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The Impact of U.S. Regulatory Activity on Prospects for Implementation of the WTO Agreement on Basic Telecommunications

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COMMENT

The Impact of U.S. Regulatory Activity on Prospects for Implementation of the WTO Agreement on Basic Telecommunications

I. Introduction

For much of the twentieth century the worldwide telecommunications industry has remained a bastion of monopolistic behavior. However, the rapid technological advances of the current decade have served as a catalyst for change of the economic model from government-sanctioned monopoly to pro-competitive open markets. The digital information age has transformed communications into the primary component linking the economies of the world. Information superhighways have emerged as the circulatory system of international economic growth. Beginning with the 1994 call by Vice President Albert Gore for the nations of the world to join in building a Global Information Infrastructure, the international telecommunications industry has worked to achieve the goals inherent in such an effort—increased competition and independent regulation. As a result, the World Trade Organization (WTO) reached a historic agreement in February 1997 to open nearly ninety percent of global telecommunications services revenues to competition by 1998.

3 See id.
4 See id.
5 See id.
6 See Cane, supra note 1. Basic telecommunications services are a $600 billion
The WTO Agreement's goal of opening foreign markets to all competitors has long been a major part of U.S. trade policy. During the three years of debate over the WTO Agreement, the United States led the lobby for other countries to adopt principles of independent and transparent telecommunications regulation. However, recent activities of the Federal Communications Commission (FCC) have led many to question the U.S. commitment to the underlying principles of the Agreement.

This Comment will examine the role of the FCC in influencing international trade policy following the WTO Agreement, focusing on three recent FCC actions that offer insight into U.S. strategy for participation in the global telecommunications arena under the WTO accord. Section II begins by outlining the evolution of the international telecommunications marketplace, culminating with the 1997 WTO Agreement. The section then describes the regulatory history of international telecommunications in the United States leading up to the WTO Agreement. Section III examines the U.S. reaction to the WTO Agreement in light of its goal of market liberalization. Specifically, the impact of the following actions will be analyzed: (1) the agency's relationship with the office of the United States Trade Representative (USTR) in bilateral trade dealings with Japan; (2) the adoption of benchmark settlement rates by the FCC in August 1997; and (3) the Rules and Policies on Foreign Participation in the U.S. Telecommunications Market issued by the FCC in November 1997 which adopts the rules necessary for the United States to

per year industry, which includes voice telephony, data transmission, facsimile services, fixed and mobile satellite services, paging, and personal communications services. See John L. Harwood II et al., *Competition in International Telecommunications Services*, 97 COLUM. L. REV. 874, 884 (1997).


8 See id.


10 See infra notes 15-84 and accompanying text.

11 See infra notes 85-132 and accompanying text.

12 See infra notes 133-66 and accompanying text.

13 See infra notes 167-240 and accompanying text.
comply with the WTO Agreement.\textsuperscript{14}

While each of these actions includes an explicit concession to multilateral efforts for liberalizing international telecommunications markets, they also contain strong bilateral elements. These elements play a key role both in achieving specific tactical goals and in encouraging other countries to embrace a pro-competitive agenda. While more overt bilateral pressure will be restricted to non-WTO countries following the implementation of the Agreement, an analysis of the above U.S. actions reveals implicit bilateral tools that are both necessary to achieve U.S. objectives of a competitive global telecommunications market and compatible with the multilateral focus of the WTO Agreement.

II. Background: The Evolution of a Competitive Environment

A. International Telecommunications Industry—Historical Perspective

Traditionally, most telecommunications operators were owned and controlled by their respective governments which, in turn, protected them as strategic national assets.\textsuperscript{15} More recently, however, privatization has occurred.\textsuperscript{16} The United States and the United Kingdom led the movement toward market liberalization, followed closely by other members of the European Union.\textsuperscript{17} In

\textsuperscript{14}See infra notes 241-328 and accompanying text.
\textsuperscript{15}See Cane, supra note 1.
\textsuperscript{16}See id.
addition, U.S. multinational corporations, which are among the
heaviest consumers of international telecommunications services,
have advocated the introduction of competition in the basic
services market to stimulate lower prices and increased service
offerings.¹⁸

The significant role that the global telecommunications
infrastructure plays in the digital information age prompted these
changes.¹⁹ In March 1994, Vice President Albert Gore announced
an initiative to promote the development of a Global Information
Infrastructure (GII) that would be guided by principles of private
investment, competition, open access to world markets, flexible
regulation and universal services.²⁰ The recent revolution in
information technology has been compared to the Industrial
Revolution in its impact on almost every aspect of daily life.²¹
Like its industrial counterpart, the infrastructure demands of a
global telecommunication network require significant capital
investment.²² No longer able to depend on national government
funding, countries have been forced to alter their policies to
embrace competition in order to attract private investment.²³

In reaction to the changing face of the global
telecommunications industry, delegates commenced efforts to
liberalize the telecommunications market during the Uruguay

²⁰ See Vice President Albert Gore, Remarks at the Meeting of the International
Telecommunications Union (Mar. 21, 1994) (visited Nov. 22, 1997).

²¹ See Hundt, supra note 2. Vice President Gore, in his promotion of the GII,
spoke of a planetary network that would transmit messages and images around the globe
at the speed of light, circling the planet with information superhighways connecting a
global community. See Gore, supra note 20.

²² See Hundt, supra note 2. The magnitude of the required investment is
exemplified by the fact that about 45 countries currently have less than one telephone
line per 100 inhabitants. See id. More than half the people on the planet have never
made a telephone call. See id. It is estimated that billions of dollars will be required to
build out the underdeveloped infrastructures that exist. See id.

²³ See id. Private sources only financed about 20% of the telecommunications
infrastructure in developing countries in the early 1990s. See id. The World Bank
estimates that by the year 2000, private lending will account for about 55% of such
infrastructure financing. See id.
Round of the General Agreement on Tariffs and Trade (GATT).\textsuperscript{24} GATT, which has long focused on international trade in goods, responded to the growing movement to open world markets to international service providers by enacting a multilateral agreement, the General Agreement on Trade in Services (GATS), in December 1993.\textsuperscript{25}

Some of the principles enacted under the GATS pertain to services generally, while others pertain specifically to telecommunications.\textsuperscript{26} Regarding services generally, each country participating in the GATS files a schedule of commitments denoting the particular services to which it will apply the GATS principles.\textsuperscript{27} Unless a signatory country claims specific exemptions in its schedule, the general service principles demand most favored nation treatment for the service providers from that country.\textsuperscript{28} Also, the GATS general principles require national treatment and compliance with specific market access provisions that are designed to prohibit certain discriminatory practices (such as limitations on foreign capital investment) against foreign service providers.\textsuperscript{29} These provisions attempt to eliminate discrimination among service providers based solely on nationality.\textsuperscript{30}

Those principles related specifically to telecommunications are included in the Annex on Telecommunications which is a supplement to the GATS.\textsuperscript{31} The Annex expands the GATS objectives to the specific area of public telecommunications network access.\textsuperscript{32} The Annex outlines principles for future telecommunications market liberalization, including “a provision calling for access to and use of the public network on reasonable,
nondiscriminatory terms and conditions.” However, the scope of the telecommunications provisions under GATS and the Annex is limited and does not directly address basic services.

B. 1997 WTO Multinational Agreement on Basic Telecommunications

Basic telecommunications services account for the majority of telecommunications revenues worldwide. Provision of these services requires an extensive network of facilities that have traditionally been controlled by government-run monopolies. Market liberalization in this area presents political as well as economic and technological challenges and, for these reasons, has proven particularly difficult to accomplish.

1. The GATS Negotiations on Basic Telecommunications Services

The GATS negotiators were unable to reach agreement on basic telecommunications services following extensive discussions during the Uruguay Round. The parties instead drafted a ministerial “Decision on Negotiations on Basic Telecommunications” in which the signatories agreed to complete negotiations through a Negotiating Group on Basic Telecommunications (NGBT) and to submit a report by April 30, 1996. In the negotiations that followed, the United States offered


34 See Harwood, supra note 6, at 880. The scope of the commitments made in schedules by individual countries determines the impact of the agreement. See id. As long as a country’s restrictions on competition do not discriminate among foreign providers on the basis of nationality, most favored nation (MFN) treatment is not violated. See id. The national treatment and market access provisions apply only to services that a country has listed on its schedule. See id. Only providers of scheduled services receive access to public telecommunications networks. See id.

35 See Harwood, supra note 6, at 881.

36 See id.

37 See id.

38 See id. at 882.

39 See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments—Results of the Uruguay
BASIC TELECOMMUNICATIONS DEREGULATION

This offer was contingent upon a number of the other participating countries making sufficient commitments to open markets. However, after concluding that too few countries had made adequate offers, the United States withdrew its offer as the April deadline approached. The United States viewed its telecommunications market as considerably more liberalized than those of the other participants. Its decision to withdraw its offer to the NGBT reflected its position that the most favored nation commitments by countries that allowed monopolies in basic services were meaningless. Major U.S. telecommunications vendors opposed the NGBT deal because of their belief that the existing offers were inadequate to assure the U.S. firms would gain access to foreign markets. The WTO saved the NGBT negotiations by extending the deadline to February 15, 1997.

