the Commission of, and in certain circumstances to obtain prior authorization before acquiring an affiliation with a foreign carrier. Among the changes it made to rule 63.11, the Commission required that U.S. carriers notify the Commission sixty days before the acquisition of a direct or indirect controlling interest in a foreign carrier by the U.S. carrier or by an entity that controls the U.S. carrier or that owns more than twenty-five percent of the U.S. carrier.[60] Previously, under rules adopted in the *Foreign Carrier Entry Order*, the Commission required prior notification only of foreign carrier investments that are controlling or that exceed twenty-five percent of the ownership of a U.S. carrier.[61] Pursuant to paragraph (e) of rule 63.11, when the Commission finds that the planned investment raises a question as to whether the investment would serve the public interest, convenience, and necessity, the U.S. carrier shall not consummate the investment until it has submitted a section 214 application under rule 63.18.[62]

2. Discussion

19. We affirm, clarify, and revise the Commission's requirement for prior notification of controlling investments by U.S. carriers in foreign carriers and of controlling investments or greater than twenty-five percent capital stock investments by foreign carriers in U.S. carriers.[63] Moreover, though we reject SBC's request that we eliminate the prior notification requirement for U.S. carrier controlling investments in foreign carriers, we clarify and revise rule 63.11 to address more precisely the Commission's underlying purpose for the provision and to reduce unnecessary regulatory burdens.[64] Specifically, we exempt from prior notification the following affiliations with foreign carriers that: (1) we

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Region, InterLATA Service in the State of New York, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. Dec. 22, 1999) (*Bell Atlantic New York Section 271 Authorization*).

60 *Foreign Participation Order*, 12 FCC Rcd at 24,036, para. 334; 47 C.F.R. § 63.11(a). Under paragraph (b) of the current rule, U.S. carriers may acquire a greater than twenty-five percent, but non-controlling interest in a foreign carrier subject only to the requirement that they notify us within thirty days of the investment. Prior notification is not required in the case of these non-controlling investments.

61 *Foreign Carrier Entry Order*, 11 FCC Rcd at 3910, paras. 96-98. This requirement continues in paragraph (a)(2) of rule 63.11.

62 47 C.F.R. § 63.11(e).

63 We use the term "U.S. carrier" to refer to any carrier authorized to provide U.S. international services pursuant to section 214 of the Act, regardless of the nationality of the carrier's ownership. A "foreign carrier" is defined in section 63.09(d) of our rules as "'any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations . . . which includes entities authorized to engage in the provision of domestic telecommunications services if such carriers have the ability to originate or terminate telecommunications services to or from points outside their country.'" *Foreign Participation Order*, 12 FCC Rcd at 23,950, n. 265. Indeed, a carrier can be both a U.S. and a foreign carrier.

64 SBC Petition. *See also* GTE Comments; BellSouth Reply; SBC Reply.

have determined in prior adjudications lack market power; (2) are only resale carriers; or (3) are from WTO Members and either demonstrate that they are entitled to retain non-dominant classification on the route pursuant to section 63.10 of the Commission's rules or agree to comply with our international dominant carrier safeguards effective upon the acquisition of the affiliation.

20. SBC argues in its petition that the prior notification requirement of controlling U.S. carrier investments in foreign carriers creates severe competitive disadvantages for potential U.S. carrier investors.[65] SBC contends that U.S. company bids would likely be deemed "conditional" and rejected in privatization auctions, and that this policy will adversely affect the development of competition in foreign markets.[66] SBC also argues that the Commission did not articulate a rational basis for its policy and did not explain in the *Foreign Participation Order* why this new policy would not frustrate U.S. investment abroad.[67] At a minimum, SBC asks that the Commission remove the prior notification requirement because it failed to provide adequate notice of the new policy in the *NPRM*;[68] the Commission's rule is vague and incomplete; and there is no clear standard for investments in carriers from WTO Members beyond paragraph (e)(2)'s statement that a carrier shall not consummate an investment and must submit a section 214 application if the investment is not deemed to serve the public interest.[69]

21. Finally, SBC notes that the transfer of controlling interests in U.S. carriers to foreign carriers is already addressed in the context of section 214 authorizations.[70] Therefore, SBC contends, the Commission should maintain prior notification of foreign carriers' controlling investments in U.S. carriers, but address any competitive concerns and adopt or modify conditions solely in the context of considering whether to approve a transfer of control or assignment of the U.S. carrier's section 214 authorization.[71]

22. Regarding U.S. GATS obligations, SBC also argues in its petition that the principle of National Treatment does not apply to U.S. carrier investments overseas.[72] SBC, along with GTE, contends that the principle of National Treatment is only relevant to the treatment of acquisitions by U.S. carriers and foreign carriers in the United States and only requires that WTO Member carriers' investments in U.S. carriers be treated similarly to U.S. carriers' investments in U.S. carriers.[73] In addition, SBC argues that there is no need for regulatory scrutiny of U.S. carrier investments in WTO Members because of those countries' commitments.[74]

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65 SBC Petition at 2.

66 *Id.* at 2-3; SBC Reply at 5.

67 SBC Petition at 3; BellSouth Reply at 8.

68 *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 (1997) (*NPRM*).

69 SBC Petition at 3-4; GTE Comments at 3.

70 SBC Petition at 4; SBC Reply at 4.

71 GTE Comments at 4; SBC Reply at 4-5.

72 SBC Petition at 4-5; SBC Reply at 3.

73 SBC Petition at 4-5; GTE Comments at 4; SBC Reply at 4.

74 SBC Petition at 4.

23. Contrary to SBC's interpretation, the concern motivating the rule change in the *Foreign Participation Order* was with the potential public interest harm and the competitive distortion that could arise in the U.S. market from the presence of a new controlling affiliation on a route, not the investment *per se*. Our purpose in reviewing an authorized carrier's proposed investment is to determine what safeguards may need to apply or what other Commission action may be necessary with regard to the authorized carrier's section 214 authorization to serve the affiliated route. Our review is limited to conditioning or prohibiting an authorized carrier's operations on the specific affiliated route if the affiliation raises a public interest concern within the scope of current Commission policies. Additionally, we find SBC's proposal that competitive concerns should be addressed solely within the context of transfer of control applications, filed pursuant to rule 63.18, inadequate to address such concerns. Not every controlling investment by a U.S. carrier in a foreign carrier requires the filing of a transfer of control application. If the U.S. carrier's section 214 authorization does not change hands in a transaction, no transfer of control application would be filed with the Commission.[75] Therefore, prior notification may be the only means in some transactions that the Commission has to assess the potential impact of a U.S. carrier's acquisition of control over a foreign carrier. Nonetheless, in response to SBC's concerns discussed above, we clarify the affiliation notification rules and procedures under rule 63.11.

24. As we explained in the *Foreign Participation Order* and the Commission's recent *Section 214 Streamlining Order*, the Commission's primary concern in the context of international telecommunications service is that a carrier with market power on the foreign end of an international route may leverage that power into the U.S. market to the detriment of competition and U.S. consumers.[76] We found in the *Foreign Participation Order* that "a vertically integrated carrier or an ownership affiliation between a U.S. and a foreign carrier creates a heightened ability and incentive to engage in anticompetitive behavior."[77] We also found that this concern is equally applicable in the context of foreign carrier investments in U.S. carriers as it is in the context of U.S. carrier investments in foreign carriers.[78] Given that our primary concern in this proceeding is with the potential leveraging of foreign market power in favor of an affiliated U.S. carrier, we find that we can narrow the application of rule 63.11 to address more specifically that concern.[79]

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75 Nor would a transfer of control application be filed in circumstances where a foreign carrier acquires a greater than twenty-five percent but non-controlling interest in a U.S. carrier. Such investments, however, warrant our scrutiny under policies adopted in the *Foreign Carrier Entry Order*, 11 FCC Rcd at 3902-06, paras. 78-87, and reaffirmed in the *Foreign Participation Order*, 12 FCC Rcd at 24,036, para. 334.

76 *In the Matter of 1998 Biennial Regulatory Review: Review of International Common Carrier Regulations*, IB Docket No. 98-118, Report and Order, 14 FCC Rcd 4909 (1999) (*Section 214 Streamlining Order*). *Id.* at 4918, para. 21. *Foreign Participation Order*, 12 FCC Rcd at 23,950-55, paras. 143-149.

77 *Foreign Participation Order*, 12 FCC Rcd at 23,954, para. 147.

78 *Id*. at 24,036, para. 334.

79 Though our actions in this order are directly related to the concerns raised in SBC's petition and by commenters, we also note that the Commission may *sua sponte* reconsider a prior decision in a rulemaking, so long as a petition for reconsideration of the prior decision is pending, even though the pending petition concerns a different aspect of the case. *See Central Florida Enterprises, Inc. v. FCC,* 598 F.2d 37, 48 n.51 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979).

