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

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

NOTICE OF PROPOSED RULEMAKING

Adopted: October 10, 2012 **Released: October 11, 2012**

Comment Date: (30 days after publication in the Federal Register)
Reply Comment Date: (50 days after publication in the Federal Register)

By the Commission:

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (NPRM), we propose changes to the criteria under which we consider certain applications from foreign carriers or affiliates of foreign carriers for entry into the U.S. market for international telecommunications services and facilities. Specifically, we propose to eliminate, or, in the alternative, simplify the effective competitive opportunities test (ECO Test) that applies to Commission review of international section 214 authority applications filed by foreign carriers or their affiliates. If we maintain the ECO Test, we also propose to codify in our rules the ECO Test criteria that would apply to cable landing license applications filed by foreign carriers or entities, or their affiliates, and notifications of foreign carrier affiliations filed by U.S. cable landing licensees.[1]

2. In initiating this proceeding, we seek to eliminate or modify rules that may be outdated and unnecessary. By doing so, we anticipate reducing to the extent possible the regulatory costs and burdens imposed by our current procedures, while improving transparency with respect to our filing requirements. We also seek to promote competition, while protecting important interests related to national security, law enforcement, foreign policy, and trade policy. We request comment on our proposals and invite parties to propose alternative approaches.

II. BACKGROUND

A. Effective Competitive Opportunities Test

3. The Commission initially adopted the ECO Test in 1995 in the *Foreign Carrier Entry Order*[2] to regulate the entry of foreign carriers or their affiliates into the U.S. market for international

[1] In a separate proceeding, the Commission is reviewing, among other issues, application of the ECO Test under section 310(b)(4) of the Communications Act. *See Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees Under Section 310(b)(4) of the Communications Act of 1934*, IB Docket No. 11-133, Notice of Proposed Rulemaking, 26 FCC Rcd 11703, 11716-21, ¶¶ 25-35 (2011).

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

telecommunications services and facilities under section 214 of the Communications Act of 1934, as amended (the "Act").[3] Under rules adopted in the *Foreign Carrier Entry Order,* the Commission examined, as one factor in its overall public interest analysis of an application for international section 214 authority, "whether effective competitive opportunities exist for U.S. carriers in the destination markets of foreign carriers seeking to enter the U.S. international services market through affiliation with a new or existing carrier."[4] The Commission initially applied the ECO Test only to applications to provide service to foreign points where the affiliated foreign carrier had market power.[5] At that time, the Commission's analysis did not distinguish between World Trade Organization ("WTO") Member countries and non-WTO Member countries. Although the *Foreign Carrier Entry Order* did not discuss application of the ECO Test to submarine cable applications, the Commission historically had applied an analysis similar to the section 214 ECO Test analysis on a case-by-case basis[6] under the Cable Landing License Act.[7]

4. In its 1997 *Foreign Participation Order,*[8] the Commission replaced the ECO Test with an open entry standard for applicants from WTO Member countries.[9] Under the open entry standard, the Commission presumes, subject to rebuttal, that section 214 and cable landing license applications filed by foreign carriers or their affiliates from WTO Member countries "do not pose concerns that would justify denial of the application on competition grounds."[10] The Commission does not presume, however, that an application from a carrier in either a WTO or non-WTO Member country poses no national security, law enforcement, foreign policy or trade policy concerns, and accords deference to Executive Branch agencies in identifying and interpreting issues of concern related to these matters.[11]

5. The Commission adopted the open entry standard because it anticipated, in light of the market opening commitments in the WTO Agreement on Basic Telecommunications Services (WTO Basic Telecommunications Agreement), a "shift away from monopoly provision of telecommunications services and toward competition, open markets, and transparent regulation."[12] The Commission, however, retained the ECO Test with respect to foreign entrants from non-WTO Member countries,

[3] 47 C.F.R. § 214(a).

[4] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3875, ¶ 2. For purposes of applying the ECO Test, the rules defined *affiliation* to include "[a] greater than 25% ownership of capital stock, or controlling interest at any level, in the applicant by a foreign carrier, or by any entity that directly or indirectly controls or is controlled by a foreign carrier, or that is under direct or indirect common control with a foreign carrier…." *See* 47 C.F.R. §63.01(r)(6), (7) (1996) (the ECO Test) and *id*. § 63.01(r)(1)(B) (1996) (defining the types of affiliations that triggered the ECO Test).

[5] *Id.* at 3917, ¶ 116. Under current Commission rules applicable to U.S. carriers, the term *market power* means "sufficient market power to affect competition adversely in the U.S. market." *See* 47 C.F.R. § 63.09(f).

[6] *See Telefonica Larga Distancia de Puerto Rico, Inc*., Memorandum Opinion and Order, 12 FCC Rcd 5173 (1997) (*Telefonica Licensing Order*) (citing The French Telegraph Cable Company, 71 FCC 2d 393 (1979)).

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

[8] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, *Market Entry and Regulation of Foreign-Affiliated Entities,* IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891(1997) (*Foreign Participation Order)*.

[9] *See Foreign Participation Order,* 12 FCC Rcd at 23896, ¶ 9.

[10] *Id*. at 23913, ¶ 50.

[11] *Id*. at 23919-21, ¶¶ 61-66.