2. The Resulting WTO Agreement

On February 15, 1997, sixty-nine countries, including the United States and most of its major trading partners, agreed to open markets for basic telecommunications services by January 1, 1998. The WTO Agreement covers ninety-five percent of the $600 billion international market for such services. Sixty-five of the countries, including the United States, further pledged to permit competition in the basic voice telephony arena by agreeing...
to a document containing a binding, enforceable set of competition rules to be enforced through the WTO's dispute settlement mechanism. "Sixty-nine [countries] made offers on foreign investment with forty-eight allowing full private investment." Finally, with respect to market access for satellite services and facilities, fifty-two countries made offers of full guaranteed domestic and international access and seven others guaranteed access for selected satellite services and facilities.

The new opportunities for global competition created by the Agreement excited industry leaders. Delegates attending the Global Networking Conference in June 1997 in Calgary, Alberta heard speakers proclaim the death of the "old order" of centrally directed monopolies in telecommunications services and a new era of liberalization under the WTO Agreement. While delegates from around the world celebrated the promise that new telecommunications technologies would enhance economic growth in their countries, many also anticipated incremental rather than revolutionary implementation. Yet, Gerald Taylor, chief executive of MCI, recognized the shift in attitude toward deregulation and called passage of the Agreement a "defining event." Taylor's excitement reflected his belief that the new competitive safeguards would "increase his company's odds when

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48 See IN 97-15, supra note 46. The telecommunications industry rules contained in the Reference Paper on Pro-Competitive Regulatory Principles include those governing fair and economical interconnection guarantees, prohibitions on anticompetitive conduct, and independent industry regulation. See id. The rules are based on the principles found in the U.S. Telecommunications Act of 1996. See id.

49 See id.; see also Vineeta Shetty, Win some, lose more (World Trade Organization Agreement), COMM. INT'L, Apr. 1997, available in 1997 WL 9942182 (noting that the Agreement marks the first time that any of the sixty five countries have allowed common competition rules in their markets to be enforced through the WTO's dispute settlement mechanism).

50 Hundt, supra note 2.

51 See id.

52 See Sisson, supra note 17.


54 See id.

55 Sisson, supra note 17.
challenging entrenched” operators in formerly protected markets.\textsuperscript{56}

The Agreement, which has been called the most visible achievement of the WTO to date, represents a major victory for the United States in its efforts to open the international telecommunications market to competition.\textsuperscript{57} Participating countries were obligated to ratify the Agreement by November 30, 1997 and to draft clearer competition rules ensuring fair competition through regulatory oversight.\textsuperscript{58} At the November deadline, twenty signatories had failed to formally ratify the Agreement, which caused squabbling among WTO delegates concerning the Agreement’s entry-into-force date.\textsuperscript{59}

At a December 1997 meeting of the signatories, the deadline for ratification was extended until July 31, 1998, and entry of the Agreement into force, originally slated for January 1, 1998, was delayed.\textsuperscript{60} On four separate occasions during December 1997 and January 1998, the United States single-handedly delayed implementation in a move to apply pressure on some of the then twenty signatories who had not yet ratified the Agreement.\textsuperscript{61}

Since the November 30, 1997 deadline, seven additional countries have sent formal notification of their ratification to the WTO, bringing the total to fifty-seven by the January 26, 1998 meeting of the signatories.\textsuperscript{62}

Citing the widely held belief that no country has reconsidered its decision to sign the Agreement, the United States reversed its

\textsuperscript{56} Id.
\textsuperscript{57} See id.; Harwood, supra note 6, at 884.
\textsuperscript{60} See id.
\textsuperscript{61} See id.
earlier position and, at the January 26 meeting, agreed with the other WTO members that the Agreement would take effect on February 5, 1998. U.S. Trade Representative Charlene Barshefsky released a statement following the January 26 meeting in which she noted that, although the thirteen laggard countries represent only four percent of the global telecommunications services market, it is essential that all parties to the Agreement formally obligate themselves. The United States emphatically stated that it will continue to pursue ratification with the thirteen outlying countries in both bilateral sessions and future WTO meetings. It remains unclear how the United States will respond in the interim regarding its obligations under the Agreement to those countries that have not yet ratified.

Implementation of the Agreement is anticipated to provide ongoing challenges since many countries made pledges that phase in gradually or are less sweeping than those of other signatories. The impact, however, is expected to be significant. According to an estimate from the Office of the USTR, those countries granting market access under the auspices of the Agreement account for ninety-nine percent of the total basic international telecommunications services revenues of all WTO member countries.


65 See WTO Sets Feb. 5 Date For Trade Agreement, supra note 59. The 13 countries that have not yet signed the Agreement are Argentina, Belgium, Bolivia, Brazil, Chile, Dominica, the Dominican Republic, Ghana, Guatemala, Papua New Guinea, the Philippines, Poland, and Romania. See id. Most of the 13 outlier countries appear to have run into timing issues in completing the necessary domestic legislative, executive, and/or regulatory procedures. See id. A U.S. trade official emphasized that the governments of those countries in the southern hemisphere are on vacation at this time of year. See id.

66 See id.

67 See Harwood, supra note 6, at 883.

68 See id.

69 See id. at 883-84.
3. Implications of the WTO Agreement

Increased opportunity for truly integrated global marketing strategies will be a major implication of the Agreement. The chief effects of such strategies will result from international branding, including one-stop shopping for seamless worldwide service at consistent prices. This is of particular importance to large multinational corporations that currently must deal with multiple providers of basic telecommunications services around the world.

Another important implication of the Agreement is the promise of improved dispute resolution and enforcement mechanisms. The aim of the WTO dispute resolution process is to ensure the current goals and to prevent retrogression. Effective and timely dispute resolution is expected to reduce the risks of investing abroad and, thereby, promote a much-needed acceleration in the pace of such investment. A key aspect of this dispute resolution process is the replacement of bilateral agreements with a legally enforceable, multilateral Agreement to be upheld by the World Court. In addition, complaints will be handled by an independent WTO panel empowered to enact binding resolutions and impose penalties, including unilateral trade sanctions.

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70 See Sisson, supra note 17.
71 Branding is a marketing effort directed toward distinguishing a product for its completion. See, e.g., LOUIS E. BOONE & DAVID L. KURTZ, CONTEMPORARY MARKETING, 185 (1974). The focus of international branding is the building of global awareness of a product's image and the development of quality associations that allow consumers to readily identify the product for repeat purchases. See id.
72 See Sisson, supra note 17.
73 See Harwood, supra note 6, at 875. Because these services vary widely in technical capabilities, incompatibilities often result. See id. In addition, the multinationals must comply with various regulatory schemes and pay their bills in numerous currencies. See id.
74 See Sisson, supra note 17.
75 See Harwood, supra note 6, at 884.
76 See Sisson, supra note 17.
77 See id. The Agreement requires most favored nation treatment for all participating countries and national treatment for all foreign carriers entering a market. See id.
78 See id. at 17. Several concerns remain, however, that to some extent diminish
Perhaps the most controversial implication of the Agreement concerns the fallout from increased competition resulting from deregulation. While telecommunications providers will require more funds to expand their service offerings, price competition will lead to smaller margins and thus lower profits and will seriously threaten inefficient operators. The most vulnerable segment will be the international long-distance market which, because of high tariffs and traffic imbalances, has produced the income traditionally used to subsidize inefficient operators. An important harbinger of this expected outcome is the recent adoption by the United States of international settlement rate benchmarks. This action has led to global outcry. The implications will be analyzed in Part III.B of this Comment.

C. Regulatory History of International Telecommunications in the United States

Prior to the conclusion of the GATS, U.S. trade related to international telecommunications services was limited primarily to bilateral agreements. The FCC’s policy of increasing domestic deregulation over the past two decades served as an impetus for multilateral liberalization. As the size and relative openness of confidence in the effectiveness of the proposed dispute resolution process. See id. Critics point to the ineffectiveness of an early 1997 WTO panel in resolving an international dispute over the Helms-Burton law. See id. In addition, since the WTO dispute resolution process handles only international trade disputes brought by governments rather than foreign operators, there is concern that access to the WTO forum will not be easily and quickly available. See id. Finally, the domestic implementation of the Agreement is likely to present significant challenges, both financially and politically, as countries must change their laws to comply with the regulatory changes inherent in the Agreement. See id.

79 See id.
80 See id.
81 See id.
83 See id.
84 See note 167-240 and accompanying text.
85 See Harwood, supra note 6, at 879.
86 See id. at 875.
the U.S. market attracted an increasing number of foreign carriers, domestic carriers became concerned that foreign market opportunities remained unavailable to them. They began to pressure the FCC to use its regulatory authority to encourage international market liberalization, which they hoped would increase competitiveness.