25. We conclude that U.S. carriers' investments in or by foreign carriers that we have previously determined in adjudications, such as section 214 application or declaratory ruling proceedings, lack market power will not likely pose competitive or other public interest concerns that would lead us to prohibit the U.S. carrier from providing U.S. international service on the newly-affiliated route or to impose conditions. In these circumstances, the benefit of engaging in prior review of the investment is outweighed by the burden prior review imposes on those U.S. carrier investments. In addition, we concluded in the *Section 214 Streamlining Order* that U.S. carrier affiliations with foreign resale carriers are unlikely to raise market power concerns.[80] We allowed, in that order, applicants to take advantage of our streamlined section 214 authorization procedures for service on routes where an affiliated foreign carrier has no facilities (other than switching facilities). Similarly, we conclude in this proceeding that we need not require prior notification for investments in or by foreign resale carriers.[81] As the Commission previously stated in the *Foreign Participation Order*, our primary concern is to prevent carriers that control bottleneck facilities in foreign countries from using those bottlenecks to discriminate against unaffiliated U.S. carriers.[82] This rationale applies equally to carriers from non-WTO Members as it does to WTO Members.[83]

26. We will amend rule 63.11 to require only post-investment notification of U.S. carrier affiliations with carriers that lack market power or are resale carriers in order to monitor and evaluate whether any of these affiliations implicate our section 214 public interest policies.[84] In addition, authorized carriers that intend to rely on one of these exceptions to the prior notification rule must also submit a certification with the Commission as part of its notification indicating upon which exception it is relying and certifying as to the factual basis for the qualification.

27. In addition to the above exceptions for prior notification, we conclude that we need not require prior notification of an investment in or by a foreign carrier from a WTO Member, so long as the authorized carrier can demonstrate pursuant to the Commission's rules that it should retain non-dominant classification on the newly affiliated routes or so long as the authorized carrier agrees to comply with the Commission's international dominant carrier safeguards effective upon the acquisition of the affiliation.[85]

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80 *Section 214 Streamlining Order*, 14 FCC Rcd at 4922, para. 29.

81 We note that we also permitted applications from affiliates of foreign mobile wireless carriers to be streamlined in the *Section 214 Streamlining Order*; nevertheless, we expressed concern that mobile wireless carriers may be able to exercise bottleneck control over terminating international telecommunications as use of such services in foreign markets expands. *Id.* Because of this concern about potential anticompetitive behavior, we maintain a prior notification requirement for affiliations with mobile wireless carriers. We expect, nonetheless, that most U.S. affiliates of foreign mobile wireless carriers will be able to demonstrate that their foreign wireless affiliates either are authorized to operate in a WTO Member or lack market power and thereby file under our post-notification procedures.

82 *Foreign Participation Order*, 12 FCC Rcd at 23,949, para. 140.

83 *Id.* at 23,945, para. 128 (noting that the Commission would continue to apply the ECO test to non-WTO Members that possess market power).

84 In using the terms "prior notification" and "post notification" we are respectively referring to notification prior to the consummation of the proposed transaction and subsequent to the closing of the proposed transaction.

85 *See* Section 63.10 of the rules. 47 C.F.R. § 63.10.

Because of the commitments made in the context of the WTO Basic Telecom Agreement to adopt principles of open markets, private investment, and competition, as well as the adoption of pro-regulatory principles, we find that, as a general rule new affiliations with carriers from WTO Members do not require prior notification because they will not likely pose significant competitive or other public interest concerns that cannot be addressed through the application of competitive safeguards.[86] Our main concern with respect to prior notification of U.S. carrier affiliations with carriers from WTO Members is to monitor and evaluate new affiliations that may implicate our section 214 public interest policies, *i.e.*, new affiliations that require application of dominant carrier safeguards to that route.[87] We find that this concern can be addressed through a requirement that an authorized carrier make the required showing, pursuant to section 63.10 of the Commission's rules, in its post-notification that the authorized carrier is entitled to retain non-dominant classification on the routes on which it is newly affiliated with a WTO Member or, in the alternative, that it agrees to comply with the Commission's dominant carrier safeguards on those routes, including the safeguard requiring compliance with the Commission's benchmark rates on affiliated routes where the foreign carrier possesses market power. In the event that the authorized carrier does not demonstrate in its post-notification that it is entitled to non-dominant classification on a route, the Commission may impose dominant carrier classification or other conditions it deems necessary to prevent harm to the public interest. We emphasize that this exception is limited to investments in or by a foreign carrier from a WTO Member. As discussed below,[88] prior notification is necessary in the context of controlling affiliations with carriers from non-WTO Members because non-WTO Members have not made the commitments that WTO Members have made such as liberalizing their markets that would offset concerns about anticompetitive behavior, and there are not sufficient regulatory tools and safeguards to justify a more deregulatory approach towards non-WTO Members.[89]

28. We additionally emphasize that we will continue to review notifications of affiliations with carriers from WTO Members under the entry standard adopted in the *Foreign Participation Order*. Pursuant to this standard, we presume, subject to rebuttal, that entry by, or affiliations with, WTO Member carriers do not pose concerns that would justify denial of entry on competition grounds. In the exceptional case where entry poses a very high risk to competition in the U.S. market and, where safeguards and conditions would be ineffective at eliminating this risk, we reserve the right to designate for revocation the authorized carrier's section 214 authorization on the newly-affiliated route.[90]

29. In summary, we will continue to require prior notification of a U.S. carrier's controlling investment in a foreign carrier or a foreign carrier's controlling or greater than twenty-five percent investment in a U.S. carrier with the exception that prior notification is not required if one of the following

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86 *Foreign Participation Order*, 12 FCC Rcd at 23,896, para. 9. *See also id.* at 23,906-10, paras. 33-43 (finding that the Commission need no longer require applicants from WTO Members to demonstrate that their markets satisfy the ECO test).

87 *Id.* at 24,036, para. 333.

88 *Infra* para. 35.

89 As discussed above in the text, these concerns would not apply to foreign carriers that we have previously determined in adjudications lack market power or that operate solely as resale carriers. *Supra* para. 25.

90 *See Foreign Participation Order*, 12 FCC Rcd 23,913-15, paras. 50-54; *see also id.* at 24,036, para. 334.

is true for the foreign carrier: (1) the foreign carrier is one that we have previously determined in an adjudication lacks market power in destination markets authorized to be served by the U.S. carrier; (2) the foreign carrier is a resale carrier in such markets; or (3) the destination markets in which the foreign carrier is authorized to operate are WTO Members and the authorized carrier either demonstrates that it should retain non-dominant classification on the newly-affiliated routes pursuant to rule 63.10 or the authorized carrier agrees to comply with the Commission's dominant carrier safeguards on those routes. We find that prior notification of investments not subject to one of these exceptions is still necessary to evaluate whether safeguards should apply or whether other Commission action may be necessary with regard to the U.S. carrier's authorization to serve the affiliated route. Prior notification in situations not covered by an exception enables the Commission's staff to identify affiliations that raise public interest concerns within the scope of current Commission policies. Therefore, we maintain our prior notification requirement with the above listed exceptions. Affiliations covered by an exception are subject to post-notification procedures.[91] We emphasize that notifications filed pursuant to the rule are required only for affiliations with foreign carriers that operate in a market that the U.S. carrier is authorized to serve.

30. We further modify the prior notification requirement so that such prior notifications must be filed forty-five days rather than sixty days prior to the consummation of the acquisition in order to respond to carriers' concerns that sixty days is overly burdensome.[92] We find that forty-five days will give the Commission reasonable time to accomplish the functions of reviewing the notification, issuing a public notice, receiving comments on the notification, and advising the Executive Branch of the new affiliation. Moreover, reducing the time to forty-five days will reduce the regulatory burden on carriers providing prior notification and should facilitate compliance with the rule. We, therefore, modify the time period for prior notification in rule 63.11 to forty-five days.

31. In addition, we revise rule 63.11 in order to provide U.S. carriers the opportunity to file confidentially the information requested by the Commission as part of their prior notifications of affiliation. We modify our rule to allow a U.S. carrier to file such prior notification information confidentially with the Commission forty-five days prior to the planned consummation of the investment, and we permit the carrier to request in an accompanying cover letter that the Commission maintain confidential treatment of the prior notification information for twenty days, after which date the carrier agrees to public treatment of such information. The Commission will then place the notification on public notice twenty-five days prior to the planned consummation of the investment. We find that such action will give ample opportunity for public comment, while alleviating carriers' concerns that we often receive about the time burden and difficulty of maintaining the confidentiality of sensitive transactions until they are finalized.[93]

32. We also amend the language in rule 63.11 to reduce further regulatory burdens on carriers and administrative burdens on the Commission. We amend the rule to permit the Commission to classify

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91 In the event a party wishes to challenge an affiliation subject to one of the above-listed exceptions, the party will have an opportunity to comment on the affiliation once the post-notification is placed on public notice. *See* revised rule 63.11(c) in Appendix B.