[12] *Id.* at 23896, ¶ 9.

finding that circumstances that existed when it adopted the *Foreign Carrier Entry Order* had "not changed sufficiently with respect to countries that are not members of the WTO."[13]

B. Section 214 ECO Test Criteria

6. The ECO Test that applies to international section 214 authority applications filed by foreign carriers or certain of their affiliates is codified in section 63.18(k) of the Commission's rules.[14] If an applicant is a foreign carrier or an affiliate of a foreign carrier,[15] and if the foreign carrier has market power[16] in a non-WTO Member country which the applicant seeks authority to serve, the applicant must demonstrate that there are effective competitive opportunities for U.S. carriers in the foreign country. In particular, the applicant must demonstrate: (1) the legal ability of U.S. carriers to enter the foreign market and provide facilities-based and/or resold international services, in particular international message telephone service (IMTS),[17] (2) the existence of reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services or the provision of the relevant resale service,[18] (3) the existence of competitive safeguards in the foreign country to protect against anticompetitive practices,[19] (4) the existence of an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other safeguards,[20] and (5) any other factors the applicant deems relevant to the ECO Test demonstration.[21]

7. In addition to international section 214 authority applications, the Commission also applies the ECO Test in the context of its rules requiring authorized U.S.-international carriers to notify the Commission of their foreign carrier affiliations. Under section 63.11 of the Commission's rules, U.S. authorized carriers have a continuing obligation to notify the Commission of foreign carrier affiliations acquired after the Commission grants their section 214 authorizations.[22] Generally, carriers may file their notifications within 30 days of consummating a transaction.[23] Certain transactions, however, require the U.S. carrier to notify the Commission forty-five days *before* consummation.[24] Furthermore, a U.S. carrier may acquire, or may seek to acquire, an affiliation with a foreign carrier that is authorized to operate in a non-WTO Member country that the U.S. carrier is authorized to serve under section 214. In any of these situations, the U.S. carrier must demonstrate in its notification either that the foreign carrier lacks market power in the non-WTO Member country or that the non-WTO Member country offers effective

[13] *Id.* at 23898, 23944, ¶¶ 15, 124.

[14] 47 C.F.R. § 63.18(k)(3)(i)-(vi).

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

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

[17] 47 C.F.R. § 63.18(k)(3)(i),(ii). The Commission examines whether the foreign destination market offers effective competitive opportunities for U.S. carriers to provide the service(s) being applied for under section 214 – whether facilities-based and/or resold switched or private line services.

[18] 47 C.F.R. § 63.18(k)(3)(iii).

[19] 47 C.F.R. § 63.18(k)(3)(iv)(A),(B),(C).

[20] 47 C.F.R. § 63.18(k)(3)(v).

[21] 47 C.F.R. § 63.18(k)(3)(vi).

[22] 47 C.F.R. § 63.11.

[23] 47 C.F.R. § 63.11(b).

[24] 47 C.F.R. § 63.11(a),(b). The foreign carrier affiliation notification need not be filed before consummation of the transaction if (1) the Commission has previously determined that the foreign carrier lacks market power in the destination market, or (2) the foreign carrier owns no facilities in the destination market.

competitive opportunities to U.S. carriers to provide services similar to the services that the foreign carrier or its affiliate is authorized to provide in the United States under section 214.[25] Section 63.11 further provides that, if the U.S. carrier cannot make either showing, or the U.S. carrier is notified by the Commission that the affiliation may otherwise harm the public interest under Commission rules and policies, the Commission may impose conditions necessary to address any public interest harms or may proceed to an immediate revocation hearing.[26]

8. Most of the international section 214 authority applications requiring an ECO analysis were evaluated and granted by the Commission or on delegated authority between 1996 and 1998.[27] Since our last action taken under the ECO Test in 1998, we have only received one section 214 application and two foreign carrier affiliation notifications requesting ECO Test determinations.[28] TA Resources, an Aruban company, filed an application in 2010 requesting an ECO determination under its section 214 authority. The International Bureau granted the application on November 17, 2011.[29]

C. Cable Landing Licensee ECO Test Criteria

9. The Commission's ECO Test as it applies to applications for submarine cable landing licenses filed by foreign carriers or certain of their affiliates is similar but not identical to the analysis for international section 214 applications. Although the ECO Test is not codified in rules under which the Commission considers cable landing license applications,[30] the Commission concluded in the *Foreign*

[25] 47 C.F.R. § 63.11(g)(2).

[26] *Id.*

[27] *See Telstra, Inc., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Acquire Capacity in International Facilities for the Provision of Switched and Private Line Services Between the United States and Australia,* Memorandum Opinion, Order and Certificate, 13 FCC Rcd 205 (Int'l Bur. 1998) (Section 214 ECO analysis); *BT North America Inc., Application for Authority Under Section 214 of the Communications Act to Acquire and Operate Facilities for the Provision of International Services Between the United States and the United Kingdom,* Order and Authorization, 13 FCC Rcd 5992 (Int'l Bur. 1997) (Section 214 ECO analysis); *Merger of MCI Communications Corporation and British Telecommunications plc,* Memorandum Opinion and Order, 12 FCC Rcd 15351 (1997) (*MCI-BT Merger Order*) (Section 214 and Cable Landing License ECO analysis); *Telia North America, Inc., Application for Authority, Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Facilities to Provide International Services Between the United States and Sweden,* Order, Authorization and Certificate, 13 FCC Rcd 4061 (Int'l Bur. 1997) (Section 214 ECO analysis)*; Telecom New Zealand Limited, Application for Authority Under Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Facilities to Provide International Services Between the United States and New Zealand,* Order, Authorization and Certificate, 12 FCC Rcd 19379 (Int'l Bur. 1996) (Section 214 ECO analysis); *Sprint Corporation, Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended*, Declaratory Ruling and Order, 11 FCC Rcd 1850 (1996) (Section 214 and Section 310(b)(4) ECO analysis).