1. Communications Act of 1934

The FCC historically has exercised authority to regulate foreign investment in the U.S. telecommunications industry under two provisions of the Communications Act of 1934 (the 1934 Act). Both provisions contain an evaluation of the public interest impact of the proposed investment that is given considerable weight in the FCC’s ultimate determination.

Section 214 of the 1934 Act deals directly with a foreign carrier’s entry into the U.S. services market by acquisition or operation of a telecommunications line. It requires a foreign carrier investing in a U.S. carrier to obtain FCC approval because, as a consequence of the investment, the foreign carrier would in effect acquire and/or operate a line. Approval consists of a certificate granted by the FCC after the foreign carrier successfully passed a public convenience and necessity test.

Companies using radio technology to offer common carrier, broadcast, or aeronautical services fall within section 310.

87 See id.
88 See id. at 874.
90 See id. §§ 214(a), 310(b).
91 See id. § 214(a).
92 See id. § 214(a).
93 See id.; see also supra note 91 and accompanying text.
94 See id. § 310(b).
Telecommunications companies, including most telephone companies, are included in this regulation because they use radio, satellite, or microwave links in their networks and, thus, require an FCC-issued radio license.\(^9\) Section 310 limits the ability of foreign entities to hold certain FCC licenses by restricting foreign investment in those U.S. companies holding such licenses.\(^6\) Specifically, section 310(b) limits total foreign ownership and the number of foreign directors to twenty-five percent and prohibits foreign officers.\(^7\) Requests to exceed these restrictions are subject to examination on a case-by-case basis by the FCC considering the public interest effect of the licensing.\(^8\)

\textit{a. Foreign Carrier Entry Order}

On November 30, 1995, the FCC issued the Foreign Carrier Entry Order which explicitly stated its intention to use the FCC's regulatory power over the world's largest telecommunications services market as leverage to bilaterally negotiate telecommunications market access concessions from foreign

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No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station shall be granted to or held by -

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

\(^{95}\) See Schmidt, \textit{supra} note 58, at 630 n.3.

\(^{96}\) See \textit{id.} at 630.

\(^{97}\) See \textit{id.}; see also Veronica M. Ahern, \textit{Developments in the International Marketplace}, 427 PLI/PAT 273, 303 (1995) (noting that these limits represent "benchmarks" only).

\(^{98}\) See Ahren, \textit{supra} note 97, at 303.
countries. Through this Order, in January 1996, the FCC incorporated an "effective competitive opportunities" (ECO) analysis into the public interest calculus utilized in sections 214 and 310. The ECO test, which is "loosely based on the principle of reciprocity," involves a determination of whether U.S. carriers have "equivalent" market opportunities in the domestic market of a foreign carrier "seeking to operate in the United States." The FCC utilizes the ECO test whenever foreign carriers and their affiliates seek authorization to provide U.S. international facilities-based service under section 214 and also when foreign entities seek to obtain an indirect ownership interest of more than twenty-five percent in a U.S. radio licensee under section 310(b).

Once a section 214 review is initiated, the analysis examines whether "effective competitive opportunities" exist for U.S. carriers in the relevant "destination markets." If the ECO

99 See Harwood, supra note 6, at 885.
100 See In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities (Foreign Carrier Entry Order), 11 F.C.C.R. 3873, 3875-76 (1996) [hereinafter FCC 95-475].
102 See id.
103 See FCC 95-475, supra note 100, at 3917; see also FCC Moves to Implement WTO Agreement, Proposes Easy Market Entry for Foreign Carriers, supra note 101. Destination markets are those markets where the foreign carrier is capable of exercising market power. See id.

There are six factors in the ECO analysis:

(1) whether U.S. carriers can offer in the foreign country international facilities-based services substantially similar to those that the foreign carrier seeks to offer in the United States;
(2) whether competitive safeguards exist in the foreign country to protect against anticompetitive and discriminatory practices . . . ;
(3) the availability of published, nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services;
(4) timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities;
(5) the protection of carrier and customer proprietary information; and
(6) whether an independent regulatory body with fair and transparent procedures is established to enforce competitive safeguards.
requirement is satisfied, the FCC will permit the foreign carrier to enter the U.S. international services market.  

The reasoning behind the ECO analysis under section 310 flows from the “public interest” determination required of the FCC when analyzing requests for new market entry representing a more than twenty-five percent indirect foreign ownership. A section 310 ECO analysis is limited to common carrier radio licenses and follows the same multi-step analysis as that under a section 214 review, except that the focus is on home markets rather than destination markets. According to the FCC, the ECO test is satisfied if “U.S. companies can acquire a controlling interest in the home market of a foreign investor.”

It is important to note that the ECO analysis under either section 214 or 310 is not dispositive. Additional public interest factors may be used to outweigh the results of the ECO test. These factors assess the significance of the proposed entry by the foreign entity on competition in the U.S. telecommunications market, along with any national security, law enforcement, foreign policy or trade considerations raised by the executive branch. The first FCC application following adoption of the ECO test—the Sprint case—revealed the breadth of discretion available to the FCC via the public interest analysis.

b. The Sprint Case – Initial Application of the ECO Test

In June 1995, Sprint, Deutsche Telekom, and France Telecom agreed to the terms by which Deutsche Telekom and France Telecom would purchase a twenty percent equity investment in Sprint. This proposed investment provided the FCC its first

FCC 95-475, supra note 100, at 3889.

104 See id.
105 See id. at 3943.
106 See id. at 3954.
107 Id.
108 See Schmidt, supra note 58, at 663.
109 See FCC 95-475, supra note 100, at 3955.
111 See Schmidt, supra note 58, at 636.
opportunity to apply the ECO analysis, which had been adopted only seventeen days before the final ruling in Sprint. Despite a finding that no competitive opportunities existed in Germany or France, the FCC nevertheless approved the investment based on its beneficial effect on U.S. competition.

Following completion of the section 214 analysis, the FCC concluded that effective competitive opportunities did not exist in this transaction because U.S. carriers were legally prohibited from entering the French and German international telecommunications markets because of de jure monopolies in both countries. Further, the FCC chose not to consider a section 310 ECO analysis both because it had already made a determinative finding under section 214 that effective competitive opportunities did not exist and, more importantly, because it had approved the transaction based on public interest factors.

The FCC stated two factors it considered significant in approving the transaction. First, the large capital infusion into the third largest carrier in the U.S. market would allow Sprint to meet capital requirements for future expansion with the goal of increased competitiveness. Second, because of impending European Union and national legislation obligating both Germany and France to full liberalization of their markets, the United States received assurance that both nations would open their respective telecommunications markets before 1998.

Moreover, the FCC approved the transaction with a condition: Restrictions on market power abuses were implemented and were to remain effective until full facilities and services competition

112 See id.
113 See id.; In re Sprint Corp., 11 F.C.C.R. at 1850.
114 See Schmidt, supra note 58, at 637. A section 214 analysis was technically not required because the investment did not meet the 25% requirement for affiliation; however, the FCC chose to apply the analysis because of the size of the two foreign investors. See id.
115 See id. Sprint sought the section 310 approval because of its expected aggregate percentage of foreign ownership. See id.
116 See id.
117 See id.
were instituted in both France and Germany.\textsuperscript{118}

The indeterminate outcome of *Sprint* and those applications which followed it have generated concern in the industry. It has been suggested that as a result of the agency's actions in *Sprint*, the FCC policies would ultimately discourage foreign investment in the U.S. market—a result seemingly at odds with the FCC's stated objectives.\textsuperscript{119} Although the Order states that the FCC is not imposing a reciprocity standard with the ECO test, its application has become universally unpopular with foreign carriers and governments over the past two years.\textsuperscript{120} In particular, the public interest factors, considered by many as broad and unclear, have proven potent weapons in bilateral trade negotiations.\textsuperscript{121} Thus, while the ECO test has received credit for its effectiveness in encouraging liberalization in foreign markets, its almost total demise in light of the WTO Agreement has been cause for considerable celebration.\textsuperscript{122}

2. **Telecommunications Act of 1996**

Widely recognized as the model for the Reference Paper on Pro-Competitive Regulatory Principles adopted by sixty-five of the countries bound to the WTO Agreement,\textsuperscript{123} the Telecommunications Act of 1996 (1996 Act) was the first significant overhaul of the U.S. domestic telecommunications

\textsuperscript{118} See id. at 637-39. Specifically, the FCC ruled that it would not authorize Sprint to operate additional circuits on U.S.-France and U.S.-German routes until France and Germany allow the provision of (1) alternative infrastructure for already liberalized services (which include most non-public voice services) and (2) basic switched voice resale. See id. The FCC also required Sprint to obtain a written commitment from France Telecom to lower the accounting rate between the United States and France to the same range as the U.S.-U.K. and U.S.-Germany rates. See id. Finally, the FCC stated that, if France and Germany fail to implement their planned liberalization measures by the spring of 1998, the FCC will revisit its approval of the alliance. See id.

\textsuperscript{119} See id. at 649.

\textsuperscript{120} See Harwood, supra note 6, at 885.


\textsuperscript{122} See Harwood, supra note 6, at 885; see also infra notes 268-70 and accompanying text (discussing market reaction to the Notice of Proposed Rulemaking, FCC 97-398, which eliminated most usages of the ECO test).