92 We disagree with AT&T's suggestion that the notification period should be reduced from sixty to thirty days to reduce the burden of compliance. We find that thirty days would not provide the Commission in all cases reasonable time to perform the functions described in the text. AT&T Comments at 7-8.

93 *See e.g.*, Letter from Laura B. Sherman, Communications Counsel, Paul, Weiss, Rifkind, Wharton & Garrison, to Ms. Susan O'Connell & Ms. Lisa Choi, International Bureau, FCC (November 15, 1999) (Ms. Sherman comments as a practitioner on the difficulty for carriers to comply with rule 63.11).

an authorized carrier as dominant by a public notice, rather than by written order, in circumstances in which the authorized carrier agrees to abide by dominant carrier regulation on an affiliated route.[94] Moreover, we modify the content of notifications of affiliation to include a statement by an authorized carrier as to whether the notification is subject to prior notification (including the date of projected closing) or post notification (including the actual date of closing). In order to facilitate the processing of notifications and transfer of control or assignment applications, we also require authorized carriers that must file related transfer of control or assignment applications to cross-reference their applications and foreign carrier affiliation notifications.[95] Similarly, with respect to the content of post-notifications of affiliation, we are deleting the current reference to rule 63.18 in order to facilitate processing of filings and clarify that carriers may not notify the Commission of a proposed affiliation with a foreign carrier in the context of a transfer of control or initial section 63.18 application in order to discharge their notification obligations under rule 63.11.[96] We also modify rule 63.11 to clarify that carriers are responsible for the continuing accuracy of the contents of their prior notifications during the forty-five day notice period; carriers otherwise are responsible on an on-going basis for complying with the rule's requirement for notifying the Commission of their affiliations with foreign carriers.[97] In accordance with the policies the Commission adopted in the *Foreign Participation Order*, we therefore revise rule 63.11 and rule 63.18(e)(3) to reflect these revisions of our prior and post-notification requirements.[98]

33. Since we last amended rule 63.11, the Commission has repealed Part 62 of the rules governing interlocking directorates.[99] Although Part 62 addressed all U.S.-authorized common carriers, it did not address concerns with respect to vertical integration or ownership affiliations between U.S. and foreign carriers. Our rules governing international carriers, therefore, continue to reference and request information regarding interlocking directorates between U.S. and foreign carriers. The term "interlocking

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94 *See* § 63.11(e)(1) (to be renumbered § 63.11(g)(1)) ("[T]he Commission, if it deems it necessary, will by written order at any time before or after the deadline for submission of public comments impose dominant carrier regulation on the carrier for the affiliated routes.").

95 For example, if a foreign carrier seeks to acquire control of a U.S. carrier, the foreign carrier (*i.e.*, the transferee) is required to file a transfer of control application under rule 63.18(e)(3). The U.S. carrier (*i.e.*, the transferor) would also be required to file a prior notification of the planned investment under rule 63.11(a)(2) unless one of the exceptions we here adopt applies. As another example, if U.S. carrier "X" seeks to acquire control of U.S. carrier "Y" which controls a foreign carrier, then U.S. carrier "X," as transferee, is required to file a transfer of control application under rule 63.18(e)(3). U.S. carrier "X" is also required to file a prior notification of the planned investment under rule 63.11(a)(1) unless one of the exceptions we here adopt applies. In each of the above examples, the prior notification required under rule 63.11 must reference the transfer of control application made pursuant to rule 63.18, and vice-versa.

96 *See* § 63.11(b). *See* revised rule 63.11(c) in Appendix B.

97 Rule 63.11(f) (to be renumbered 63.11(h)), as currently written, can be read to require carriers to update the Commission on an on-going basis with respect to all information contained in their notifications, including, for example, changes in interlocking directorates with foreign carriers. 47 C.F.R. §§ 63.11(f), 63.21(a).

98 *See* Appendix B.

99 *In the Matter of Biennial Regulatory Review – Repeal of Part 62 of the Commission's Rules*, CC Docket No. 98-195, Report and Order, FCC 99-163 (rel. Jul. 16, 1999).

directorates," as used in rules 63.11 and 63.18, was intended to invoke the definition in Part 62 of the Commission's rules. Because Part 62 has since been repealed, we now amend rule 63.11 and our Part 63 definitional section in rule 63.09, to clarify what is required. We also conclude that the definition of "interlocking directorates" need not be as broad as was required by the definition in Part 62. The requirement in rules 63.11 and 63.18 to identify interlocking directorates between the U.S. carrier and any foreign carrier is intended to help verify the U.S. carrier's certification as to its foreign affiliations. Given this limited purpose, we limit the definition to those persons having any of the duties ordinarily performed by a director, president, vice president, secretary, treasurer, or other officer of a carrier. We also modify rule 63.11 to require that authorized carriers identify only their interlocking directorates with the foreign carriers that are the subject of the notifications. This modification will reduce the reporting burden on authorized carriers while retaining information to help verify whether an authorized carrier's affiliation with a foreign carrier constitutes a controlling interest in or by the foreign carrier.

34. In addition, we are sensitive to SBC's specific concern in its petition that bids in privatization auctions may be deemed "conditional" as a result of the prior notification requirement and language contained in rule 63.11(e)(2). Therefore, we clarify and revise the provision in current rule 63.11(e)(2) prohibiting the consummation of an investment pending Commission approval.[100]

35. Significantly, prior notification in part serves to protect the public interest against "backdoor" entry into the U.S. international telecommunications market by carriers from non-WTO Members. If a U.S. carrier proposes to acquire a controlling interest in a foreign carrier that has market power in a non-WTO Member, it is our policy to apply the ECO analysis to the non-WTO Member to determine whether it would continue to serve the public interest to permit the U.S. carrier to operate on that route and under what conditions.[101] The same issues are present if a foreign carrier from a non-WTO Member proposed to acquire a controlling interest or greater than twenty-five percent interest in the capital stock of a U.S. carrier. Because the underlying concern regarding the evasion of the Commission's ECO analysis may not be evident in the current language contained in rule 63.11(e)(2), we clarify and revise the rule to focus on controlling affiliations with carriers from non-WTO Members.[102] Consistent with the initial application process for international section 214 authorizations in section 63.18(k) of the Commission's rules, we require authorized carriers that acquire affiliations subject to our revised rule 63.11 with carriers in non-WTO Members to demonstrate that the foreign carrier lacks market power or is a resale carrier, or to make an ECO showing in order to continue to operate on the applicable route.[103]

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100 *See* revised rule 63.11(g)(2) in Appendix B.

101 *See Foreign Participation Order*, 12 FCC Rcd at 24,036, para. 334 ("Ín order to implement the standards we adopt in this *Order*, including our decision to apply our entry policies (whether the open entry policies for WTO Members or the ECO test for non-WTO Members) to U.S. carriers' investments in foreign carriers, we find that it is necessary to require an authorized carrier to notify the Commission 60 days before it, or a company that owns more than 25 percent of it, acquires a direct or indirect controlling interest in a foreign carrier.") (*footnote omitted*).

102 *See* revised rule 63.11(g)(2) in Appendix B. We note that, pursuant to our rules, a U.S. carrier's non-controlling investment in a carrier that is authorized to operate in a non-WTO Member does not invoke our ECO analysis. *See Foreign Participation Order*, 12 FCC Rcd at 23,949, para. 140; 47 C.F.R. § 63.18(j)-(k).

103 With respect to U.S. carrier investments in or by foreign carriers that are authorized to operate in WTO Members, the Commission determined in the *Foreign Participation Order* that entry by carriers from WTO Members would rarely pose anticompetitive harm to the U.S. international telecommunications (continued….)

Otherwise, an authorized carrier risks having its authorization revoked.

36. SBC also requests in its petition that the Commission clarify that the "denial" provision of paragraph (e)(2) applies only in the case of prior notifications, which are made pursuant to paragraph (a) of rule 63.11.[104] In response to SBC's concern about the applicability of rule 63.11(e)(2), we clarify in this order that our review of non-WTO affiliations in revised rule 63.11(g)(2) is only applicable in the case of prior notification; therefore, bids and other investments that do not trigger prior notification will not raise SBC's concern about U.S. company bids in privatization auctions. Considering the concerns SBC has raised regarding the interpretation of rule 63.11, we further revise rule 63.11 to reduce unnecessary regulatory burdens on carriers.

