

Dated: December 15, 1995.

John E. Veentjer,

Captain U.S. Coast Guard, Captain of the Port, Philadelphia, PA.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 63

[IB Docket No. 95-22, FCC 95-475]

Market Entry and Regulation of Foreign-affiliated Entities

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Report and Order contains information collections subject to the Paperwork Reduction Act of 1995 (PRA). It has been submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA, OMB, the general public, and other Federal agencies are invited to comment on the information collections contained in this proceeding.

On November 28, 1995, the Federal Communications Commission adopted a Report and Order in response to a Notice of Proposed Rulemaking which the Commission adopted on February 7, 1995, that establishes a market entry standard for foreign carriers seeking to provide basic international telecommunications services under section 214 of the Communications Act of 1934, as amended ("the Act"). The Report and Order also establishes a standard by which the Commission will review whether it is in the public interest to permit foreign investment in licensees of common carrier radio facilities in excess of the benchmarks contained in section 310(b)(4) of the Act. The Report and Order was adopted. The Report and Order makes additional changes to the Commission's regulations of international common carriers.

In reviewing applicants for international section 214 authority filed by a foreign carrier or its U.S. affiliate (collectively "foreign carrier"), the Commission will examine, as an important part of its public interest analysis, whether competitive opportunities exist for U.S. carriers in destination markets in which the foreign carrier has market power. The Commission will apply a similar analysis in reviewing indirect foreign investment in licensees of common carrier radio facilities under section 310(b)(4), but it will limit its review to the "home market" of the foreign

investor. In addition to considering effective competitive opportunities, the Commission will examine additional public interest factors that might weigh in favor of, or against, approving the foreign carrier's international section 214 application, or permitting the indirect foreign investment in a common carrier radio licensee to exceed the section 310(b)(4) benchmark.

In taking this action, the Commission's primary goal is to advance the public interest by promoting effective competition in the U.S. telecommunications services market, particularly the market for international services. The action also reaffirms the Commission's goals to prevent anticompetitive conduct in the provisions of international services or facilities, and to encourage foreign governments to open their communications markets.

EFFECTIVE DATE: The rules adopted in this Report and Order will become effective January 29, 1996. However, if OMB has not approved the information collections contained in these rules by this date, the Commission will publish a document to delay the effective date of these rules.

Written comments by the public on the information collections are due January 10, 1996.

ADDRESSES: Submit all comments concerning the Paperwork Reduction Act to Dorothy Conway, Federal Communications Commission, Room 234, 1919 M Street, NW., Washington, DC 20554, or via the Internet to dconway@fcc.gov, and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725-17th Street, NW., Washington, DC 20503 or via the Internet to fain-t@al.eop.gov.

FOR FURTHER INFORMATION CONTACT: For additional information concerning the information collections contained in this Report and Order contact Dorothy Conway at 202-418-0217, or via the Internet as dconway@fcc.gov.

For further information on the Report and Order contact: Susan O'Connell, Attorney, International Bureau, (202) 418-1484, Ken Schagrin, Attorney, International Bureau, (202) 418-1407, or Robert McDonald, Attorney, International Bureau, (202) 418-1467.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order adopted on November 28, 1995, and released November 30, 1995 (FCC 95-475). The full text of this Report and Order is available for inspection and copying during normal hours in the FCC Reference Center (Room 239), 1919 M St., NW., Washington, DC. The complete text also may be purchased from the

Commission's Copy contractor, International Transcription Service, Inc., (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037

Paperwork Reduction Act

The Commission, as 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 collections contained in this Report and Order. Comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

This Report and Order contains information collection requirements. Written comments by the public on the information collections are due January 10, 1996. Written comments must be submitted by OMB on the information collections on or before January 15, 1996.

OMB Approval Number: New Collection.

Title: Market Entry and Regulation of Foreign-affiliated Carriers.

Type of Review: New collection.

Respondents: Business or other for-profit.

Number of Respondents: 431 per year.
Estimated Time Per Response: 9.5 hours.

Total Annual Burden: 4127 hours.

Needs and Uses: The collections of information for which approval is here sought are contained in amendments to part 63 and in the Report and Order adopting such amendments. These information collections are authorized and necessary for the Commission to carry out its statutory mandate, pursuant to sections 4, 214, 219, 303(r) and 403 of the Communications Act, 47 U.S.C. 154, 214, 219, 303(r) and 403.