\textsuperscript{123} See IN 97-15, supra note 46 and accompanying text.
regulatory regime in over sixty years. In his speech before the World Affairs Council in October 1997, then-Chair Hundt stated that the Act showcased “a pro-competitive, deregulatory communications policy and opened previously closed local telephone monopolies to new entrants.”

The 1996 Act’s practices and standards for interconnections, unbundling of services and universal service have served as models for countries around the world. More importantly, the Act’s refusal to regulate the Internet was intended to state the U.S. commitment to promote economic growth and innovation throughout the world by encouraging competition.

The Act makes two important changes to the Communications Act of 1934 as it relates to foreign investment. First, the 1996 Act discharges the ban on foreign nationals serving as officers or directors of a common carrier licensee or its holding company. The Act also directs state and local governments to open local markets to competition from both domestic carriers and those telecommunications companies with partial foreign ownership.

The 1996 Act has proven difficult to enforce, however, and competition in the local markets has not fully opened to long distance carriers as the Act intended. Such domestic difficulties have prompted critics of the WTO Agreement to voice concern regarding the chances for successful international progress.

III. Analysis: U.S. Actions Following the WTO Agreement

This Comment argues that recent FCC actions, in anticipation of implementation of the WTO Agreement, define dual strategies regarding international deregulation of basic telecommunications
services—adherence to standards of market liberalization coupled with protection of competition in U.S. markets. Each of the three agency actions analyzed—the FCC interrelationship with the USTR as exemplified in trade dealings with Japan, the unilateral adoption of benchmark settlement rates and, most importantly, the rules adopted for regulatory compliance with the WTO Agreement itself—will be shown to contain elements supportive of each strategy. The analysis further shows, despite public criticism to the contrary, not only the compatibility of these strategies but also their necessity in ensuring that the overall objectives of the WTO Agreement are met.

A. The FCC Interrelationship with the USTR in Trade Negotiations

Much of the dissatisfaction of foreign carriers and governments regarding the ECO test for entry into the U.S. market stems not from the requirement for effective competitive opportunities within their home markets but rather from the associated public interest factors that may be used to outweigh the results of the ECO test. These factors assess the significance of the proposed foreign entry on competition in the U.S. market, along with any national security, law enforcement, foreign policy or trade considerations raised by the executive branch. To many foreign investors they represent vague standards that may be arbitrarily used to deny access to the U.S. market. Of particular concern is the power of the USTR to influence FCC licensing decisions as leverage in unrelated trade negotiations—as the following situation exemplifies.

Two Japanese telecommunications companies have only recently emerged from a regulatory limbo that resulted from a long-standing squabble with the Office of the USTR. Both

133 See supra notes 99-100 and accompanying text.
135 See FCC 95-475, supra note 100, at 3955.
136 See Foreign Carriers Want FCC’s ECO to Fade Away, supra note 134.
137 See Robinson, supra note 7.
138 See U.S., Japan in Trade Talks on Procurement, Ownership; FCC to Move on
Nippon Telegraph and Telephone Corp. (NTT) and Kokusai Denshin Denwa Co. Ltd. (KDD) were notified in March 1997 that their applications to enter the U.S. market would be stalled pending resolution of U.S. trade concerns. An interagency group composed of officials from the Office of the USTR and other executive branch agencies requested that the FCC take no action on the applications. The USTR cited issues involving the continuing Japanese limits on foreign ownership of NTT and KDD and the renegotiation of an equipment procurement contract for NTT.

The executive branch agencies expected the pressure created from the stalled applications to facilitate ongoing talks with the Japanese government over the procurement situation. While the FCC normally would have accepted the applications from the Japanese carriers and put them on public notice for comment from other entities, the executive branch’s formal request may have left the FCC little choice but to comply. For its part, the USTR recognized the advantage of one agency withholding a key bargaining chip while another agency holds negotiations on an unrelated matter.

The USTR also could have launched 301 sanctions to deal with recalcitrance of the Japanese in extending the procurement pact. This process, however, takes a considerable amount of time and bureaucratic effort. The FCC action, in contrast, was both swift and easily accomplished. Furthermore, challenges to an FCC action must occur in the judicial system and quick

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139 See Robinson, supra note 7.
140 See id.
141 See id.
142 See id.
143 See id.
144 See id.
145 See id.
146 See id.
147 See id.
resolution is rare. One former USTR official likened using FCC action to address unfair trade practices abroad to “a 301 without the pain.”

Although Japanese officials threatened to complain to the WTO about U.S. tactics, the USTR pressure eventually resulted in an agreement between the two countries to resume negotiations. On September 8, 1997, the interagency group sent a letter to the FCC officially withdrawing its request to stall the Japanese applications. That action fulfilled a condition the Japanese had set before they would agree to proceed with the trade talks. Thus, on September 8, the United States and Japan announced their agreement to begin formal negotiations to extend the pact governing procurement of U.S. telecommunications equipment by NTT. Japan also agreed to address the issue of foreign investment in NTT and KDD, an issue much debated during and after the WTO Agreement was reached. The FCC then announced that it would resume processing the applications, and on September 11, 1997, it issued a public notice indicating that two of the applications filed by KDD had been granted.

One industry expert called this FCC action the “most obvious use by U.S. trade authorities of the FCC as a trade policy tool since the telecommunications market-opening effort began.” Although the use of the FCC approval process as a convenient weapon to achieve trade objectives was not without tactical

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148 See id.
149 Id.
151 See U.S., Japan in Trade Talks on Procurement, Ownership; FCC to Move on KDD, NTT Requests, supra note 138.
152 See id.
153 See id.
154 See id. Japan’s exemption of both NTT and KDD from their commitment to allow up to 100% foreign ownership remains a problem for the United States. See id.
155 See id.
156 Robinson, supra note 7.
logic, it raised questions about the U.S. commitment to market deregulation on the eve of implementation of the WTO Agreement.

One of the primary objectives of the WTO Agreement—and the one most zealously promoted by the United States—has been independent regulation. Throughout the years of negotiations on the Agreement, the United States consistently pressured its trading partners to adopt regulatory structures and standards insulated from commercial and political pressures. While it might be more convenient to achieve particular tactical goals outside the accepted regimen, to do so certainly risks inducing comparable action abroad. In order to remain faithful to the goals established by the WTO Agreement, some would argue that the United States should refrain from seeking such tactical advantages, particularly when the measures are chosen more for expediency than for ultimate outcome.

On the other hand, an argument could be made that the U.S. action was, in fact, supportive of the underlying goals of the WTO Agreement in that the pressure exerted by the United States resulted in a promise by Japan to address concerns specifically related to the implementation of the Agreement. The Clinton administration was clearly concerned that Japan did not make enough concessions during the negotiation of Agreement. While the equipment procurement issue was outside the scope of the Agreement, it nevertheless has direct bearing on the telecommunications market liberalization effort. Moreover, the

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157 See id.
158 See id. This concern is particularly relevant in light of the continued utilization of the public interest test in the newly issued FCC rules governing implementation of the WTO Agreement. See infra notes 268-75 and accompanying text.
159 See Hundt, supra note 2.
160 See Robinson, supra note 7.
161 See id.
162 See id.
163 See Cooper, supra note 150.
164 See id. Under the expiring pact, Japan had pledged to boost the transparency of KDD’s procurement policies. See id. The U.S. objective has been to ensure that U.S. suppliers have fair access to compete for NTT’s sizable procurement contracts. See U.S., Japan Come to Terms On Telecom Trade Issues, TR INT’L, Sept. 12, 1997,
issue of foreign investment in NTT and KDD is directly relevant to the successful implementation of the Agreement. The United States was disgruntled that Japan refused to remove rules limiting foreign ownership of the two companies to twenty-five percent; by contrast, under the WTO pact, Japanese companies will be eligible to buy one hundred percent of some U.S. carriers. Thus, the success of the FCC's bilateral action in achieving some movement by Japan on this issue is not entirely inconsistent with the goals established by the Agreement.

B. International Settlement Rates

One of the ways in which the United States plans to safeguard the pro-competitive arena established by the WTO Agreement is through benchmark settlement rates. The international settlement process is a system by which U.S. international switched message providers and their foreign counterparts divide the proceeds that result from settlement. Settlement payments are the compensation paid by a carrier in the country where an international call originates to a carrier in the destination country for providing switching and routing facilities to deliver the call to its intended recipient. Terms and conditions of the agreement between the two entities are individually negotiated in an operating agreement for the provision of service between the two countries.