[28] *See Notification of Proposed Foreign Carrier Affiliations and Request for a Determination that the Independent State of Samoa Provides Effective Competitive Opportunities to U.S. Carriers to Land and Operate a Submarine Cable in Samoa and Provide International Services,* IB Docket No. 11-57, Public Notice, 26 FCC Rcd 5049 (Int'l Bur. 2011). The foreign carrier affiliation notifications in this case involve both an international section 214 authorization and a cable landing license held by an entity that is affiliated with a foreign carrier in Samoa. Subsequent to the filing of the request for an ECO Test determination, Samoa joined the WTO on May 10, 2012. *See* WTO Press Release, Montenegro and Samoa Strengthen the WTO (Apr. 30, 2012), *available at* http://wto.org/english/news_e/pres12_e/pr660_e.htm.

[29] *See TA Resources N.V., Application for International Section 214 Authorization and Determination that Aruba Provides Effective Competitive Opportunities to U.S. Carriers,* IB Docket No. 10-228, Order and Authorization, 26 FCC Rcd 15978 (Int'l Bur. 2011) (*TA Resources Order*).

[30] 47 C.F.R. §§ 1.767, 1.768.

Participation Order that it would continue to apply an ECO Test as part of its analysis under section 2 of the Cable Landing License Act.[31] The Commission examines: (1) the legal, or *de jure*, ability of U.S.-licensed companies to have ownership interests in submarine cables landing in the foreign market, and (2) if no explicit legal restrictions on ownership exist, the practical, or *de facto,* ability of U.S.-licensed companies to have ownership interests in cable facilities in the foreign market.[32] The Commission also considers other public interest factors consistent with its discretion under the Cable Landing License Act that may weigh in favor of or against grant of a license, including any national security, law enforcement, foreign policy or trade policy concerns that may be raised by a particular application.[33]

10. The Commission also applies the ECO Text in the context of its rules requiring U.S. cable landing licensees to notify the Commission of their foreign carrier affiliations. Under section 1.768 of the Commission's rules, U.S. cable landing licensees have a continuing obligation to notify the Commission of an affiliation with a foreign carrier authorized to operate in a destination market where the U.S.-licensed cable lands.[34] In certain circumstances, cable landing licensees have an obligation to obtain prior approval before acquiring an affiliation with a foreign carrier authorized to operate in a market where the U.S.-licensed cable lands.[35] Furthermore, this obligation extends to licensees acquiring an entity that owns or controls a cable landing station in that market. Where a U.S.-licensed cable lands in a non-WTO Member country and the U.S. cable landing licensee proposes to acquire an affiliation with a foreign carrier in that non-WTO Member country, the U.S. licensee must demonstrate in its notification either that the foreign carrier lacks market power in that country or that there are effective competitive opportunities for U.S.-licensed companies to land and operate submarine cables in that country.[36] If the licensee is unable to make either showing, then the Commission may impose conditions on the authorization or proceed to an authorization revocation hearing."[37]

III. DISCUSSION

11. We believe it is time to review the requirements of the ECO Test as it applies to section 214 authority applications, cable landing license applications, and foreign carrier affiliation notifications.

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

[32] *See Telefonica Licensing Order,* 12 FCC Rcd 5181-5185, ¶¶ 23-33 (1997) (a cable landing license application filed by an affiliate of Telefonica de Espana to acquire ownership interests in submarine cable circuits connecting the United States and Spain was denied based on findings that Telefonica had market power in Spain, Spain did not afford U.S. carriers the legal right to own interests in the Spanish end of international submarine cables, and any countervailing economic benefits of granting the application did not outweigh Commission concerns about the lack of effective competitive opportunities in Spain for U.S. carriers); *MCI-BT Merger Order,* 12 FCC Rcd 15433-15447, ¶¶ 212-246 (1997) (after consideration of all of the relevant factors under the ECO Test, the United Kingdom was found to offer effective competitive opportunities to U.S. carriers seeking to compete in each of the communications market segments that BT sought to enter in the United States). *See also Cable & Wireless, PLC, Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom*, Cable Landing License, 12 FCC Rcd 8528, ¶ 34 (1997) (C&W was found to lack market power in the destination market of the proposed submarine cable, and therefore the Commission did not reach the issue of whether the United Kingdom afforded U.S. carriers effective competitive opportunities to land and operate cable systems in the United Kingdom).

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

[34] 47 C.F.R. § 1.768.

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

[36] 47 C.F.R. § 1.768(g)(2).

[37] *Id.*

There are now 156 countries that are Members of the WTO (in addition to the European Union), up from 132 countries in 1998 when the WTO Basic Telecommunications Agreement went into effect.[38] There also are 27 observer countries that are in the process of joining, or acceding to, the WTO.[39] While this leaves approximately one-quarter of all countries outside the WTO that have not opened up their markets pursuant to WTO accords, the non-WTO Member countries represent a *de minimis* fraction of the world's gross domestic product.[40] Moreover, the detailed ECO Test requirements were designed to be applied to countries that could support advanced regulatory regimes, but most of the remaining non-WTO Member countries are smaller countries and may be without resources to support a regulatory framework that meets the detailed ECO Test requirements.

12. In light of these considerations, there may not be reason to impose all of the requirements of the ECO Test absent complaints or evidence of anti-competitive conduct on routes between the United States and countries that are not members of the WTO. We therefore propose to re-examine current ECO Test requirements to explicitly provide more flexibility in analyzing whether a foreign market provides effective competitive opportunities for U.S. carriers. We will consider eliminating the ECO Test or modifying the criteria we use to determine if there are effective competitive opportunities for U.S. carriers in the foreign country.