37. Through these revisions and clarifications, we have made every effort to simplify and clarify the purpose and application of rule 63.11. The rule changes discussed above will also harmonize the Commission's policies regarding U.S. carriers' dealings with foreign carriers that lack market power and the Commission's findings in its most recent *Section 214 Streamlining Order*.[105] We emphasize that in order for the Commission to maintain the integrity of our policies and to fulfill our mandate to protect the public interest, it is imperative that carriers comply with our rules. Failure to comply with section 63.11 of our rules could subject non-compliant carriers to enforcement action.

C. "Grooming" Arrangements

1. Background

38. In the *Foreign Participation Order*, the Commission revised the "No Special Concessions" rule that it had previously adopted in the *Foreign Carrier Entry Order*.[106] The Commission narrowed the rule in the *Foreign Participation Order* only to prohibit U.S. carriers from entering into exclusive arrangements with foreign carriers that possess sufficient market power in a relevant market on the foreign end of the route to affect competition adversely in the U.S. market.[107] The Commission concluded that special concessions granted by foreign carriers without market power could serve the public interest by permitting innovative services and operational efficiencies.[108] In addition, the risk from exclusive arrangements in situations where a foreign carrier does not possess the market power to restrict the supply of services or facilities would not likely limit rivals' ability to provide services or increase their

(Continued from previous page)

market. *See supra* note 9. Under rule revisions that we adopt in this order, parties may challenge an authorized carrier's section 214 authorization on a newly-affiliated U.S.-WTO route in their comments filed pursuant to the pleading cycle of the required post-notification of affiliation. *See* revised rule 63.11(c) in Appendix B.

104 SBC Petition at 4. Authorized carriers notify the Commission of affiliations through non-controlling investments in foreign carriers under § 63.11(b) of the Commission's rules after the investment is made.

105 *Section 214 Streamlining Order*, 14 FCC Rcd 4909 (1999).

106 *Foreign Participation Order*, 12 FCC Rcd at 23,957-58, para. 156.

107 *Id.* at 23,957-58, para. 156. Prior to the Commission's modification, the rule prohibited all U.S. international carriers from agreeing to accept special concessions from any foreign carrier or administration. 47 C.F.R. § 63.14.

108 *Foreign Participation Order* at 23,957-58, para. 156.

costs.[109]

39. In order to determine market power, the Commission adopted a rebuttable presumption that foreign carriers with less than 50% market share in each of three relevant markets on the foreign end of a route lack sufficient market power to affect competition adversely in the U.S. market.[110] The relevant markets on the foreign end of a route generally include international transport facilities or services, including cable landing station access and backhaul facilities; inter-city facilities or services; and local access facilities or services.[111] The Commission also required U.S. carriers to provide proof as to the relevant input markets if they intend to rely on this lack of market power presumption to accept a special concession, and required carriers to file relevant contracts, operating agreements, and other arrangements with foreign carriers with the Commission within 30 days of execution.[112]

2. Discussion

40. In response to the *Foreign Participation Order*, SBC petitions the Commission to reconsider its decision regarding the "No Special Concessions" rule and discontinue its practice of placing a special condition on BOC affiliate section 214 authorizations with respect to "grooming" arrangements (*i.e.*, arrangements to terminate traffic in particular geographic regions).[113] SBC argues that the Commission's rules could be misinterpreted to forbid special concessions with foreign non-dominant carriers as well as with foreign carriers that possess market power because of the broad language in rules 43.51(e) and 64.1001.[114] In addition, SBC claims that carriers may believe that different special concessions rules apply to BOCs, or their affiliates, because of the right of BOCs to terminate traffic in-region and because grooming arrangements require approval as a special concession.[115] Therefore, SBC expresses concern that some carriers may interpret the conditions to apply only to BOC affiliate section 214 grants.[116]

41. Because we find SBC's request to be moot in light of the Commission's *ISP Reform Order*, we deny SBC's petition. In the 1999 *ISP Reform Order*, we further narrowed the "No Special Concessions" rule.[117] We amended rule 63.14 by removing the application of the rule to the terms and conditions under which traffic is settled, including the allocation of return traffic or "grooming" arrangements, on a route where we remove the ISP.[118] We, nevertheless, maintained the application of the

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109 *Id.* at 23,958, para. 158.

110 *Id.* at 23,959, para. 161.

111 *Id.* at 23,952-53, para. 145.

112 *Id.* at 23,960-62, paras. 162-163.

113 SBC Petition at 5-7; SBC Reply at 6.

114 SBC Petition at 6.

115 *Id.* at 6-7; BellSouth Reply at 10.

116 SBC Petition at 7.

117 *ISP Reform Order*, 14 FCC Rcd at 7994-96, paras. 82-88.

118 *Id.* at 7995, para. 85.

"No Special Concessions" rule with respect to matters other than the terms and conditions under which traffic is settled on routes with carriers possessing sufficient market power to affect the U.S. international market adversely, regardless of whether we remove the ISP, because we found the risk of discriminatory behavior still exists.[119]

42. Elsewhere in the *ISP Reform Order*, we found that there are not any greater anticompetitive risks associated with allowing incumbent local exchange carriers to engage in "grooming" arrangements than with other carriers.[120] Therefore, we removed the special condition on BOC international section 214 certificates to obtain prior approval to enter such arrangements as special concessions, regardless of whether the ISP applies.[121] We affirm these conclusions and reject SBC's request as moot.

D. Common Carrier Designation of Submarine Cables

1. Background

43. In the *Foreign Participation Order*, the Commission chose to eliminate the ECO-type analysis applied in the context of applications to land and to operate submarine cables in favor of an "open entry" standard for such applications for entities from WTO Members.[122] The Commission found that the market-opening commitments of WTO Members, along with the Commission's ability to impose requirements on both cable landing licenses and section 214 authorizations, as well as the ability to deny submarine cable licenses, rendered the ECO test unnecessary.[123] The Commission also noted that if there is a danger of inadequate common carrier capacity on submarine cables to a particular destination, the Commission has the authority to require that new or existing cables be operated on a common carrier basis or to impose conditions short of such a requirement.[124]

2. Discussion

44. We deny SBC's request that the Commission reconsider the language in the *Foreign Participation Order* referring to the Commission's ability to designate cable operators as common carriers.[125] SBC contends that the Commission offers no legal support for the *dicta* in the *Foreign Participation Order* announcing this view and has established no factual basis to assume such authority, nor did it give parties notice or opportunity to comment on this issue.[126] According to SBC, the case law

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119 *Id.* at 7995, para. 86.

120 *Id.* at 7997, para. 91.

121 *Id.* at 7998, para. 94.

122 *Foreign Participation Order*, 12 FCC Rcd at 23,933-34, para. 93.

123 *Id.*

124 *Id.* at 23,934, para. 95.

125 SBC Petition at 8-10; SBC Reply at 7; BellSouth Reply at 9-10.

126 SBC Petition at 8.

supports the position that the Commission's discretion is limited in denominating common carriers.[127] Moreover, SBC notes that forcing submarine cable operators to act as common carriers, while not similarly compelling satellite providers, would be discriminatory.[128]

45. Because the language SBC requests that we reconsider was not at issue in the *Foreign Participation Order* or in the *NPRM*, this Order on Reconsideration is not the appropriate forum to address SBC's concern. We note that the regulatory distinction between common carrier and non-common carrier submarine cables is at issue in the *Submarine Cable Streamlining* proceeding.[129]

E. Market Power Test for Foreign Carriers from WTO Members.

1. Background

46. The Commission stated in the *Foreign Participation Order* that it would define market power, consistent with Commission precedent, as a carrier's ability to raise prices by restricting the output of services.[130] The Commission determined that foreign carriers with market power in input markets for U.S. international telecommunications services could leverage that power to the detriment of competition and consumers.[131] Therefore, the Commission adopted regulatory safeguards that apply to all U.S. carriers' dealings with foreign carriers that have market power and adopted dominant carrier safeguards that apply to dealings between merged or affiliated carriers with market power where there is a heightened risk of anticompetitive conduct.[132] The Commission applied the same market power test used in the application of the "No Special Concessions" rule to determine the applicability of the dominant carrier safeguards.[133]

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127 *Id.* at 9 (citing *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir.) (*NARUC I*), *cert. denied*, 425 U.S. 992 (1976). GTE, in support of SBC's petition, also argues that the Commission first must examine the functions of the entity and terms under which that entity does business and then find a correspondence between those activities and the controlling definition of common carriage. GTE Comments at 5.

128 SBC Petition at 10.

129 *In the Matter of Review of Commission Consideration of Applications under the Cable Landing License Act*, IB Docket No. 00-106, Notice of Proposed Rulemaking, FCC 00-210 (rel. June 22, 2000) (*Submarine Cable NPRM*).

130 *Foreign Participation Order*, 12 FCC Rcd at 23,951-52, para. 144.