The operating agreement establishes the "accounting rate," which represents the per minute charge shared by the two carriers for completing the call and is often higher than the cost to the carriers of providing the service. The accounting rates determine the amount of compensation, known as "settlement payments," that a carrier in a country where an international call originates

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165 See Cooper, supra note 150.
166 See id.
167 See Harwood, supra note 6, at 875.
168 See Ahern, supra note 97, at 276.
169 See Harwood, supra note 6, at 904 n.1.
170 See Ahern, supra note 97, at 276.
171 See id.; Harwood, supra note 6, at 898.
must pay the delivering carrier in the destination country.\textsuperscript{172} Since many more international calls originate in the United States than terminate here, U.S. carriers routinely make net payments to their foreign correspondents.\textsuperscript{173} Higher accounting rates increase the amounts of those payments and also keep prices for international calls artificially high.\textsuperscript{174}

The international settlements process, which predates the FCC, has been problematic from the start.\textsuperscript{175} It is based on a natural monopoly model which assumes no competition.\textsuperscript{176} Under its Uniform Settlements Policy, the FCC required uniform settlements for all carriers on parallel international routes for the purpose of preventing "whipsawing"\textsuperscript{177} of competing U.S. international carriers.\textsuperscript{178} However, in light of the success of domestic pro-competitive policies during the mid-1980s, the FCC became concerned that the uniformity requirement would dampen competitive entry into markets.\textsuperscript{179} In 1986, the FCC began to issue waivers of the uniform settlement policy; these offers of waiver were determined on a case-by-case basis after consideration of a variety of factors.\textsuperscript{180}

As competition was introduced to the international voice

\textsuperscript{172} See Harwood, supra note 6, at 898.
\textsuperscript{173} See id.
\textsuperscript{174} See id. By FCC estimates, the net payments from the United States to foreign carriers in 1995 were approximately $5 billion. See id. The portion of those payments in excess of the cost by the correspondent carrier, an estimated $3.75 billion, represents a subsidy by U.S. consumers. See id. In addition, the FCC estimates that excessive accounting rates result in international calling rates that are six times the average for domestic long distance. See id.
\textsuperscript{175} See Ahern, supra note 97, at 277.
\textsuperscript{176} See id.
\textsuperscript{177} Whipsawing is the practice whereby a monopolist foreign carrier plays competing U.S. carriers against each other to gain an advantage. See Ahern, supra note 97, at 280.
\textsuperscript{178} See id. at 279. The U.S. government first began to regulate international accounting rates in 1937. See Mackay Radio & Telegraph Co., 2 F.C.C. 592; aff'd en banc, 4 F.C.C. 150 (1937); aff'd sub nom Mackay Radio & Telegraph Co. v. FCC, 97 F.2d 641 (D.C. Cir. 1938). In 1936, the FCC first applied the Uniform Settlements Policy to international voice services. See Ahern, supra note 97, at 280.
\textsuperscript{179} See Ahern, supra note 97, at 279-80.
\textsuperscript{180} See id. at 280.
services arena and the U.S. billed traffic came to predominate the market, the FCC’s focus changed to reflect growing concern regarding the serious deficits that result from uneven international traffic flows and high accounting rates. In 1991, the FCC began a series of reforms designed to deal with the problems of above-cost accounting rates. For example, the FCC attempted to include language within the International Telecommunications Union (ITU) recommendations that would clarify that accounting rates should be both non-discriminatory and cost-based. Further, in November 1992, the FCC set “benchmark” settlement rates as a guide to U.S. carriers in their negotiations with foreign carriers. The benchmark rates represented the FCC’s “conservative estimate of an appropriate range for settlement rates, based on the underlying costs to terminate international calls.” U.S. carriers were required to report on the progress made in negotiating settlement rates within the FCC’s benchmark ranges but these benchmarks were not considered mandatory.

More serious action to reform the settlement process by bringing accounting rates close to the level that would prevail in a competitive environment began with a December 1996 order (Flexibility Order) which provided U.S. carriers with more flexibility in negotiating operating agreements with their foreign correspondents. On routes where competition in the foreign market is sufficient to eliminate the potential for whipsawing, U.S. carriers were allowed to negotiate the terms of their agreements with foreign carriers through individual agreement. The FCC’s

181 See id. at 281.
182 See id. at 282.
183 See id. The ITU is one of the world’s longest standing international organizations with 184 members today. See id. The Telecommunication Sector is responsible for technical, operating and tariff questions, including accounting and settlement rates, with a view toward standardizing telecommunications on a global basis. See id.
184 See id. at 284.
185 Id. at 285 (quoting In the Matter of Regulation of International Accounting Rates, 7 F.C.C.R. 8040 (1992) (Phase II Second Order and Second Further Notice)).
186 See id. at 285.
187 See Harwood, supra note 6, at 898.
188 See id. at 899.
aforementioned ECO test was used to determine which routes would be eligible for flexibility.\textsuperscript{189} Also, the FCC could, at its discretion, allow flexibility on routes where it would serve to promote market-oriented pricing as long as there was little risk of whipsawing.\textsuperscript{190}

Significantly more controversial than the Flexibility Order was the FCC's proposal in December 1996 to set specific targets for accounting rates.\textsuperscript{191} This notice announced the FCC's intention to revise its benchmark ranges for accounting rates to reflect cost reductions made possible by advances in the technology surrounding originating and terminating international voice calls.\textsuperscript{192} Further, the FCC suggested several tactics to ensure compliance with the benchmarks, including conditioning authorizations to provide U.S. international services on compliance with the benchmark rates.\textsuperscript{193}

Because many lesser-developed countries use the settlement payments received from U.S. carriers for much needed infrastructure development, any reform of the accounting rate regime was certain meet with resistance.\textsuperscript{194} The above-cost accounting rates represent a direct subsidy to the foreign carrier and, as such, provide a strong disincentive to reduce collection rates.\textsuperscript{195} In addition, advances in technology now allow circumvention of the settlement process such that the imbalance of calls has increased disproportionate to the actual traffic.

\textsuperscript{189} See id.
\textsuperscript{190} See id.
\textsuperscript{191} See id.
\textsuperscript{193} See Harwood, supra note 6, at 900. Other suggested ways the FCC proposed to enforce the benchmarks included the enlistment of the relevant foreign government for assistance and prohibiting U.S. carriers from settling with the foreign carrier at other than the benchmark rate until the foreign carrier agrees to cooperate in the negotiations. See id.
\textsuperscript{194} See id.
\textsuperscript{195} See Ahern, supra note 97, at 282. As long as the price for calling to the United States from those countries remains high, billed traffic will remain low and the disparity in calling volumes will continue, thus continuing the subsidy. See id.
imbalance. Not surprisingly, the FCC’s proposal launched an unprecedented wave of opposition from foreign administrations. Many questioned the FCC’s jurisdiction to unilaterally impose pricing rules on international services. More than ninety comments were filed in the proceeding, with both foreign carriers and their governments urging the FCC to take a multilateral approach by working with the International Telecommunications Union (ITU). However, the FCC was clearly frustrated with ITU efforts, which dated back more than five years and had failed to produce results. Although the ITU had grudgingly conceded to a need for settlement rates to decrease, there had been no agreement among members of the group on measures to achieve that goal.

Consequently, at its August 1997 meeting, the FCC adopted an order to enforce new, stringent benchmarks on the settlement rates U.S. carriers will pay for the termination of international calls. Although the FCC claimed it had modified its December proposal to reflect the numerous comments it had received, industry

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196 See id. at 291-92. The use of traffic routing schemes, e.g., call-back service and call reorigination, to avoid the international settlement process or to gain some other competitive advantage is an increasing problem in the international telecommunications market. See id.


198 See Harwood, supra note 6, at 900.

199 See FCC Puts Pin to International Settlement Bubble, supra note 82.

200 See id.

201 See id.

202 See FCC Sinks Teeth into U.S. Settlement Deficit, supra note 197. The benchmark settlement rate is set at 15 cents per minute for high-income countries, 19 cents per minute for middle-income countries, 23 cents per minute for lower-income countries. See id. The FCC based the benchmarks on foreign carriers’ publicly available tariff rates and information published by the ITU. See id. The order will take effect on January 1, 1998 with the benchmarks themselves commencing one year later and beginning with the high-income countries on January 1, 1999. See id. The phase-in continues in yearly increments with upper-middle-income countries on January 1, 2000, lower-middle-income countries on January 1, 2001, and low-income countries on January 1, 2002. See id. Countries with extremely low telecommunications service density would have to meet the relevant benchmark by the year 2003. See id.
analysts were doubtful that the changes were significant enough to prevent the numerous judicial appeals and trade actions likely to follow.203

Also, the FCC offered to refrain from applying the benchmarks in the new order if the ITU can coordinate an interconnection agreement before the first benchmarks go into effect on January 1, 1999.204 However, the FCC did not specify what ITU provisions would be required in order to supersede implementation of the benchmarks.205 In addition, many question whether the ITU could meet the 1999 deadline for a settlement reform plan.206

In spite of the widely-acknowledged slow pace of ITU action, critics restated their opposition to the FCC’s plan to set unilateral benchmarks.207 The FCC, for its part, presented estimates that use of benchmarks could result in savings to consumers of $1.86 billion in 1999 alone.208 Outgoing International Bureau Chief Peter Cowhey predicted those savings would grow to $4.23 billion in annual savings in the year 2003.209 According to Mr. Cowhey, the FCC’s goal is not to “‘micro-manage’” international settlement rates but rather to force those rates down until they become cost-oriented.210 From that point, “market dynamics should determine the [existence of] U.S. surplus or deficit on these payments.”211

Several FCC Commissioners pointed to the conclusion of the WTO Agreement as incentive to move quickly to reform the international settlement system.212 Since carriers from WTO member nations can use funds from inflated settlement payments to cross-subsidize their entry into the U.S. market, they would

203 See FCC Sinks Teeth into U.S. Settlement Deficit, supra note 197.
204 See id.
205 See id.
206 See id.
207 See id.
208 See id.
209 See FCC Puts Pin to International Settlement Bubble, supra note 82.
210 See id.
211 Id.
212 See id.
have a sizable cost advantage over U.S. carriers. That advantage would be funded primarily by U.S. international service ratepayers. The benchmark rates are intended to reduce the potential for such competitive distortions in the market.