13. Although we are considering changes to the ECO Test as it applies to Commission review of section 214 applications, cable landing license applications, and foreign carrier affiliation notifications, we do not propose to change other Commission policies designed to protect competition and the public interest. We propose to continue to maintain our dominant carrier safeguards [41] and "no special concessions" [42] rules. These rules help to prevent certain anticompetitive strategies that foreign carriers

[38] *See* http://wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited October 10, 2012).

[39] *See* http://www.wto.org/english/thewto_e/acc_e/acc_e.htm (last visited October 10, 2012).

[40] Using the most recent (2010) World Bank Gross Domestic Product (GDP) data, we calculate that the 156 WTO Member countries represent approximately 95 percent of the world's GDP. The Commission derived these figures by comparing the aggregate GDP for WTO Member countries to the aggregate GDP for non-WTO Member countries, using GDP information from the World Bank's World Development Indicators. This information is available at http://data.worldbank.org/data-catalog.

[41] 47 C.F.R. §§ 63.10(c), (d), (e). Generally, U.S. carriers are classified as "dominant" in their provision of U.S. international service between the United States and foreign points where the U.S. carrier is affiliated with a foreign carrier that has market power in the foreign point. *See* 47 U.S.C. § 63.10(a). A U.S. carrier classified as dominant must provide service as an entity that is separate from its foreign carrier affiliate (separate books of account and non-joint ownership of transmission or switching facilities) and file certain quarterly reports (including traffic and revenue reports, provisioning and maintenance reports, and circuit status reports) for the route on which it is dominant. Importantly, a dominant carrier may not provide facilities-based switched services on a route on which it is classified as dominant, unless its foreign affiliate on that route charges U.S. international carriers termination rates that are "benchmark-compliant." *See* 47 C.F.R. § 63.10(e). This last requirement ensures that unaffiliated U.S. carriers have access to benchmark-compliant rates when competing with a dominant U.S. carrier.

[42] "No special concessions" is part of a larger set of competitive safeguards that apply to all U.S. carriers exchanging traffic with a foreign carrier that has market power on the foreign end of a U.S. international route. The "no special concessions rule" in section 63.14 prohibits U.S. carriers from agreeing to accept any exclusive arrangement involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services where the arrangement is not offered to similarly situated U.S. carriers. The "no special concession" rule does not apply, however, to the rates, terms, and conditions under which a U.S. carrier and foreign carrier settle their exchange of switched traffic if the route is not subject to the International Settlements Policy (*i.e.*, if the route is benchmark-compliant). *See* 47 C.F.R. §63.14(c). Thus, as a practical matter, the rule prohibiting "No Special Concessions" does not apply to settlement arrangements between a U.S. carrier and an affiliated foreign carrier on a U.S. international route where the affiliate has market power on the foreign end, because, under our dominant carrier rules, the route must be benchmark-compliant as a condition of the affiliated U.S. carrier providing switched service on the route. *See* 47 C.F.R. § 63.10(e). The "no special

(continued....)

can use to discriminate among their U.S. carrier correspondents, such as refusal to interconnect and circuit blocking, which in our experience have proven the most injurious to U.S. carriers. Absent these rules, foreign carriers with market power could use their market power to discriminate in favor of certain U.S. carriers, including their own affiliates. We would also reserve the right to consider other factors in our public interest analysis under section 214 and the Cable Landing License Act, either on our own motion or on the basis of public comments filed in response to applications and foreign carrier affiliation notifications. Furthermore, we propose to continue to coordinate all applications for section 214 authority and cable landing licenses, and foreign affiliation notifications, that involve foreign carrier entry or investment with the appropriate Executive Branch agencies and accord deference to their views in matters related to national security, law enforcement, foreign policy, or trade policy that may be raised by a particular transaction.[43] We do not propose to adopt any change in policy that would affect the Commission's ability to condition or disallow foreign ownership that may pose a risk of harm to national security, be contrary to foreign policy or trade interests, or pose law enforcement concerns.

A. Proposals to Eliminate or Modify the ECO Test

14. We seek comment on eliminating the ECO Test and associated rules from the Commission's public interest review of section 214 authority applications, cable landing license applications and foreign carrier affiliation notifications. As an alternative, we seek comment on proposals to modify the ECO Test criteria for section 214 authority applications and cable landing licenses, including their respective foreign carrier affiliation notifications, and to codify these modified ECO Tests in the Commission rules.

15. In considering the options below, we generally seek comment on the costs and benefits of eliminating the ECO Test. We also seek comment on whether and to what extent retention of the ECO Test criteria is necessary to protect competition. In doing so, we will consider whether non-WTO Member countries have the resources needed to develop regulatory frameworks that satisfy each of the requirements of the current ECO Test, and to what extent a lack of resources warrants modification or elimination of the ECO Test. We also invite comment on the benefits and costs of the current ECO Test with respect to cable landing license applications and notifications. Specifically, is there an incentive for non-WTO Member countries to open their markets to U.S. carriers under the current test, or are there any other benefits to U.S. carriers and/or the Commission in modifying the ECO Test? Conversely, what are the costs an applicant incurs in providing information under the current ECO Test? We seek comment on whether the costs imposed upon applicants in responding to the detailed requirements of the current test, as well as costs borne by the Commission in reviewing any one application that may not be otherwise opposed, may outweigh any benefits that may accrue from the current requirements. Do carriers maintain the information required by the ECO Test in the normal course of business or is this information only needed for regulatory compliance?