The information collections contained in amendments to §§ 63.01 (r) and (s) and 63.11 and 63.17(b)(4) of the Commission's rules are necessary to determine whether, and under what conditions, the public interest, convenience, and necessity will be served by authorizing particular foreign carriers, or their U.S. affiliates, to provide international common carrier services between the United States and countries where these foreign carriers have market power, *i.e.*, the ability to

discriminate against unaffiliated U.S. carriers through control of "bottleneck services or facilities" on the foreign end of a U.S. international route.

"Bottleneck services or facilities" are those that are necessary to terminate U.S. international traffic.

Second, the information collections contained in amendments to § 63.10 of the Commission's rules are necessary for the Commission to maintain effective oversight of U.S. carriers that are affiliated with, or involved in certain co-marketing or similar arrangements with, foreign carriers that have market power.

Third, the information collections contained in amendments to § 63.01(k) of the Commission's rules are necessary to protect the U.S. public interest in cost-based international telecommunications services.

Fourth, the information collections under section 310(b)(4) of the Act are necessary to determine, under that section, whether a greater than 25 percent indirect foreign ownership interest in a U.S. common carrier radio licensee would be inconsistent with the public interest.

The Order adopts a requirement that section 214 applicants amend their pending applications to the extent they are inconsistent with the new rules. Applications pending as of the effective date of the new rules must be amended within thirty days of the effective date of the new rules. This information will be used to process pending applications under the Commission's public interest standard enunciated in the Order.

The information will be used by the Commission staff in carrying out its duties under the Communications Act. Common carrier applicants providing or seeking to provide international service under part 63 of the Commission's rules must comply with our rules.

Summary of Report and Order

In response to the Notice of Proposed Rulemaking (60 FR 11644 (March 2, 1995)), the Commission adopted a decision to further the goal of promoting effective competition in the U.S. telecommunications market, particularly the market for international services. In order to promote effective competition in this market, the Commission's new rules are designed to prevent anticompetitive conduct in the provision of international services or facilities, and to encourage foreign governments to open their communications markets.

With this Report and Order, the Commission adopts standards for regulating the entry of foreign carriers into the United States market for international telecommunications

services. This Report and Order explicitly sets forth the entry criteria necessary to promote effective competition in the U.S. market for these services, including global, seamless network services. As an important part of the Commission's overall public interest analysis under Section 214 of the Communications Act, it will examine 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 either directly or through an affiliation with a new or existing U.S. carrier.

Similarly, in deciding whether it is in the public interest to permit indirect foreign investment in licensees of common carrier wireless facilities in excess of the benchmarks contained in section 310(b)(4) of the Act, the Commission will examine whether foreign markets offer effective competitive opportunities to U.S. entities. This approach is fully consistent not only with the Commission's existing jurisdiction under section 310, but also with telecommunications bills currently pending in Congress which would specifically incorporate an effective competitive opportunities analysis as part of a section 310(b)(4) determination.

The New Entry Standard

The Commission's effective competitive opportunities analysis under section 214 of the Act will focus first on whether U.S. carriers have the legal right to provide international basic services in the destination markets where the foreign applicant has market power. If there are no legal barriers to entry, the Commission also will consider the practical ability for U.S. carriers to compete in those markets. The Commission considers several factors essential to viable competition. These factors include: First, whether there are reasonable and nondiscriminatory terms and conditions for interconnection to a foreign carrier's facilities; second, whether there are competitive safeguards to protect against anticompetitive conduct; and third, whether there is an effective regulatory framework to implement and enforce these conditions and safeguards. The Commission will apply the effective competitive opportunities analysis to foreign carriers seeking to provide facilities-based or resale service in the United States. The public interest analysis under section 214 also will continue to consider additional public interest factors, including the general significance of the proposed entry to the

promotion of competition in the U.S. communications services market, the presence of cost-based accounting rates, as well as national security, law enforcement issues, foreign policy, or trade concerns raised by the Executive Branch.