131 *Id.* at 23,952-53, para. 145.

132 *Id.* at 23,955-24,023, paras. 150-292.

133 In revising the Commission's "No Special Concessions" rule so that it no longer applies to arrangements with foreign carriers that lack market power, the Commission adopted a rebuttable presumption that foreign carriers with less than 50% market share in each relevant market on the foreign end lack sufficient market power to affect competition adversely in the U.S. market. These relevant markets include: (1) international transport facilities or services, including cable landing station access and backhaul facilities; (2) inter-city facilities or services; and (3) local access facilities or services on the foreign end. *Foreign Participation Order*, 12 FCC Rcd at 23,952-53, para. 145 and at 23,959-60, para. 161.

47. The Commission concluded that risks of anticompetitive behavior are greater when U.S. and foreign carriers share common ownership; therefore, the Commission adopted certain competitive safeguards applicable to U.S. carriers serving foreign-affiliated markets.[134] Carriers that are classified as dominant on a particular route due to an affiliation with a foreign carrier with market power on the foreign end of that route are subject to specific dominant carrier safeguards.[135] The Commission adopted a rebuttable presumption that a U.S. affiliate of a foreign carrier with less than 50% market share in each of the relevant markets on the foreign end of a particular route should not be regarded as dominant.[136]

48. In the *ISP Reform Order*, the Commission removed the ISP for arrangements between U.S. carriers and foreign carriers that lack market power.[137] The Commission determined market power according to the same presumption it used in the *Foreign Participation Order, i.e.*, that a carrier with less than 50% market share in each of the three relevant foreign input markets lacks market power.[138] The Commission rejected KDD's proposed standard that carriers lack market power if they have no market power in the local exchange market and face competition in a WTO Member because the Commission determined that it would be more cumbersome than the current standard and provide less certainty for carriers.[139] In any event, the presumption may be rebutted by an appropriate showing that the carrier nevertheless lacks market power.

2. Discussion

49. We reject KDD's renewed request that the Commission modify its rebuttable presumption regarding the market power of a foreign carrier from a WTO Member.[140] KDD argues that such carriers should be presumed non-dominant if they: (1) do not control bottleneck local exchange facilities in the foreign country; (2) are subject to competition from multiple facilities-based carriers that possess the ability to terminate international traffic and serve customers in the foreign market; and (3) are from a WTO Member.[141]

50. According to KDD, it would be "a rare case where a foreign carrier who lacks control over bottleneck local exchange facilities can manipulate capacity restrictions to retain market power in the face of multiple facilities-based competitors."[142] Furthermore, by limiting the proposed presumption to WTO

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134 *Id.* at 23,969-70, para. 177. The *Benchmarks Reconsideration Order* subsequently modified the competitive safeguard that applied to foreign-affiliated carriers so that the safeguard applies only to the provision of facilities-based switched or private line service to foreign affiliates with market power in the destination market. *Benchmarks Reconsideration Order*, 14 FCC Rcd at 9269-72, paras. 39-46.

135 *Foreign Participation Order*, 12 FCC Rcd at 23,987-24,022, paras. 215-292. 47 C.F.R. §63.10.

136 *Foreign Participation Order*, 12 FCC Rcd at 23,996, para. 232.

137 *See supra* para. 8.

138 *ISP Reform Order*, 14 FCC Rcd at 7977, para. 39.

139 *Id.* at 7978, para. 41.

140 KDD Petition; KDD Reply.

141 KDD Petition at 6; KDD Reply at 2.

142 KDD Petition at 9.

Members, KDD argues that the minimally burdensome proposal should alleviate any concerns the Commission may have about the foreign country's commitment to market liberalization policies.[143] KDD also notes that the Commission adopted a similar standard (lack of multiple facilities-based competitors) for rebutting the presumption in favor of flexibility when it eliminated the ECO test for alternative settlement arrangements with carriers from WTO Members.[144]

51. In addition, KDD claims that the rebuttable nature of the presumption will alleviate concerns that carriers that satisfy this presumption may still retain market power.[145] At most, KDD believes that the Commission should extend its presumption of market power to U.S. carriers that have an affiliation with foreign carriers that have market share in excess of 50% or that do not face competition from multiple facilities-based providers.[146] Therefore, KDD requests that the Commission reconsider KDD's proposed standard for a presumption of non-dominant regulatory status with the modification that it also argued in the *ISP Reform Order* proceeding that it applies only for WTO Members.

52. For the reasons set forth in the *Foreign Participation Order*, we will not alter our definition of market power for determining dominant carrier status. As MCI notes, KDD offers no support for its position that bottlenecks in input markets other than local markets will quickly erode.[147] The entry of new facilities-based competitors will not immediately preclude anticompetitive behavior.[148] Moreover, KDD's proposal does not address the Commission's goal of avoiding an overly burdensome presumption.[149] If KDD believes that its circumstances are unique, it has the opportunity to rebut the presumption.[150] Moreover, we deny Petitioner's request because the Commission fully considered and rejected KDD's proposal, absent the limitation that it only apply to WTO Members, in the *Foreign Participation Order* and with the limitation in the *ISP Reform Order*.[151]

F. Dominant Carrier Safeguards for Foreign-Affiliated U.S. Carriers

1. Removal of Safeguards

a. Background

53. In the *Foreign Participation Order*, the Commission adopted a narrowly-tailored dominant carrier framework designed to address specific concerns of anticompetitive behavior while limiting the regulatory burden imposed generally on foreign-affiliated U.S. carriers. The elements of these

143 *Id.* at 7; KDD Reply at 4.

144 KDD Petition at 8.

145 *Id.* at 9.

146 *Id.* at 7.

147 MCI Comments at 3.

148 AT&T Comments at 9.

149 MCI Comments at 3.

150 *Id.*

151 *ISP Reform Order*, 14 FCC Rcd at 7978, para. 41.

modified dominant carrier safeguards include: imposing a one-day, rather than fourteen-day, advance notice tariff requirement with a presumption of lawfulness; removing prior approval requirements for circuit additions or discontinuances on routes for which the U.S. carrier is classified as dominant in its provision of U.S. international services; imposing limited structural separation between the U.S. carrier and its affiliate; retaining quarterly traffic and revenue reporting requirements; imposing a quarterly reporting requirement summarizing provisioning and maintenance services provided by the foreign affiliate; and adopting a quarterly circuit status report.[152]

54. Regarding U.S. commitments under the GATS, the Commission found in the *Foreign Participation Order* that it was not only entitled to apply safeguards consistent with U.S. obligations, but it was obligated to do so under the Reference Paper.[153] The Commission determined that nothing in the GATS specifies a single mechanism for addressing potential anticompetitive practices in the telecommunications services sector, and that the Commission's statutory obligation to serve the public interest both encompasses and extends beyond the traditional review under U.S. antitrust laws. The Commission, therefore, found that the order's safeguards are consistent with U.S. obligations under GATS.[154]

b. Discussion

55. We find KDD's request for the Commission to remove the dominant carrier safeguards that apply to each U.S. carrier having an affiliation with a carrier that possesses market power on the route unpersuasive because it presents no new arguments for us to consider.[155] As noted above, the Commission detailed in the *Foreign Participation Order* the consistency of its policies and safeguards with the United States' GATS obligations; therefore, we dismiss KDD's contention that the dominant carrier safeguards are inconsistent with those obligations.[156] Based upon our consideration and rejection of KDD's arguments in the underlying order, we find no reason to grant Petitioner's request.

2. Reinstatement of Safeguards

a. Background

56. The Commission also found in the *Foreign Participation Order* that retaining the fourteen-day notice period for tariff filings would significantly inhibit a dominant foreign-affiliated carrier's incentive to reduce prices, because competitors can respond to pro-consumer price and service changes before the tariff would become effective.[157] Therefore, the Commission adopted a one-day notice with a presumption of lawfulness that it found would provide carriers with additional flexibility to respond to

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152 *Foreign Participation Order*, 12 FCC Rcd at 23,987-24,022, paras. 215-292.

153 *Id.* at 23,998-99, para. 237.

154 *Id.* at 24,036-53, paras. 335-375.

155 KDD Petition; C&W Companies Comments; KDD Reply.

156 *Foreign Participation Order*, 12 FCC Rcd at 24,036-53, paras. 335-375.

157 *Id.* at 24,000, para. 244.

consumer demands and possibly deter price squeezes.[158]

57. In addition, the Commission determined that prior approval of circuit additions and discontinuances are no longer necessary. The Commission found that quarterly reporting requirements would allow the Commission to detect anticompetitive practices.[159] Furthermore, the Commission concluded that the monitoring of behavior along with effective enforcement of our rules and policies would provide sufficient deterrence.[160]

b. Discussion

58. Based on the reasoning in the *Foreign Participation Order*, we deny PanAmSat's petition to reconsider two of our dominant carrier safeguards: the streamlining of applications for tariff filings and the elimination of prior approval for circuit additions and discontinuances.[161] The Commission fully considered and dismissed PanAmSat's arguments in the underlying order.