1. Elimination of the ECO Test and Associated Rules

16. The Commission has received only eight applications and two foreign carrier affiliation notifications requiring an ECO analysis in the past 17 years. Given the small number of such filings, and the other considerations described above, we request comment on whether we should maintain specific ECO Test criteria in our rules for section 214 applications, cable landing license applications, and foreign carrier affiliation notifications, or whether we should eliminate the ECO Test altogether.

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concessions" rule that applies to each licensee of a cable landing license granted on or after March 15, 2002, is contained in section 1.767(g)(5) of the rules, 47 C.F.R. § 1.767(g)(5).

[43] *See Foreign Participation Order,* 12 FCC Rcd at 23918 ¶ 59, 23919-21, ¶¶ 61-66.

17. If we were to eliminate the ECO Test, we propose to maintain the distinction in our rules between carriers or affiliates from WTO and non-WTO Member countries. We would, however, no longer require non-WTO applicants to demonstrate compliance with the ECO Test, and the Commission would no longer engage in an ECO Test analysis. Instead, we would rely on our authority to analyze potential anticompetitive harm on a case-by-case basis to make a public interest determination as to whether U.S. carriers are experiencing competitive problems in that market, and whether the public interest would be served by authorizing the foreign carrier to enter the U.S. market. This approach would be similar to that taken prior to adoption of the ECO Test in the *Foreign Carrier Entry Order*.[44] We would eliminate the ECO Test and any initial filing burdens associated with it. Our case-by-case analysis would require applicants to submit the information to us required by our rules applicable to section 214 applications and cable landing license applications.[45] The applicant or notification filer would still have to provide information showing that it is, or is seeking to become affiliated with, a foreign carrier with market power in a non-WTO Member country. These applications would not be eligible for streamlined processing, and the foreign carrier affiliation notifications would continue to require a 45 day notification prior to consummation of the transaction. The Commission could consult with the United States Trade Representative (USTR) and other agencies as to any anticompetitive problems that may exist for U.S. companies in the home market of the applicant. U.S. carriers would have an opportunity to file comments as to whether they have experienced problems in entering the relevant market of a non-WTO Member country. If the Commission finds that U.S. carriers are experiencing competitive problems in that market, then it would have the flexibility to seek additional information from the applicant relating to U.S. carrier ability to enter the foreign market of the applicant and impose, if necessary, appropriate conditions on the authorization or license. The information that it requests may incorporate criteria enumerated by the Commission in the current ECO Test, including but not limited to, the applicant demonstrating that U.S. carriers can legally enter the foreign market to provide telecommunications services on terms and conditions that are reasonable and nondiscriminatory, as well as the existence of competitive safeguards in the foreign country to protect against anticompetitive practices. Through this approach the Commission would be able to make a determination and take action in a manner appropriate to the market in question.

18. We therefore seek comment on eliminating an ECO Test determination from our rules and policies applicable to U.S.-licensed companies and applicants under section 214 of the Act and under the Cable Landing License Act. We ask that commenters address whether the Commission's dominant carrier safeguards and reporting requirements in sections 63.10 and 1.767 of the rules,[46] respectively, and the "no special concessions" rules in sections 63.14 and 1.767 of the rules[47] provide adequate protection against anti-competitive harm, or whether additional safeguards are necessary to protect U.S. carriers from competitive harm in their provision of U.S. international services and facilities on routes between the United States and non-WTO Member countries. Finally, we seek comment on to what extent eliminating the ECO Test would reduce costs incurred by carriers by the review of applications involving an ECO Test determination. We also request comment on whether there may be benefits in retaining the ECO Test criteria that outweigh the costs and burdens associated with it.

2. Modification of the Section 214 ECO Test

19. If we were to maintain the ECO Test, we seek comment on ways to simplify and improve its application. The International Bureau's most recent experience in applying the ECO Test to a section

[44] *See Foreign Carrier Entry Order,* 11 FCC Rcd at 3881-3883, ¶¶ 19-24.

[45] 47 C.F.R. § 63.18 lists the contents of applications that apply to section 214 applicants, and 47 C.F.R. § 1.767(a)(1)-(10) lists the contents of applications that apply to cable landing licensees.

[46] 47 C.F.R. § 63.10(c) and 47 C.F.R. § 1.767(l).

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

214 authority application may be instructive in considering changes in the Commission's rules as to how it reviews applications for foreign carrier entry into the U.S. market.[48] In that case, the applicant requested a determination that Aruba provides effective competitive opportunities for U.S. carriers to compete in Aruba's market for resold and facilities-based international telecommunications services. A strict application of all of the elements of the ECO Test likely would have resulted in denial of an authorization, even though there was no opposition on the record or otherwise any indication of a competition problem. The Bureau found that U.S. carriers have the legal ability to enter and provide telecommunications services in the applicant's market. The applicant had difficulty, however, demonstrating that U.S. carriers had the *de facto,* or practical, ability to enter the applicant's market. In particular, the Bureau found that Aruba lacked fully-developed cost allocation rules and that its telecommunications regulations remain pending with the regulator, which has yet to attain full separation from the government, which, in turn, owns the dominant Aruban carrier.[49] The Bureau determined, however, that on balance, there was sufficient regulatory oversight to protect and promote competition in the Aruban telecommunications market as evidenced by the expanding list of competitors in the Aruban international telecommunications market and the absence of any complaints documented in the record. It conditioned grant of the authorization on revisiting its findings should competitive problems arise on the U.S.-Aruba international route and, if necessary, imposing appropriate conditions pursuant to the Commission's rules.[50]

20. As this example suggests, the current detailed ECO Test criteria that apply to section 214 authority applications were designed primarily to be applied to advanced telecommunications markets that can support a complex regulatory regime. Smaller countries, however, may have relatively open markets even if their regulatory regimes do not fully meet all section 63.18 standards. We believe that Commission rules should reflect a flexible approach in considering foreign carrier entry. Therefore, we request comment on a modified, less onerous test, or a variation of the current ECO Test.