The analysis under section 310 is similar to that under section 214, but with some important distinctions. Most notably, the Commission's determination will focus on the foreign investor's "home market", and will be applied to the specific service in which the foreign entity seeks to invest in the United States, e.g., cellular service. If the services in the U.S. and home markets are not precisely matched, the Commission will use the most closely substitutable wireless service in the home market, as determined from the consumer's perspective. The Commission also will examine additional public interest factors that might weigh in favor of, or against, allowing a foreign investor to exceed the 25 percent benchmark contained in section 310(b)(4). In determining a foreign investor's "home market", the Commission will identify (1) the country of its incorporation, organization, or charter; (2) the nationality of all investment principals, officers, and directors; (3) the country in which its world headquarters is located; (4) the country in which the majority of its tangible property, including production, transmission, billing, information, and control facilities, is located; and (5) the country from which it derives the greatest sales and revenues from its operations. If all five of these factors indicate that the same country should be considered to be the entity's home market, it will be presumed to be so, subject only to rebuttal based on clear and convincing evidence to the contrary. If these five factors yield inconsistent results, however, the Commission will balance them, as well as any other information that is particularly relevant to the case, to determine the appropriate home market under the totality of the circumstances.

Affiliation

For purposes of implementing this entry standard, the Commission adopts a new definition of "affiliation". It now defines affiliation as an ownership interest of greater than 25 percent, or a controlling interest at any level, in a U.S. carrier by a foreign carrier. The Commission also will apply its effective competitive opportunities analysis to foreign carrier investments of 25 percent or less if the investment presents a significant potential impact on competition in the U.S. market for

international telecommunications services. In addition, the Commission will aggregate investments of two or more foreign carriers where they are likely to act in concert and the combined interests either exceed 25 percent or constitute a controlling interest.

This definition of affiliation will apply both for purposes of determining when to apply the effective competitive opportunities analysis and of determining the regulatory status of all affiliated carriers, including U.S.-based carriers that have a greater than 25 percent investment, or a controlling interest, in a foreign carrier. The Commission also is adopting a prior notification and approval requirement to determine whether a particular investment in a U.S. carrier by a foreign carrier constitutes an affiliation with that foreign carrier, and to determine whether the investment serves the public interest, convenience and necessity. A U.S. international carrier is required to notify the Commission 60 days prior to acquisition by a foreign carrier of a 10 percent or greater interest in that U.S. carrier.

Amendment of Pending Applications

The Report and Order adopts a requirement that section 214 applicants amend their pending applications to the extent they are inconsistent with the new rules. The Report and Order requires that applications pending as of the effective date of the new rules be amended within thirty days of the effective date of the new rules.

Dominant Carrier and Other Operating Safeguards

This Report and Order also modifies the safeguards that apply to foreign-affiliated carriers regulated as dominant under § 63.10 of the Commission's rules, 47 CFR 63.10, as amended in the Report and Order. The modified dominant carrier safeguards also will apply to U.S. carriers on particular routes where they are engaged in a co-marketing or other arrangement with a dominant foreign carrier, and such arrangement presents a substantial risk of anticompetitive effects in the U.S. market for international telecommunications services.

The Commission has modified these safeguards to reduce regulatory burdens while maintaining effective oversight over foreign-affiliated or allied carriers. It allows dominant, foreign-affiliated or allied carriers to file tariffs on 14 days notice instead of the previous 45 days and relieves those carriers of the burden of filing cost support information. It also requires that a dominant, foreign-

affiliated or allied carrier maintain complete records of the provisioning and maintenance of service and facilities it procures from its foreign carrier affiliate or ally. The Order maintains the existing requirement that a dominant foreign-affiliated carrier (and, under the new rules, a dominant, allied carrier) receive specific section 214 authorization before adding or removing circuits on routes where it is regulated as dominant, and file quarterly traffic and revenue reports.

The Order also conforms the Commission's "no special concessions" prohibition and "no exclusive arrangements" condition that have regularly been placed in section 214 authorizations and applies a "no special concessions" prohibition to all U.S. international carriers. This means that no U.S. carrier is allowed to accept a special concession directly or indirectly from any foreign carrier with respect to traffic or revenue flows between the United States and any foreign country for which the U.S. carrier is authorized to provide service.

Additional Matters

The Order additionally adopts new rules relating to the provision of international switched basic service via facilities-based and resold private lines. These rules apply to all U.S. carriers, both those that are affiliated and unaffiliated with a foreign carrier. And, it adopts a modified definition of a U.S. international facilities-based carrier.