As a concession to the comments it received from foreign governments and carriers, the FCC action will use cost averages as the basis for the benchmarks, thus allowing foreign carriers to continue to receive substantial returns from international operations despite falling rates. Also, the FCC will proceed with "extra care" in phasing in the benchmarks for countries with extremely low telecommunications service penetration (defined as less than one line per one hundred population).

Two benchmark-related conditions will be placed on some authorizations to operate in the United States as safeguards against competitive distortions. The first is designed to prevent a U.S. carrier who has a foreign affiliate from using the above benchmark rate revenues of its foreign affiliate to gain an unfair price advantage over other U.S. carriers. Those foreign affiliates will have to charge a settlement rate to all U.S. carriers at or below the acceptable benchmark for that route. In situations where the FCC detects competitive distortions in the U.S. markets, it will take enforcement action which could include mandating the payment of a settlement rate equal to the lowest commercially viable rate on a competitive international route.

The second safeguard addresses the provision of switched services using international private lines and is designed to prevent one-way bypass of the settlement system. The FCC will permit

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213 See id.
214 See id.
215 See id.
216 See id.
217 Id.
218 See id.
219 See id.
220 See id.
221 See id. Currently, the lowest commercially viable rate is eight cents per minute on the U.S.-Sweden route. See id.
222 See id.
a carrier to use its authorization to provide "switched services over international private lines only if at least half of the traffic on the route in question is being settled at rates that are at or below the relevant benchmark." Thus, foreign carriers will be precluded from sending calls into the United States through private lines in order to avoid the international accounting rate treatment while calls terminated in the foreign carrier's home market would continue to be subject to inflated settlement rates. Again, the FCC promises to take enforcement action in situations where competitive distortions occur, including suspending service authorization until at least half of the traffic on the route is settled at the lowest commercially viable rate.

Predictably, criticism of the plan has been widespread. It began, in fact, prior to the August adoption of the benchmark rates when ITU chief Pekka Tarjanne warned that unilateral FCC action on settlement rates would "move the global telecommunications industry toward catastrophe." The FCC's action appears to have succeeded, though, in pressuring the ITU to move forward with its own efforts toward setting similar restrictions. Following a September 1997 announcement by Mr. Tarjanne that the ITU's study group will produce a "historic" document on accounting rate reform by year-end, the ITU's Study Group 3 (SG-3) drafted a concrete proposal to cut international accounting rates at its meeting in Geneva on December 11, 1997.

The SG-3 proposal calls for a cut in rates by one Special Drawing Right (SDR) per minute by the end of 1998. While the

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223 Id.
224 See id.
225 See id.
227 See id.
229 See Schorr, supra note 228. The SDR fluctuates in value based on a weighted basket of currencies established by the International Monetary Fund. See id. The value of the SDR at the time of the SG-3 proposal was $1.35. See id.
The SG-3 proposal, if approved by a majority of the ITU-member countries, could take effect more rapidly than the U.S. policy adopted in August 1997. The first deadline for attaining the U.S. benchmarks, which is limited to certain developed countries, is January 1, 1999, while the SG-3 proposal calls for cuts by the end of 1998. Nevertheless, an FCC representative at the December meeting predicted that the SG-3 proposal would not be sufficient to meet the FCC's challenge to the ITU to enact a satisfactory settlement reform plan in order to derail implementation of the FCC benchmarks.\textsuperscript{232}

Other negative reaction to the FCC settlement order has included a promise by the European Commission to ask a WTO dispute resolution panel to review the action early next year if the FCC's order is not changed.\textsuperscript{233} The European Commission statement appeared against a backdrop of reported plans by foreign carriers to appeal the FCC's ruling to a U.S. appeals court.\textsuperscript{234} Also, it was reported in early September that Japanese-owned KDD would take legal action against the FCC challenging the FCC's authority to change the international rules governing settlement

\textsuperscript{230} See id.
\textsuperscript{231} See id.
\textsuperscript{232} See id.
\textsuperscript{233} See Bangemann: WTO Case Possible Against U.S., supra note 228.
\textsuperscript{234} See id.
The continuing power of the U.S. telecommunications marketplace will be a major determinant of the FCC’s success in both the implementation and enforcement of the benchmarks. A large portion of the revenue foreign carriers receive for terminating international calls comes from calls originating in the United States. Thus, foreign carriers are dependent on U.S. business and are unlikely to seriously challenge the FCC order in the short term. However, as the international long distance market becomes increasingly competitive, limits to the FCC’s enforcement ability may emerge. Relying on the success it has had with the uniform settlements policy since 1986, the FCC appears committed to press ahead with implementation, using its market power to leverage a reduction in accounting rates both bilaterally through the benchmark order and multilaterally via pressure on the ITU process.

C. Rules and Policies on Foreign Participation in the U.S. Telecommunications Market

The most significant FCC action following the signing of the WTO Agreement occurred on November 25, 1997 when the Commission adopted an Order in the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market (FCC 97-398). This action is the final step in implementing the market-opening commitments made by the United States under the WTO accord. FCC 97-398 allows significant increase in

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236 See Harwood, supra note 6, at 900.
237 See id.
238 See id.
239 See id.
240 See id.
competition in the U.S. telecommunications market by facilitating market entry and investment by foreign-owned companies.\textsuperscript{243} The FCC expects U.S. consumers to benefit from reduced prices, greater service options, and technological innovation.\textsuperscript{244}

Specifically, the FCC enacted changes to the ECO test and related rules adopted in the Foreign Carrier Entry proceeding (FCC 95-475).\textsuperscript{245} At the time of its adoption, the goals of the ECO test were to promote competition in the U.S. telecommunications market, to prevent anti-competitive conduct, and to encourage other countries to open their markets.\textsuperscript{246} FCC 97-398 delivered on the FCC’s promise to revisit the rules, if and when, a WTO agreement substantially achieving those goals was achieved.\textsuperscript{247}

While the FCC endorsed the WTO pact in principle, it attempted through FCC 97-398 to balance the dual objectives of opening the U.S. telecommunications market and thwarting attempts by either dominant foreign carriers or their U.S. affiliates to distort competition.\textsuperscript{248} Toward that end, included with the relaxation of the current rules that apply the ECO test for companies from WTO countries is a controversial provision retaining FCC authority to deny or condition foreign carrier entry if required by the public interest.\textsuperscript{249}

The FCC concluded in FCC 97-398 that it no longer needs to conduct a detailed ECO analysis involving applications under

\begin{footnotesize}
\begin{enumerate}
\item See FCC 97-398, supra note 241.
\item See id.
\item See id.
\item See IN 97-15, supra note 46.
\item See id.
\item See FCC 97-398, supra note 241; see also FCC Moves to Implement WTO Agreement, Proposes Easy Market Entry for Foreign Carriers, supra note 101.
\item See FCC 97-398, supra note 241; see also IN 97-15, supra note 46.
\end{enumerate}
\end{footnotesize}
section 214 filed by carriers from WTO member countries seeking to provide U.S. international service.\textsuperscript{250} The FCC’s conclusion was based on the premise that competition in the U.S. market will be best served by eliminating the burdensome analysis and replacing it with streamlined processing of the applications.\textsuperscript{251} Further, FCC 97-398 eliminated the ECO test as part of its section 310(b) public interest analysis of Title III applications for common carrier radio licenses filed by carriers with indirect foreign ownership from WTO countries.\textsuperscript{252} Finally, FCC 97-398 concluded that an ECO test is no longer necessary for authorization of all U.S. carriers to provide switched services over resold or facilities-based private lines between the United States and other WTO countries or for cable landing licenses for submarine cables between the United States and other WTO member countries.\textsuperscript{253}

However, if the granting of section 214, Title III common carrier, and cable landing license applications to WTO member countries is shown to pose a “very high risk to competition” in the U.S. telecommunications market and that risk can not be dealt with by the imposition of conditions on the authorization, FCC 97-398 would deny the application.\textsuperscript{254} Also, although the applications from WTO member countries will be assumed to serve the public interest, FCC 97-398 retained authority for the FCC to deny or condition such entry if required by the public interest.\textsuperscript{255} In contrast, the FCC did not believe that public interest objectives would be served by eliminating the existing ECO test for entities from countries that are not WTO members.\textsuperscript{256}