21. First, under a modified approach, we propose that the Commission retain – either in a rule or by application on a case-by-case basis under our broad authority – the first prong of the section 214 ECO Test that requires us to determine whether U.S. carriers have the legal, or *de jure,* ability to enter the foreign destination market and provide international facilities-based services and/or resold services.[51] We believe that retaining this threshold requirement would address our overarching policy concern for adopting the ECO Test in the first instance, *i.e.*, "whether effective competitive opportunities exist for U.S. carriers in the destination markets of foreign carriers seeking to enter the U.S. international services market through affiliation with a new or existing U.S. carrier."[52] Thus, we would continue to determine the legal ability of U.S. carriers to offer international facilities-based services in the destination country, and evaluate whether U.S. carriers have the legal right to obtain a controlling interest in a facilities-based carrier in that country to originate and terminate international traffic (i.e., IMTS) in that market.[53] We request comment on our proposal to retain this requirement. We request commenters to identify and comment on known legal barriers to entry in markets of non-WTO Member countries that may continue to exist, and more specifically of how laws, regulations, policies, and practices known to commenters prevent U.S. carriers from competing in a particular foreign market should this legal requirement be removed.

[48] *See TA Resources Order,* 25 FCC Rcd 15978.

[49] *Id.* at 15983-84.

[50] *Id.* at 15984-85.

[51] 47 C.F.R. §§ 63.18(k)(3)(i),(ii).

[52] *See Foreign Carrier Entry Order*, 11 FCC Rcd at 3875, ¶ 2.

[53] *Id.* at 3891-3892, ¶¶ 47-48.

22. Second, we propose to eliminate certain criteria that the Commission considers to determine whether there are practical, or *de facto,* effective competitive opportunities for U.S. carriers to enter the foreign destination market. Specifically, we propose to eliminate the requirement that applicants show that there is an effective regulatory framework in the foreign country to develop, implement, and enforce legal requirements, interconnection arrangements and other safeguards.[54] We also propose to eliminate the requirement that applicants must show whether competitive safeguards exist in the foreign country to protect against anticompetitive practices, with the exception of retaining a competitive safeguard that requires timely and nondiscriminatory disclosure of technical information needed to interconnect with carriers' facilities.[55]

23. Under this approach, we would, however, continue to require applicants to show that there are reasonable and nondiscriminatory charges, terms, and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services.[56] Furthermore, as explained above, we would continue to inquire whether the foreign destination market requires the timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, a carrier's facilities.[57] Requiring applicants to demonstrate reasonably priced domestic interconnection and inquiring about the timely disclosure of technical information, we believe, will ensure that unaffiliated U.S. carriers can compete in the provision of U.S. international telecommunications services by terminating their own traffic as an alternative to discriminatory or above-cost settlement rates. In addition, the Commission maintains broad authority to consider criteria similar to the current ECO Test on its own motion or as a result of comments from U.S. carriers experiencing difficulties serving the market under review. We seek comment on whether there is a practical basis for retaining these requirements based on carriers' experiences interconnecting to a foreign carrier's domestic facilities for termination and origination of international services.

24. We believe modifying the section 214 ECO Test and associated rules will allow the Commission and its staff to be more responsive to applicants seeking ECO Test determinations where there are no complaints or evidence of anti-competitive conduct in the applicant's home market. It will give the Commission more decisional flexibility in evaluating section 214 applications and foreign carrier affiliation notifications. It will also reduce the burden and expense to applicants from non-WTO Member countries whose regulatory regimes may differ markedly from the majority of those regimes on which the Commission primarily intended to focus when it first codified the ECO Test criteria. We seek comment on this proposal. We encourage commenters to discuss all aspects of this proposal as well as practical problems section 214 authority applicants face in complying with current ECO Test requirements. We also seek comment on whether there is a policy basis for retaining current ECO Test criteria that apply to remaining non-WTO markets, and whether fewer criteria or additional criteria are required for either type of authorization.

B. Codification of the Submarine Cable ECO Test

25. As discussed in paragraph 8 above, the ECO Test criteria that applies to submarine cables is not codified in the Commission's rules. If we maintain the ECO Test, we propose to codify in our rules the criteria that would apply to cable landing license applications filed by foreign carriers or entities, or

[54] 47 C.F.R. § 63.18(k)(3)(v).

[55] 47 C.F.R. § 63.18(k)(3)(iv)(A),(B),(C). Our current rules list three examples of these competitive safeguards: the existence of cost-allocation rules in the foreign country to prevent cross-subsidization; the timely and non-discriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities; and protection of carrier and customer proprietary information.

[56] 47 C.F.R. § 63.18(k)(3)(iii).

[57] 47 C.F.R. § 63.18(k)(3)(iv)(B).

their affiliates, and notifications of foreign carrier affiliations filed by U.S. cable landing licensees. Under our proposed rules, applicants would have to demonstrate that U.S. carriers have both the legal, or *de jure,* and practical, or *de facto*, ability to own and operate submarine cables in a country where a cable lands. To demonstrate *de facto* ability, the applicant would have to show that U.S. carriers would have the ability to collocate facilities, provide or obtain backhaul capacity, access technical network information, and interconnect to the public switched telephone network.[58] These proposed rules would also apply to notifications filed by a cable landing licensee that becomes, or seeks to become, affiliated with, a foreign carrier possessing market power in a non-WTO Member country where the cable lands.[59] We seek comment on these proposals.