Final Regulatory Flexibility Act Analysis

Pursuant to section 603 of Title 5, United States Code, 5 U.S.C. 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rulemaking in CC Docket No. 95-22. Written comments on the proposals in the Notice, including the Regulatory Flexibility Analysis, were requested.

A. Need and Purpose of this Action

This rulemaking proceeding establishes an effective competitive opportunities analysis as an important public interest factor in the Commission's overall public interest analysis of applications filed by foreign carriers to enter the U.S. international telecommunications market pursuant to section 214 of the Communications Act. It also adopts a similar analysis for determining whether the public interest would be disserved by permitting indirect foreign investment in common carrier licensees in excess of the benchmarks contained in section 310(b)(4) of the Act. In addition, this proceeding modifies existing rules and

policies relating to the definition of a U.S. international facilities-based carrier, the regulation of certain dominant carriers in the provision of international service, and other rules governing the provision of switched services over international private lines.

B. Issues Raised by the Public Comments in Response to the Regulatory Flexibility Analysis

There were no comments submitted in response to the Regulatory Flexibility Analysis. The Notice of Proposed Rulemaking offered a number of alternatives for each issue raised. The Commission responded to commenters' concerns and significantly altered the proposed market entry standard. The new approach under section 214 is designed to focus on foreign carrier entry that poses a substantial risk of anticompetitive effects in the provision of international services. In addition, the Commission is adopting a standard that is clear and administratively feasible.

C. Significant Alternatives Considered

The Commission has attempted to balance all the commenters' concerns with our public interest mandate under the Act in order to adopt a clear and administratively feasible approach to market entry by foreign carriers. Instead of examining whether effective competitive opportunities exist for U.S. carriers in every primary market where a foreign carrier operates, regardless of whether the foreign carrier seeks to serve such market, the Commission will focus its analysis under section 214 only on destination countries where the foreign carrier holds market power. Our route-by-route approach reduces the regulatory burden on all U.S. carriers seeking an affiliation with a foreign carrier. The Commission has not adopted the suggestion of some parties to exempt small U.S. carriers from the market entry rules. Whether a dominant foreign carrier makes a significant investment in a small U.S. carrier or a large one, there is a substantial risk of anticompetitive effects. Therefore, the Commission declines to exempt small U.S. carriers from these rules.

The Commission proposed to modify its standard for determining when a U.S. carrier is affiliated with a foreign carrier for purposes of both the market entry analysis and post-entry regulation. The Commission considered investment levels ranging from greater than ten percent to controlling interests at any level. It also considered adopting an affiliation standard based on: The dollar amount of the investment; the percentage of the investment; or the

amount of traffic carried by the U.S. carrier in correspondence with the foreign carrier. The Commission additionally considered adopting a reciprocal affiliation standard. Based on the record, the Commission has modified its definition of affiliation and will now consider affiliated any U.S. carrier with either: (1) A greater than 25 percent interest (or a controlling interest at any level) held by a foreign carrier; or (2) a greater than 25 percent interest in, or control of, a foreign carrier.

The Commission will apply its effective competitive opportunities analysis to the first category of affiliated U.S. carriers on routes where the affiliated foreign carrier has market powers in the destination country. It will apply its dominant carrier safeguards to all affiliated U.S. carriers on routes where the affiliated foreign carrier has market power. These safeguards will also now apply to U.S. carriers on routes for which they have formed a non-exclusive co-marketing arrangement or other joint venture with a dominant foreign carrier, where such arrangements present a substantial risk of anticompetitive effects.

The Commission has eliminated the requirement that dominant, foreign-affiliated carriers file cost support with their tariffs. This will reduce burdensome filing requirements. The Commission also adopts its proposed 14-day notice period (currently 45 days) for the filing of international service tariffs by dominant, foreign-affiliated carriers. The Commission adopts a new recordkeeping requirement that a dominant, foreign-affiliated carrier maintain complete records of the provisioning and maintenance of network facilities and services it procures from its foreign affiliate or ally. The Commission found that although this requirement is a minor burden, its benefit in preventing anticompetitive conduct outweighs such a burden. The Commission adopts new rules related to the provision of switched services using international private lines. These rules will enhance opportunities for U.S. carriers to serve U.S. consumers more efficiently. The Commission also adopts a definition of "U.S. international facilities-based carrier" that may facilitate the ability of smaller U.S. carriers to obtain operating agreements.