59. PanAmSat argues that the streamlining of applications for tariff filings and the elimination of prior approval for circuit additions and discontinuances afford dominant U.S. foreign-affiliated carriers opportunities to act anti-competitively without providing countervailing public interest benefits.[162] In particular, PanAmSat requests that the Commission retain a meaningful tariff filing requirement for dominant carriers. PanAmSat believes that the streamlining afforded to such filings in the *Foreign Participation Order* eliminated an important regulatory safeguard to review filed tariffs before they take effect.[163] Additionally, PanAmSat contends that the Commission set forth no basis in the *Foreign Participation Order* for the conclusion that a fourteen-day notice period inhibits competition and leads dominant carriers to forego price or service changes because competitors can respond to pro-consumer price and service changes before tariffs become effective.[164]

60. Moreover, PanAmSat argues that the Commission should retain the prior approval requirement for circuit additions and discontinuances on routes on which a foreign-affiliated carrier is dominant.[165] PanAmSat contends that the *post hoc* enforcement remedies available to the Commission are wholly inadequate and that it would be difficult for the Commission to determine past harm and appropriate damages. [166]

61. We conclude, however, that the safeguards adopted in the *Foreign Participation Order* are

158 *Id*

159 *Id.* at 24,002, para. 249.

160 *Id.*

161 PanAmSat Petition.

162 *Id.* at 2.

163 *Id.*

164 *Id.* at 3.

165 *Id.* at 4-5.

166 *Id.*

pro-competitive, and PanAmSat has not provided evidence sufficient to convince us to modify these safeguards. The one-day tariff filing provision fosters competition by enabling all carriers to respond to supply-side and demand-side price and service changes almost immediately.[167] In addition, the Commission found that quarterly circuit status reporting would be sufficient to detect anticompetitive practices while permitting carriers to respond promptly to the global marketplace.[168] Therefore, we affirm our decision to continue to allow dominant foreign-affiliated carriers to file tariffs on one-day's notice and add or discontinue circuits on foreign-affiliated routes without prior approval.[169] In the event of unlawful behavior, carriers and other complainants may file complaints under section 208 of the Act.[170]

G. Broadcast Licenses

1. Background

62. In the *Foreign Participation Order*, the Commission chose to eliminate the ECO test as applied under section 310(b)(4) of the Act to foreign investment from WTO Members in common carrier radio licenses and replace it with the "open entry" standard.[171] The Commission determined that it would serve the public interest to permit more open investment by entities from WTO Members in U.S. common carrier wireless licenses.

2. Discussion

63. We deny Petitioner's request that we extend our deregulatory approach regarding section 310(b)(4) requests to the treatment of broadcast licenses.[172] The Petitioner, J. Gregory Sidak, claims that it is not a legally satisfactory response, nor is it an intellectually defensible position as a matter of public policy, for the Commission to say that it need not deregulate foreign investment in broadcasting because the WTO agreement did not address broadcasting.[173] Mr. Sidak argues that the protections of the First Amendment are not dependent upon "the deliberations of international bureaucrats nestled on the shores of Lake Geneva."[174]

64. We note that Petitioner's request was not at issue in the *Foreign Participation Order*. As stated in the *NPRM* of the *Foreign Participation Order* proceeding, we did not propose to amend our rules for broadcast licenses.[175] Because, as we concluded in the *NPRM*, broadcast licenses present different issues than common carrier radio licenses and also are not covered by the WTO Basic Telecom Agreement,

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167 SBC Comments at 7.

168 *Foreign Participation Order*, 12 FCC Rcd at 24,002, para. 249.

169 MCI Comments at 5; C&W Companies Comments at 7-9.

170 47 U.S.C. § 208.

171 *Foreign Participation Order*, 12 FCC Rcd at 23,935-42, paras. 97-118. 47 U.S.C. § 310(b)(4).

172 J. Gregory Sidak Petition.

173 *Id.* at 1.

174 *Id.* at 2.

175 *NPRM*, 12 FCC Rcd at 7,875, para. 71.

we did not propose to change our current findings regarding broadcast licenses in this proceeding.[176] We discussed previously in the *Foreign Carrier Entry Order* that broadcast licenses present concerns that other types of radio spectrum licenses do not present because of the public trustee concept applied to broadcasting in the U.S.[177] In particular, foreign control of limited broadcast licenses confers editorial discretion over the content of broadcast transmissions, and the Commission, in accordance with the opinion of the Executive Branch, concluded in the *Foreign Carrier Entry Order* that concerns about control over content, especially in times of war, still exist and warrant different treatment of foreign ownership of broadcast licenses.[178] Therefore, because this matter was not at issue in the *Foreign Participation Order* or set forward for notice and comment, we find that this order on reconsideration of the *Foreign Participation Order* is not the proper forum to revisit this issue.

H. Switched Resale Authorizations

1. Background

65. In considering competitive safeguards applicable to foreign-affiliated U.S. carriers, the Commission affirmed in the *Foreign Participation Order* the Commission's decision that the settlement rate condition set forth in the *Benchmarks Order* applies to authorizations to provide facilities-based switched or private line service to an affiliated market.[179] The condition requires that on a foreign-affiliated route the foreign carrier must offer U.S.-licensed international carriers a settlement rate for the affiliated route at or below the relevant benchmark.[180]

66. The Commission also considered the application of this benchmark condition to switched resale service on foreign-affiliated routes.[181] However, the Commission chose not to apply the condition.[182] The Commission found that the dangers of anticompetitive effects that result from a facilities-based switched or private line provision of service to an affiliated market are not present in the context of a switched reseller's provision of service to an affiliated market.[183] The Commission based this decision upon two reasons: (1) switched resellers have substantially less incentive to engage in predatory price squeezes than facilities-based carriers because of their lack of control over facilities;[184] and (2) it is easier to detect predatory price squeeze strategies in the switched resale context than in the facilities-based context because wholesale rates are known or easily identifiable.[185] In addition, the Commission concluded that

176 *Id.*

177 *Foreign Carrier Entry Order*, 11 FCC Rcd at 3,946-47, para.192.

178 *Id.* at 3,946-47, paras. 192-94.

179 *Foreign Participation Order*, 12 FCC Rcd at 23,976, para. 191.

180 *Benchmarks Order*, 12 FCC Rcd at 19,897-912, paras. 195-231.

181 *Foreign Participation Order*, 12 FCC Rcd at 23,977-86, paras. 193-214.

182 *Id.* at 23,977-78, para. 194.

183 *Id.*

184 *Id.* at 23,979-81, paras. 198-203.

applying the condition to switched resale could deter entry into the U.S. International Message Telephone Service (IMTS) market.[186] The Commission also dismissed the concern that affiliation would increase substantially a foreign carrier's incentive or ability to engage in traffic distortions.[187]

67. In the Commission's recent *Benchmarks Reconsideration Order*, the Commission modified the *Benchmarks Order* section 214 requirement on the provision of facilities-based switched or private line service to affiliated markets.[188] In the order, the Commission determined that the requirement should apply only to foreign-affiliated U.S. carriers that are providing service on a route where their foreign affiliate possesses market power.[189] The Commission concluded that the threat of price squeeze behavior by a foreign-affiliated U.S. carrier whose foreign affiliate lacks market power in the foreign market is not substantial. The Commission reasoned that the ability to engage in a price squeeze is dependent upon the foreign affiliate possessing sufficient facilities in the foreign destination market in order to terminate all of the traffic generated by the U.S. carrier.[190] Therefore, the Commission determined that a foreign-affiliated carrier that lacks market power is unlikely to have sufficient facilities to engage in a price squeeze, and, therefore, the anticompetitive threat such a carrier could pose would not warrant the imposition of the *Benchmarks Order* condition.[191]

2. Discussion

68. MCI requests that the Commission impose on switched resale authorizations to serve foreign-affiliated markets the requirement that the foreign carrier offer U.S. licensed carriers a settlement rate for the affiliated route at or below the relevant benchmark.[192] MCI claims that the Commission's reasoning for not extending the application of the benchmark condition is incorrect and underestimates the threat of competitive distortion by foreign-affiliated switched resellers because of their control over accounting rates.[193]

69. The Commission fully considered and rejected Petitioner's request in the *Foreign*

(Continued from previous page)

185 *Id.* at 23,981-83, paras. 204-206. *See also id.* at 23,978, para. 195. A price squeeze is a tactic by which a carrier with a foreign affiliate sets its prices for end-user services below the level of its imputed costs when providing service on an affiliated route because the price of an essential input, the settlement rate charged by its affiliate, is above the economic cost incurred by the foreign affiliate to provide international termination.