26. We also invite parties to propose alternatives that address legal, regulatory, business, and/or practical concerns. We request comment on whether the proposed ECO Test, or a variation of the current ECO Test, will provide us more flexibility to apply the criteria to an application of notification filed by an applicant requesting an ECO Test determination. We also invite comment on the benefits and costs of the current ECO Test with respect to cable landing license applications and notifications. Specifically, is there an incentive for non-WTO Member countries to open their markets to U.S. carriers under the current test, or are there any other benefits to U.S. carriers in modification of the ECO Test? Conversely, what are the costs an applicant incurs in providing information under the current ECO Test? We encourage commenters to discuss all aspects of this proposal as well as practical problems cable landing license applicants face in complying with the current ECO Test requirements.

IV. CONCLUSION

27. By this NPRM, we seek comment on either eliminating the current ECO Test or modifying it as it applies to Commission review of international section 214 authority applications, cable landing license applications, and notifications of foreign carrier affiliations filed by applicants, carriers and licensees who are affiliated, or seek to become affiliated, with a foreign carrier with market power in a destination market that is not a WTO Member country. Under either approach we propose to maintain other regulatory safeguards as discussed above, as well as the ability to consider under our broad authority all relevant competition issues in assessing the public interest under section 214 of the Act and the Cable Landing License Act.

V. PROCEDURAL ISSUES

A. *Ex Parte*

28. The proceeding this Notice initiates shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[60] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be

[58] *See* Appendix A, Proposed Rules, § 1.767(a)(8)(iv).

[59] *See* Appendix A, Proposed Rules, § 1.768(g)(2).

[60] 47 C.F.R. §§ 1.1200 *et seq.*

found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

B. Initial Regulatory Flexibility Certification

29. Pursuant to the Regulatory Flexibility Act (RFA),[61] the Commission certifies that that an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the proposals considered in this NPRM is not warranted, and that a regulatory flexibility certification is appropriate for the reasons stated below.

30. First, the ECO Test rules we are proposing to either eliminate or modify in this NPRM affect only applications filed by foreign carriers or their affiliates that hold market power in a country that is not a member of the WTO. Based on statistics available to us, there are currently 156 WTO Member countries (in addition to the European Union), and we calculate, based on 2010 World Bank gross domestic product (GDP) data, that the remaining non-WTO Member countries represent approximately five percent of the world's GDP.[62] The ECO Test requirements are detailed and were designed to be applied to countries that could support advanced regulatory regimes. Most of the non-WTO Member countries are countries that may be without resources to support a regulatory framework that meets the ECO Test requirements. In this NPRM we are proposing either to completely eliminate or modify the current ECO Test criteria which will result in lessening the economic impact on applicants from non-WTO Member countries requesting an ECO Test determination.

31. We believe that the proposal and other option on which we seek comment in this NPRM will reduce costs and burdens currently imposed on applicants, carriers, and licensees, including those that are small entities, and accelerate the authorization and licensing process, while continuing to ensure that we have the information we need to carry out our statutory duties. Therefore, we certify that the proposals in this NPRM, if adopted, will not have a significant impact on a substantial number of small entities. The Commission will send a copy of the NPRM, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[63] This initial certification will also be published in the Federal Register.[64]

C. Initial Paperwork Reduction Act of 1995 Analysis

32. This document contains proposed new and modified information collection requirements. The Commission, as a part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public

[61] 5 U.S.C. § 603. 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).

[62] *See supra* n.40.

[63] 5 U.S.C. § 605(b)

[64] *Id.*

Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

33. Written comments by the public on the proposed and/or modified information collections are due 60 days from the date of publication of the Notice in the Federal Register. Written comments must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on the proposed and/or modified information collections on or before 60 days after the date of publication in the Federal Register of the Notice. In addition to filing comments with the Secretary, Marlene H. Dortch, a copy of any comments on the information collection(s) contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1-C804, 445 12th Street, SW, Washington, DC 20554, or via the Internet to Judith.BHerman@fcc.gov and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, N.W., Washington, DC 20503 or via the Internet to Kim_A._Johnson@omb.eop.gov.

D. Filing of Comments and Reply Comments

34. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/ or the Federal eRulemaking Portal: http://www.regulations.gov. Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

35. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

36. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

37. All parties must file one copy of each pleading electronically or by paper to each of the following:

(1) The Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com

(2) James Ball, Chief, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail: James.Ball@fcc.gov

(3) David Krech, Associate Chief, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail: David.Krech@fcc.gov

(4) Jodi Cooper, Attorney, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail: Jodi.Cooper@fcc.gov

(5) Mark Uretsky, Economist, Policy Division, International Bureau, 445 12th Street, S.W., Washington, D.C. 20554; e-mail: Mark.Uretsky@fcc.gov.

38. Filings and comments will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, D.C. 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, telephone: (202) 488-5300, fax: (202) 488-5563, or via e-mail through www.bcpiweb.com. They will also be accessible through the Commission's Electronic Filing System (ECFS) on the Commission's website, www.fcc.gov.

39. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules.[65] All parties are encouraged to utilize a table of contents, to include the name of the filing party and the date of the filing on each page of their comments' length of their submission. We also strongly encourage that parties track the organization set forth in the Notice of Proposed Rulemaking in order to facilitate our internal review process.