Since the ECO test is eliminated for section 214 purposes, the FCC also will eliminate the test as the basis for permitting U.S. carriers to negotiate alternative settlement arrangements with

\textsuperscript{250} See FCC 97-398, supra note 241.
\textsuperscript{251} See id.; IN 97-15, supra note 46.
\textsuperscript{252} See FCC 97-398, supra note 241.
\textsuperscript{253} See id.
\textsuperscript{254} Id.
\textsuperscript{255} See id.
\textsuperscript{256} See id. Most notably, China and Russia, as non-WTO members, will remain subject to the ECO standard. See Shetty, supra note 49.
carriers from WTO countries under its Flexibility Order.\textsuperscript{257} Instead, FCC 97-398 will replace the ECO test with a presumption in favor of permitting flexibility for carriers.\textsuperscript{258} To rebut any such application, there must be a showing that market conditions in the country in question are not sufficiently competitive to prevent discrimination against U.S. carriers by a dominant carrier in the foreign market.\textsuperscript{259} Again, in this area, FCC 97-398 continues the use of the ECO test as a threshold standard for permitting flexibility with carriers that are from non-WTO member countries.\textsuperscript{260}

The FCC safeguards applicable to foreign-affiliated carriers regulated as dominant on particular U.S. international routes were modified in several ways.\textsuperscript{261} The revisions were tailored to address competitive concerns but not to pose an undue burden on the foreign-affiliated carrier.\textsuperscript{262} The safeguards apply to dominant foreign-affiliated carriers depending on the risk of competitive harm the carrier poses.\textsuperscript{263} Where a U.S. carrier is affiliated with a foreign carrier who has market power in a destination country subject to competition from multiple international facilities-based competitors, basic dominant carrier regulations consisting of a minimal set of safeguards apply.\textsuperscript{264} Supplemental safeguards providing for greater oversight apply to foreign carriers with market power in a destination country that cannot meet this standard.\textsuperscript{265} These supplemental safeguards include compliance with stricter limits on joint marketing, including the sharing of foreign market telephone customer information and the steering of

\textsuperscript{257} See IN 97-15, supra note 46; see also FCC 97-398, supra note 241.
\textsuperscript{258} See FCC 97-398, supra note 241.
\textsuperscript{259} See id.
\textsuperscript{260} See id.
\textsuperscript{261} See id.; IN 97-15, supra note 46. U.S. carriers are classified as dominant carriers on an international route where they are affiliated with a foreign carrier that has market power in the destination country. See id.
\textsuperscript{262} See id.
\textsuperscript{263} See id.; FCC 97-398, supra note 241.
\textsuperscript{264} See id.; see also IN 97-15, supra note 46.
\textsuperscript{265} See FCC 97-398, supra note 241.
customers by the foreign carrier to the affiliated U.S. carrier. Requirements for prior approval to add circuits on an affiliated route and to require carriers to file quarterly circuit status reports also were adopted.

Reaction to FCC 97-398 began in June 1997, when publication of the much-awaited NPRM provoked significant public outcry along with numerous official comments from foreign carriers and governments. While the response was overwhelmingly positive to the proposed elimination of the ECO test in most applications made by WTO member countries, the controversy centered on the belief by some foreign carriers that the FCC’s application of a non-ECO public interest analysis was an attempt to preserve reciprocity standards. Foreign carrier protest focused on the U.S. insistence on retaining: a) its right to determine whether a foreign carriers market entry would pose a grave risk to competition in the United States; and b) the executive branch’s ability to consider concerns about national security, trade, and foreign policy issues in making a “public interest” evaluation of a foreign carrier application. Also, particular attention was given to the proposed link between the NPRM and the FCC’s separate proposal, and subsequent Order, on accounting rate benchmarks which was also criticized widely outside the United States.

Not surprisingly, since both the KDD and NTT applications were still suspended when the NPRM was released, Japan was quick to voice its concerns. The Japanese government noted the inclusion of trade concerns and the FCC’s continued right to deflect risks to competition as areas where the FCC would have too much latitude to arbitrarily exercise its power. KDD pointed

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266 See id; IN 97-15, supra note 46.
267 See FCC 97-398, supra note 241; see also IN 97-15, supra note 46.
268 See Foreign Carriers Want FCC’s ECO To Fade Away, supra note 134.
270 See FCC Moves To Implement WTO Agreement, Proposes Easy Market Entry for Foreign Carriers, supra note 101.
271 See supra notes 138-55 and accompanying text.
272 See Foreign Carriers, Governments Say FCC Falls Short On WTO
specifically to its pending application on which consideration was held up on the basis of trade policy concerns as an example of why it considered the NPRM's remaining restrictions particularly troubling.\textsuperscript{273} NTT recognized the NPRM's reservation of the right to restrict market entry based on national security and law enforcement concerns.\textsuperscript{274} However, it reiterated the concerns of both the government and KDD regarding restrictions based on foreign policy and trade matters.\textsuperscript{275}

Initial reaction from European-based carriers, while applauding the decision to drop the ECO test for most applications by WTO member nations, was also heavily critical of the remainder of the proposal. Deutsche Telekom AG accused the United States of adding new restrictions under the guise of public interest which would be in violation of both the WTO Agreement and the GATS.\textsuperscript{276} It challenged the United States to join with Germany and most European Union member countries to implement the WTO Agreement without reserving the right to regulate market entry of foreign carriers.\textsuperscript{277}

France Telecom S.A. responded by urging the United States not to attempt to "claw back" the commitments made under the WTO Agreement.\textsuperscript{278} It requested assurance from the FCC that the proposed public interest consideration would not become an evaluation method incompatible with the most-favored nation and national treatment principles of the Agreement.\textsuperscript{279}

Telefonica Internacional de Espana S.A. voiced its concern that the FCC will condition market entry on compliance with proposed international settlement rate benchmarks.\textsuperscript{280} Cable &

\textit{Commitments: U.S. Carriers Want Firmness}, supra note 269.

\textsuperscript{273} See id.

\textsuperscript{274} See id.

\textsuperscript{275} See id.

\textsuperscript{276} See id.

\textsuperscript{277} See id.

\textsuperscript{278} Id.

\textsuperscript{279} See id.

\textsuperscript{280} See id. Concern about the proposed link between authorizations for interconnected private line services to compliance with the proposed settlement rate benchmarks was also voiced outside the European Union, most notably from the Telecommunications Authority of Singapore. See id.
Wireless plc, based in Great Britain, concluded that the NPRM, if implemented, would make it impossible for foreign carriers to compete on a full scale in the United States.\textsuperscript{281} BT North America, Inc. charged the United States to adopt regulatory policies that assume participants will comply with the WTO Agreement.\textsuperscript{282} It suggested that a more effective approach would be to adopt meaningful sanctions against carriers displaying anti-competitive behavior once they are operating in the U.S. market.\textsuperscript{283}

By early August 1997, the European carriers' protest had reached the European Commission (EC) who issued a warning to the FCC that the NPRM risked violation of the WTO's principles governing market access.\textsuperscript{284} The EC's response focused on both the continued use of factors such as law enforcement, trade concerns, and foreign policy to determine whether a foreign carrier should be allowed entry into the U.S. market and also on the ability of the United States to refuse a license to applicants who pose a very high risk to competition.\textsuperscript{285} Further, the EC questioned the need for more stringent safeguards for those U.S. carriers affiliated with foreign dominant carriers.\textsuperscript{286}

Following the lead of foreign carriers from the European Union member states, the EC presented comments regarding the NPRM to the FCC, requesting the U.S. agency to reconsider the proposal.\textsuperscript{287} In its formal response, the EC reserved the right for the European Union and its member states to challenge the NPRM draft rules within the WTO dispute resolution framework.\textsuperscript{288}

Meanwhile, U.S. based carriers filed comments expressing their own concerns that the FCC had not done enough to protect their interests by guaranteeing that foreign markets would be open

\textsuperscript{281} See id.
\textsuperscript{282} See id.
\textsuperscript{283} See id.
\textsuperscript{284} See European Commission: FCC Breached WTO in Market-Entry Proposals, supra note 121.
\textsuperscript{285} See id.
\textsuperscript{286} See id.
\textsuperscript{287} See Smith, supra note 9.
\textsuperscript{288} See id.
AT&T voiced strong resistance to the NPRM’s abandonment of safeguards against anti-competitive conduct, noting that of the nearly seventy countries that signed the WTO Agreement, no more than twenty of their commitments would meet the ECO test when the Agreement took effect. MCI urged the FCC to maintain the link between market entry and compliance with proposed international settlement rate benchmarks. WorldCom, Inc. opposed the rebuttable presumption model for section 214 facilities and cable landing license applications. It cited the need for the FCC to retain discretion to respond in situations where the foreign carrier’s home country has no real market liberalization. Frontier Corp echoed these sentiments.