186 *Id.* at 23,986, para. 213.

187 *Id.* at 23,983, paras. 207-212.

188 *Benchmarks Reconsideration Order*, 14 FCC Rcd at 9269-72, paras. 39-46.

189 *Id.* at 9270, para. 40.

190 *Id.* at 9270-71, para. 41.

191 *Id.*

192 MCI Petition; AT&T Comments; MCI Reply. But see Telefónica Internacional Comments; Sprint Comments; SBC Comments; GTE Comments; C&W Companies' Comments; Ameritech Comments; C&W Companies' Reply.

193 MCI Petition at 5.

Participation Order.[194] In addition, we note that we have further narrowed the section 214 condition on facilities-based carriers so that it currently applies only to the provision of facilities-based switched and private line service to foreign-affiliated markets where the foreign affiliate possesses market power.[195] Therefore, for the reasons described in both the *Foreign Participation Order* and the *Benchmarks Reconsideration Order*, we deny MCI's petition to broaden the application of the *Benchmarks Order* condition, and we do not revisit the Commission's conclusions.

I. Aeronautical Enroute Services

1. Background

70. Considering the Commission's open entry policies toward WTO Members in the *Foreign Participation Order*, the Commission concluded that some aeronautical enroute and aeronautical fixed services are basic telecommunications services covered by the WTO Basic Telecom Agreement.[196] Therefore, the Commission decided to apply the same open entry standard to those services under section 310(b)(4) as it applies to other basic telecommunications services. The Commission noted that the WTO Basic Telecom Agreement encompasses both private and commercial telecommunications services and that most WTO Members have committed to providing market access to mobile services, including aeronautical enroute and fixed services.[197] In addition, the Commission concluded that allowing foreign participation in this market may create additional competition in aeronautical services.[198]

71. The Commission further determined in the *Foreign Participation Order* that its evaluation of whether investments pose a high risk to competition or the public interest, along with input from the Executive Branch, should protect the public interest.[199] Moreover, the Commission chose not to address the rule limiting the number of aeronautical enroute licenses to "one per location," as that issue was beyond the scope of the proceeding.[200]

2. Discussion

72. ARINC requests that we reconsider the Commission's decision that aeronautical enroute service is a basic telecommunications service.[201] Aeronautical en route and fixed services include some

194 *Foreign Participation Order*, 12 FCC Rcd at 23,977-86, paras. 193-214.

195 *Benchmarks Reconsideration Order*, 14 FCC Rcd at 9269-72, paras. 39-46.

196 *Foreign Participation Order*, 12 FCC Rcd at 23,940-42, paras. 111-118. Aeronautical enroute and aeronautical fixed stations provide communications for the operational control of aircraft companies. Communications relate to safe, efficient, and economical operation of aircraft. Typical messages concern aircraft performance, fuel, weather, position reports, and essential services and supplies. Public correspondence (*e.g.*, private or personal messages of passengers or crew) is not permitted.

197 *Id.* at 23,942, para. 117.

198 *Id.*

199 *Id.*

200 *Id.* at 23,942, para. 118.

201 ARINC Petition; ARINC Reply.

traditional telecommunications voice services, in addition to mobile data services, and, therefore, include some basic telecommunications services covered by the WTO Basic Telecom Agreement.[202] ARINC argues that such services are a private, enhanced service important to the public safety and national security.[203] Although we have treated aeronautical enroute and fixed services as private services, they still fall within the class of services covered by U.S. commitments in the WTO. As we stated in the *Foreign Participation Order*, the WTO Basic Telecom Agreement covers basic telecommunications services, which encompass both private and commercial services. Moreover, we reject Petitioner's request that we consider these services exempt from the WTO Basic Telecom Agreement because of national security or public safety concerns. Our analysis of foreign investments under Section 310(b)(4) already considers any additional public interest factors such as national security, law enforcement, or foreign trade or policy concerns on a case-by-case basis.[204] Therefore, we reaffirm our conclusion that some aeronautical fixed and enroute services are telecommunications services falling within the scope of U.S. WTO commitments and deny ARINC's petition.[205]

III. ADMINISTRATIVE MATTERS

A. Final Regulatory Flexibility Certification

73. The purposes of this proceeding are to adopt a liberalized standard for participation by foreign and foreign-affiliated entities in the U.S. telecommunications market, to eliminate some regulatory requirements, and to simplify and clarify other existing rules. The modifications do not impose any additional compliance burden on persons dealing with the Commission, including small entities. Any prospective carrier will continue to submit foreign carrier affiliation notifications. In most cases, the notifications will be filed after the consummation of the investment resulting in a foreign carrier affiliation. We anticipate that the revisions we adopt here will expand the ability of U.S. carriers to reap economic benefits by taking advantage of new opportunities in the international telecommunications marketplace.

74. The Regulatory Flexibility Act (RFA)[206] requires that an agency prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small

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202 *See* 47 C.F.R. § 64.702(a) (defining enhanced services).

203 ARINC Petition at 3-6. The Telecommunications Act of 1996 uses the terms "telecommunications services" and "information services," rather than the terms "basic services" and "enhanced services." In the *Universal Service Report to Congress*, the Commission concluded that the definitions of "telecommunications services" and "information services," added to the Act by the Telecommunications Act of 1996, "essentially correspond to the pre-existing categories of basic and enhanced services." *Universal Service Report to Congress*, 13 FCC Rcd 11501, 11516.

204 *Foreign Participation Order*, 12 FCC Rcd at 23,919-21, paras. 61-66. *See supra* para. 3.

205 We note that because ARINC's petition did not provide detail regarding the types of services it considers enhanced or information services, in the future we may find that some aeronautical services may fall outside of our policies.

206 5 U.S.C. § 601 *et seq.* The RFA has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

entities."[207] The rule changes adopted in this order only affect the timing of the submission of foreign carrier affiliation notifications. These changes do not impose additional compliance burdens on small entities nor do they alter the small entities possibly affected by the rules published in the *Foreign Participation Order*. The rules adopted in this order would not have a detrimental impact on small entities. In fact, we anticipate that the rule changes we adopt here will reduce regulatory and procedural burdens on small entities. Therefore, we certify, pursuant to Section 605(b) of the RFA, that the rules adopted herein will not have a significant economic impact on a substantial number of small entities.

75. The Commission will send a copy of the Order on Reconsideration, including a copy of this final certification, in a report to congress pursuant to SBREFA.[208] In addition, the Order on Reconsideration and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register.[209]

B. Paperwork Reduction Act of 1995 Analysis

76. This Order on Reconsideration contains either a new or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this order, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from date of publication of this Order in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Written comments must be submitted on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 12th Street S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov. For additional information concerning the information collections contained in the Report and Order, contact Judy Boley at 202-418-0214.

IV. ORDERING CLAUSES

77. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 2, 4(i), 201, 203, 205, 214, 303(r), 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201, 203, 205, 214, 303(r), 309, 310 and Parts 43 and 63 of the Commission's rules, 47 C.F.R. Secs. 43, 63, that the Order on Reconsideration in IB Docket No. 97-142 is ADOPTED.

78. IT IS FURTHER ORDERED that 47 C.F.R. Part 63 IS AMENDED as set forth in the Appendix, effective thirty days after publication of the text thereof in the Federal Register.

79. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by ARINC,

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207 5 U.S.C. § 605(b).

208 *See* 5 U.S.C. § 801(a)(1)(A).

209 *See* 5 U.S.C. § 605(b).

BellSouth, KDD, MCI, PanAmSat, SBC, and Sidak ARE DENIED, as described herein.

80. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Order on Reconsideration, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

81. IT IS FURTHER ORDERED that the policies, rules, and requirements established in this decision shall take effect thirty days after publication in the Federal Register or in accordance with the requirements of 5 U.S.C. § 801(a)(3) and 44 U.S.C. § 3507.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

IV. APPENDIX A

LIST OF PARTIES
SUBMITTING PETITIONS, COMMENTS, OR REPLIES

Aeronautical Radio, Inc. (ARINC): *Petition, Reply*
Ameritech: *Comments*
AT&T Corp. (AT&T): *Comments*
BellSouth Corporation (BellSouth): *Petition, Reply*
Cable and Wireless PLC and Cable & Wireless, Inc. (C&W Companies): *Comments, Reply*
GTE Service Corporation (GTE): *Comments*
Kokusai Denshin Denwa Co. Ltd. (KDD): *Petition, Reply*
MCI Telecommunications Corporation (MCI): *Petition, Comments, Reply*
PanAmSat Corporation (PanAmSat): *Petition*
SBC Communications Inc. (SBC): *Petition, Comments, Reply*

A. **J. Gregory Sidak (Sidak): *Petition***

B. **Société Internationale de Télécommunications Aéronautiques (SITA): *Comments***

Sprint Communications Company, L.P. (Sprint): *Comments*
Telecommunications Resellers Association (TRA): *Comments*
Telefónica Internacional de España, S.A. (Telefónica Internacional): *Comments*

APPENDIX B

RULE CHANGES

Part 63 of Title 47 of the Code of Federal Regulations is amended as follows:

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

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

Authority: Section 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.