40. Commenters that file what they consider to be proprietary information may request confidential treatment pursuant to section 0.459 of the Commission's rules. Commenters should file both their original comments for which they request confidentiality and redacted comments, along with their request for confidential treatment. Commenters should not file proprietary information electronically. *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816 (1998), Order on Reconsideration, 14 FCC Rcd 20128 (1999). Even if the Commission grants confidential treatment, information that does not fall within a specific exemption pursuant to the Freedom of Information Act (FOIA) must be publicly disclosed pursuant to an appropriate request. *See* 47 C.F.R. § 0.461; 5 U.S.C. § 552. We note that the Commission may grant requests for confidential treatment either conditionally or unconditionally. As such, we note that the Commission has the discretion to release information on public interest grounds that falls within the scope of a FOIA exemption.

VI. ORDERING CLAUSES

41. IT IS ORDERED that, pursuant to sections 1, 2, 4(i) and (j), 201-205, 208, 211, 214, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 201-205, 208, 211, 214, 303(r), and 403, and the Cable Landing License Act, 47 U.S.C. §§ 34-39 and

[65] 47 C.F.R. § 1.49.

Executive Order No. 10530, section 5(a), reprinted as amended in 3 U.S.C. § 301, this Notice of Proposed Rulemaking is ADOPTED.

42. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

It is proposed that Parts 1 and 63 of the Commission rules be amended as follows:

Part 1 – PRACTICE AND PROCEDURE

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

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

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

§ 1.767 Cable Landing Licenses.

*****

(a)(8) For each applicant:

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

(ii) A certification as to whether the applicant is, or is affiliated with, a foreign carrier, including an entity that owns or controls a cable landing station, in any foreign country. The certification shall state with specificity each such country;

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

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

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

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

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

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

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

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

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

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

*****

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

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

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

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

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

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

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

*****

(g) ***
(2) In the case of a prior notification filed pursuant to paragraph (a) of this section, the U.S. authorized carrier must demonstrate that it continues to serve the public interest for it to operate on the route for which it proposes to acquire an affiliation with the foreign carrier authorized to operate in the

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

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

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

§ 63.18 Contents of applications for international common carriers.

*****

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

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

*****

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

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Alternative Proposed Rules

Part 1 – PRACTICE AND PROCEDURE

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

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

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

§ 1.767 Cable Landing Licenses.

(a) ***

(8) For each applicant:

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

(ii) A certification as to whether the applicant is, or is affiliated with, a foreign carrier, including an entity that owns or controls a cable landing station, in any foreign country. The certification shall state with specificity each such country;

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

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

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

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

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

(iv) For any country named in response to paragraph (a)(8)(iii) of this section, the applicant shall make one of the following showings:

(A) The named country is a Member of the World Trade Organization; or

(B) The foreign carrier lacks market power in the named country, with reference to the criteria in §63.10(a) of this chapter; or

(C) The named country provides effective competitive opportunities to U.S. cable landing licensees to have ownership interests in submarine cables that land in that country. An effective competitive opportunities demonstration should address the following factors:

(1) Whether U.S. cable landing licensees have the legal ability to enter the market of the named country and have ownership interests in submarine cables that land in that country;

(2) Whether there exist reasonable and nondiscriminatory charges, terms and conditions to interconnect a cable in the named country, the ability to collocate facilities, provide or obtain backhaul capacity, and access to timely disclosed technical network information for the purpose of providing services in the market of that country; and

(3) Any other factors the applicant deems relevant to its demonstration.

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

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

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

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

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(g) ***
(2) In the case of a prior notification filed pursuant to paragraph (a) of this section, the U.S. authorized licensee must demonstrate that it continues to serve the public interest for it to retain its interest in the cable landing license for that segment of the cable that lands in the non-WTO Member country by demonstrating either that the foreign carrier lacks market power in that country, with reference to the criteria in §63.10(a) of this chapter, or that the country offers effective competitive opportunities to U.S. cable landing licensees to land and operate submarine cables in that country by making the required showing in §1.767(a)(8)(iv)(C). If the licensee is unable to make either required showing or is notified by the Commission that the affiliation may otherwise harm the public interest pursuant to the Commission's policies and rules under 47 U.S.C. 34 through 39 and Executive Order No. 10530, dated May 10, 1954, then the Commission may impose conditions necessary to address any public interest harms or may proceed to an immediate authorization revocation hearing.

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

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

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

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

11. Section 63.18 is amended by redesignating paragraph (k)(3)(vi) to (k)(3)(iv), revising paragraphs (k)(3)(ii) and (k)(3)(iii), and removing paragraphs (k)(3)(iv) and (k)(3)(v) to read as follows:

§ 63.18 Contents of applications for international common carriers.

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(k) ***
(3) The named foreign country provides effective competitive opportunities to U.S. carriers to compete in that country's market for the service that the applicant seeks to provide (facilities-based, resold switched, or resold private line services). An effective competitive opportunities demonstration should address the following factors:

(i) ***

(ii) If the applicant seeks to provide resold services, the legal ability of U.S. carriers to enter the foreign market and provide resold international switched services (for switched resale applications) or resold private line services (for private line resale applications);

(iii) Whether there exist reasonable and nondiscriminatory charges, terms and conditions, including timely disclosed technical information, for interconnection to a foreign carrier's domestic facilities for termination and origination of international services or the provision of the relevant resale service; and

(iv) Any other factors the applicant deems relevant to its demonstration.

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