Speaking on behalf of the local exchange carriers (LECs), the U.S. Telephone Association stated that the easing of conditions for foreign carrier market entry should result in the LECs also being allowed to enter all domestic U.S. telecommunications markets. BellSouth agreed, saying that “[i]t would be irrational for the Commission to adopt a formal presumption in favor of foreign entry . . . while continuing to deny the Bell companies a chance to enter the domestic interexchange market, even when they show their local markets are in fact open.” U.S. West, Inc. suggested the FCC should continue to use the ECO test until the January 1, 1998 effective date of the WTO Agreement in order to encourage foreign governments to open their markets. Ameritech proposed

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289 See Foreign Carriers Want FCC’s ECO to Fade Away, supra note 134.
290 See Foreign Carriers, Governments Say FCC Falls Short On WTO Commitments; U.S. Carriers Want Firmness, supra note 269.
291 See id. MCI further proposed that the authorization for market entry be conditioned on achievement of settlement rates at the low end of the proposed benchmark range. See id.
292 See id.
293 See id.
294 See id.
296 See Foreign Carriers, Governments Say FCC Falls Short On WTO Commitments; U.S. Carriers Want Firmness, supra note 269.
a replacement of the ECO test with a review of whether the home countries of foreign competitors who apply for entry to U.S. markets have allowed multiple-carrier entry into their own domestic markets.\textsuperscript{297}

GTE Corporation was alone in voicing concerns similar to those of the foreign carriers. It agreed with the FCC that care should be taken to prevent competitive distortions by foreign carriers.\textsuperscript{298} However, it urged the FCC to strike an appropriate balance between U.S. market protection and the opening of foreign markets, citing the risk that overzealous U.S. protection would result in countermeasures by foreign countries.\textsuperscript{299}

Reflecting somewhat different concerns, U.S. wireless carriers urged the FCC to allow increased foreign investment as quickly as possible.\textsuperscript{300} NextWave Personal Communications, Inc. urged the FCC to begin implementation of its commitment under the WTO Agreement to eliminate restrictions on indirect investment in wireless licensees.\textsuperscript{301} Other endorsements of relaxing the application of section 310's foreign ownership restrictions came from FaciliCom International LLC, WinStar Communications, Inc., Shell Offshore Services Co., and Telephone and Data Systems, Inc.\textsuperscript{302}

U.S. government agencies gave mixed responses in their comments to the NPRM. The Office of the USTR supported the FCC's right to analyze the effect market entry will have on competition—regarding both U.S. telecommunications carriers under existing telecommunications regulation and foreign entrants under the newly proposed rules.\textsuperscript{303}

Comments from two other executive agencies reflected concern about the rebuttable presumption framework.\textsuperscript{304} The

\textsuperscript{297} See id.
\textsuperscript{298} See id.
\textsuperscript{299} See id.
\textsuperscript{300} See Foreign Carriers Want FCC's ECO to Fade Away, supra note 134.
\textsuperscript{301} See id.
\textsuperscript{302} See id.
\textsuperscript{303} See Foreign Carriers, Governments Say FCC Falls Short On WTO Commitments; U.S. Carriers Want Firmness, supra note 269.
\textsuperscript{304} See id.
Secretary of Defense stated that a presumption that market entry is in the public interest should not apply to national security issues, adding that such issues should be "affirmatively resolved before an application from a foreign-affiliated carrier is granted." Similarly, the Federal Bureau of Investigation stated that the FCC must defer to determinations made by executive branch agencies regarding national security or law enforcement issues.

By the close of the official comment period, the FCC had received comments from forty-seven parties, including fourteen foreign telecommunications carriers. Most of the negative response to the NPRM stemmed from the public interest hurdle that must be overcome before authorization to enter the U.S. market is granted. As noted in the discussion of the NTT and KDD applications, this position clearly leaves the United States with an effective tool to exert implied bilateral pressure through the aggressive scrutiny of applications that present a risk of anticompetitive conduct.

Although FCC 97-398 acknowledged the comments received, it did not back away from the public interest analysis. Throughout the WTO negotiations, the FCC maintained the position that the United States has the right under WTO rules to protect its national interests, including the promotion of competition and national security. The NPRM went a step further in asserting that the WTO accord obligates the FCC to


306 See id.

307 See FCC 97-398, supra note 241.


309 See supra notes 138-55 and accompanying text.

310 See Harwood, supra note 6, at 902.


312 See FCC Moves to Implement WTO Agreement, Proposes Easy Market Entry for Foreign Carriers, supra note 101.
“maintain measures to prevent anticompetitive conduct.” In announcing FCC 97-398 in November 1997, the newly-installed Commission vigorously defended the safeguards by stating that the public interest analysis for both foreign and domestic service providers is mandated by the Communications Act of 1934. Thus, failure to apply the public interest standard to foreign carriers would have the effect of granting them more favorable treatment than U.S. carriers receive.

However, the Commissioners repeatedly emphasized that the public interest test will be invoked very rarely to deny or condition applications for entry into the U.S. market by carriers from WTO member countries. In addition, the Commissioners attempted to assure foreign governments and, in particular, the EC, that the FCC will retain its independence from the Executive Branch. Many industry observers seemed willing to take the FCC at its word, deferring judgment on the new rules pending the outcome of their implementation. Whether the FCC’s assurances will be sufficient to dissuade the EC from proceeding with its threatened action at the WTO remains to be seen. EC officials held open the option that they may still seek action while they scrutinized the FCC’s order to determine whether all their concerns have been satisfactorily addressed. The final impediment to implementation of FCC 97-398 concerned its interrelationship with the WTO Agreement. Because the January 1, 1998 date for the WTO Agreement to enter

313 FCC 97-195, supra note 242.
315 See id.
316 See id. FCC officials characterized the public interest test as a narrow one aimed at specific law enforcement, national security or foreign or trade policy concerns. See FCC Opens U.S. Telecom and Satellite Markets to Foreign Competition, COMM. DAILY, Nov. 26, 1997, available in 1997 WL 13781003.
317 See FCC Opens U.S. Telecom and Satellite Markets to Foreign Competition, supra note 316.
318 See id.
319 See id.
320 See id.
into force had been delayed pending resolution of the outstanding ratifications of a handful of signatories, there was also some question as to when FCC 97-398 would take effect. The FCC would not formally commit to implement its new rules prior to official commencement of the WTO accord. However, shortly after the official declaration of the February 5, 1998 implementation date for the WTO Agreement, the FCC released an order confirming that its rules would go into effect February 9, 1998. Ironically, since the United States had held up implementation of the entire WTO Agreement in order to force some countries to meet the ratification deadline, this left one business day when the WTO pact was in effect without official U.S. compliance. More significantly, the implementation of FCC 97-398 with the public interest safeguards intact marks the preservation by the United States of an important resource in its foreign trade arsenal.

IV. Conclusion

As implementation of the WTO Agreement commences, the United States continues to reiterate its support for the Agreement’s goals of increased competition and independent regulation. Although the FCC recently saw a turnover of all but one of its Commissioners, the new members unanimously adopted FCC 97-398, indicating continued support for the open-market principles of the previous Commission. The FCC’s new chief of its International Bureau, Regina Keeney, assumed office with a pledge that “her staff is ready to throw open the doors to the U.S.

322 See supra notes 59-65 and accompanying text.
323 See supra notes 59-65 and accompanying text.
324 See supra notes 59-65 and accompanying text.
325 See With 57 Countries On Board, WTO Picks Feb. 5 Telecom Pact Start Date, supra note 64.
326 See supra notes 59-65 and accompanying text.
327 See With 57 Countries On Board, WTO Sets Feb. 5 Telecom Pact Start Date, supra note 64. In a further ironic twist, the Commission explained the February 9 date by pointing to domestic intergovernmental approvals required. See id. The orders, adopted in late November 1997, had to first undergo congressional review mandated by the Contract with America Advancement Act prior to enactment. See id. Also, the new rules had to be approved by the Office of Management and Budget. See id.
telecom market under the historic WTO agreement."

Although the change in FCC leadership and the global outcry surrounding U.S. actions in recent months could impact the U.S. implementation strategy, there are no strong indications to that effect. The methodology adopted by the United States, as exemplified by the three recent FCC actions analyzed in this Comment, appears to be successful, albeit unpopular internationally. The use of bilateral pressure through the retained public interest hurdle of FCC 97-398 will likely be effective on a prospective basis in exacting compliance with the pro-competitive goals of the WTO Agreement. In addition, the ability of the United States to condition licensing approvals on adherence to its recently published benchmark settlement rates will provide perhaps an even stronger bilateral weapon in the market liberalization arsenal. And, as long as these weapons are being used to foster the goals set forth by the Agreement—increased competition and independent regulation—they are not likely to face real resistance either bilaterally or though a WTO panel.

Because the United States currently dominates the global telecommunications market, it can use its market power as effectively under the WTO Agreement as it has in recent months on a bilateral basis. However, as more foreign carriers enter the global market, the U.S. power to exert control will necessarily diminish and the real test of U.S. commitment to market liberalization will occur. Meanwhile, as applications pour into the FCC in response to the implementation of the WTO Agreement, the goal of a Global Information Infrastructure no longer seems light years away.

PAULA BARNES SOURS

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