Part 63 of Title 47 of the Code of Federal Regulations is amended as follows:

2. Section 63.09 is amended by adding paragraph (g) to read as follows:

§ 63.09 Definitions applicable to international Section 214 authorizations.

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(g) As used in this part, the term:

(1) *Interlocking directorates* shall mean persons or entities who perform the duties of "officer or director" in an authorized U.S. international carrier or an applicant for international Section 214 authorization who also performs such duties for any foreign carrier.

(2) *Officer or director* shall include the duties, or any of the duties, ordinarily performed by a director, president, vice president, secretary, treasurer, or other officer of a carrier.

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3. Section 63.11 is revised 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.

If a carrier is authorized by the Commission ("authorized carrier") to provide service between the United States and a particular foreign destination market and it becomes, or seeks to become, affiliated with a foreign carrier that is authorized to operate in that market, then its authorization to provide that international service is conditioned upon notifying the Commission of that affiliation.

(a) *Affiliations requiring prior notification:* Except as provided in paragraph (b) of this section, the authorized carrier must notify the Commission, pursuant to this section, forty-five days before consummation of either of the following types of transactions:

(1) Acquisition by the authorized carrier, or by any entity that controls the authorized carrier, or by any entity that directly or indirectly owns more than twenty-five percent of the capital stock of the authorized carrier, of a controlling interest in a foreign carrier that is authorized to operate in a market that the carrier is authorized to serve; or

(2) Acquisition of a direct or indirect interest greater than twenty-five percent, or of a controlling interest, in the capital stock of the authorized carrier by a foreign carrier that is authorized to operate in a market that the authorized carrier is authorized to serve, or by an entity that controls such a foreign carrier.

(b) *Exceptions.*

(1) Notwithstanding paragraph (a) of this section, the notification required by this section need not be filed before consummation, and may instead be filed pursuant to paragraph (c) of this section, if either of the following is true with respect to the named foreign carrier regardless of whether that foreign carrier is authorized to operate in a World Trade Organization (WTO) or non-WTO Member:

(i) The Commission has previously determined in an adjudication that the foreign carrier lacks market power in that destination market (for example, in an international section 214

application or a declaratory ruling proceeding); or

(ii) The foreign carrier owns no facilities in that destination market. For this purpose, a carrier is said to own facilities if it holds an ownership, indefeasible-right-of-user, or leasehold interest in bare capacity in international or domestic telecommunications facilities (excluding switches).

(2) In the event paragraph (b)(1) of this section cannot be satisfied, notwithstanding paragraph (a), the notification required by this section need not be filed before consummation, and may instead be filed pursuant to paragraph (c), if the authorized carrier certifies that the named foreign carrier is authorized to operate in a WTO Member and provides certification to satisfy either of the following:

(i) The authorized carrier demonstrates that it is entitled to retain non-dominant classification on its newly affiliated route pursuant to § 63.10; or

(ii) The authorized carrier agrees to comply with the dominant carrier safeguards contained in § 63.10 effective upon the acquisition of the affiliation. See § 63.10.

(c) *Notification after consummation*. Any authorized carrier that becomes affiliated with a foreign carrier and has not previously notified the Commission pursuant to this section shall notify the Commission within thirty days after consummation of the acquisition.

***Example 1* to paragraph (c). Acquisition by an authorized carrier (or by any entity that directly or indirectly controls, is controlled by, or is under direct or indirect common control with the authorized carrier) of a direct or indirect interest in a foreign carrier that is greater than twenty-five percent but not controlling is subject to paragraph (c) but not to paragraph (a).**

Example 2 **to paragraph (c). Notification of an acquisition by an authorized carrier of a hundred percent interest in a foreign carrier may be made after consummation, pursuant to paragraph (c), if the foreign carrier operates only as a resale carrier.**

Example 3 **to paragraph (c). Notification of an acquisition by a foreign carrier from a WTO Member of a greater than twenty-five percent interest in the capital stock of an authorized carrier may be made after consummation, pursuant to paragraph (c), if the authorized carrier demonstrates in the post-notification that it qualifies for non-dominant classification on the affiliated route or agrees to comply with dominant carrier safeguards on the affiliated route effective upon the acquisition of the affiliation.**

(d) ***Cross-Reference*****: In the event a transaction requiring a foreign carrier notification pursuant to this section also requires a transfer of control or assignment application pursuant to § 63.18(e)(3), the foreign carrier notification shall reference in the notification the transfer of control or assignment application and the date of its filing. See § 63.18(e)(3).**

(e) ***Contents of notification.*** **The notification shall certify the following information:**

(1) The name of the newly affiliated foreign carrier and the country or countries in which it is authorized to provide telecommunications services to the public;

(2) Which, if any, of those countries is a Member of the World Trade Organization;

(3) What services the authorized carrier is authorized to provide to each named country, and the FCC file numbers under which each such authorization was granted;

(4) Which, if any, of those countries the authorized carrier serves solely through the resale of the international switched services of unaffiliated U.S. facilities-based carriers;

(5) The name, address, citizenship, and principal business of any person or entity that directly or indirectly owns at least ten (10) percent of the equity of the authorized carrier, and the percentage of equity owned by each of those entities (to the nearest one percent);

(6) A certification that the authorized carrier has not agreed to and will not in the future agree to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses market power on the foreign end of the route; and

(7) *Interlocking directorates*. The name of any interlocking directorates, as defined in § 63.09(g), with each foreign carrier named in the notification. See § 63.09(g).

(8) With respect to each foreign carrier named in the notification, a statement as to whether the notification is subject to paragraph (a) or (c) of this section. In the case of a notification subject to paragraph (a), the authorized carrier shall include the projected date of closing. In the case of a notification subject to paragraph (c), the authorized carrier shall include the actual date of closing.

(9) If an authorized carrier relies on an exception in paragraph (b) of this section, then a certification as to which exception the foreign carrier satisfies and a citation to any adjudication upon which the carrier is relying. Authorized carriers relying upon the exceptions in paragraph (b)(2) of this section must make the required certified demonstration in paragraph (b)(2)(i) of this section or the certified commitment to comply with dominant carrier safeguards in paragraph (b)(2)(ii) of this section in the notification required by paragraph (c) of this section.

(f) In order to retain non-dominant status on each newly affiliated route, the authorized carrier should demonstrate that it qualifies for non-dominant classification pursuant to § 63.10. See § 63.10.

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

(1) If the Commission deems it necessary at any time before or after the deadline for submission of public comments, the Commission may impose dominant carrier regulation on the authorized

carrier for the affiliated routes based on the provisions of § 63.10. See § 63.10.

(2) In the case of a prior notification filed pursuant to paragraph (a) of this section in which the foreign carrier is authorized to operate in a non-WTO Member, the 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 non-WTO foreign carrier by making the required showing in §§ 63.18(k)(2) or (3) to the Commission. If the authorized carrier is unable to make the required showing in §§ 63.18(k)(2) or (3) or is notified 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. See §§ 63.18(k)(2) and (3).

(h) All authorized carriers are responsible for the continuing accuracy of information provided pursuant to this section for a period of forty-five days after filing. During this period if the information furnished is no longer accurate, the authorized carrier shall as promptly as possible, and in any event within ten days, unless good cause is shown, file with the Secretary in duplicate a corrected notification referencing the FCC file numbers under which the original certification was provided, except that the carrier shall immediately inform the Commission if at any time, not limited to the forty-five days, the representations in the "special concessions" certification provided under paragraph (e)(6) of this section or § 63.18(n) are no longer true. See § 63.18(n).

(i) A carrier that files a prior notification pursuant to paragraph (a) of this section may request confidential treatment of its filing, pursuant to § 0.459 of this chapter, for the first twenty days after filing. Such a request must be made prominently in a cover letter accompanying the filing.

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4. § 63.18(e)(3) is revised to read as follows:

§ 63.18 Contents of applications for international common carriers

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(e) ***

(3) ***

In the event the transaction requiring a transfer of control or assignment application also requires the filing of a foreign carrier affiliation notification pursuant to § 63.11, the applicant shall reference in the application the foreign carrier affiliation notification and the date of its filing. See § 63.11. See also § 63.24 (*pro forma* assignments and transfers of control).

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