Ordering clauses

Accordingly, it is ordered that the policies, rules, and requirements adopted herein, except those needing OMB approval, will become effective January 29, 1996.

Matters subject to OMB approval, pursuant to the Paperwork Reduction

Act of 1995, Public Law 104-13, will become effective upon such approval.

This action is taken pursuant to sections 4, 214, 219, 303(r) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 214, 219, 303(r) and 403.

It is further ordered That this proceeding is hereby terminated.

List of Subjects in 47 CFR Part 63

Communications common carriers, Reporting and recordkeeping requirements, Telegraph, Telephone.

Federal Communications Commission, LaVera Marshall, Acting Secretary.

Final Rules

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

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

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

Authority: Secs. 1, 4(i), 4(j), 201-205, 218, and 403 of the Communications Act of 1934, as amended, and sec. 613 of the Cable Communications Policy Act of 1984, 47 U.S.C. secs. 151, 154(i), 15(j), 201-205, 218, 403, and 533 unless otherwise noted.

2. Section 63.01 is amended by revising paragraphs (k)(5) and (r), redesignating paragraph (k)(6) as paragraph (k)(7), and adding new paragraphs (k)(6), (s) and Notes 1 through 4 to paragraph (r) to read as follows:

§ 63.01 Contents of applications.

* * * * *

(k) * * *

(5) The procedures set forth in this section are subject to Commission policies on resale of international private lines in CC Docket No. 90-337 as amended in IB Docket No. 95-22. If proposed facilities are to be acquired through the resale of private lines for the purpose of providing international switched basic services, applicant shall demonstrate for each country to which it seeks to provide such services that the country affords resale opportunities equivalent to those available under U.S. law. In this regard, applicant shall:

(i) State whether the Commission has previously determined that equivalent resale opportunities exist between the United States and the subject country; or

(ii) Include other evidence demonstrating that equivalent resale opportunities exist between the United States and the subject country, including any relevant bilateral agreements between the administrations involved. Parties must demonstrate that the foreign country at the other end of the private line provides U.S. carriers with:

(A) The legal right to resell international private lines, interconnected at both ends, for the provision of switched services;

(B) Nondiscriminatory charges, terms and conditions for interconnection to foreign domestic carrier facilities for termination and origination of international services, with adequate means of enforcement;

(C) Competitive safeguards to protect against anticompetitive and discriminatory practices affecting private line resale; and

(D) Fair and transparent regulatory procedures, including separation between the regulator and operator of international facilities-based services.

(6) Except as otherwise provided in this paragraph, any carrier authorized under this part to acquire and operate international private line facilities other than through resale shall, for each country for which it seeks to provide switched basic service over its authorized private lines facilities, request such authority by formal application. Such application shall be accompanied by a demonstration that that country affords resale opportunities equivalent to those available under U.S. law. In this regard, applicant shall include the information required by paragraph (k)(5) of this section.

(i) No formal application is required under this paragraph in circumstances where the carrier's previously authorized private line facility is interconnected to the public switched network only on one end—either the U.S. or the foreign end—and where the carrier is not operating the facility in correspondence with a carrier that directly or indirectly owns the private line facility in the foreign country at the other end of the private line.

* * * * *

(r) A certification as to whether or not the applicant is, or has an affiliation with, a foreign carrier.

(1) The certification shall state with specificity each foreign country in which the applicant is, or has an affiliation with, a foreign carrier. For purposes of this certification:

(i) Affiliation is defined to include;

(A) A greater than 25% ownership of capital stock, or controlling interest at

any level, by the applicant, or by any entity that directly or indirectly controls or is controlled by it, or that is under direct or indirect common control with it, in a foreign carrier or in any entity that directly or indirectly controls a foreign carrier; or

(B) 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; or by two or more foreign carriers investing in the applicant in the same manner in circumstances where the foreign carriers are parties to, or the beneficiaries of, a contractual relation (e.g., a joint venture or market alliance) affecting the provision or marketing of basic international telecommunications services in the United States. A U.S. carrier also will be considered to be affiliated with a foreign carrier where the foreign carrier controls, is controlled by, or is under common control with a second foreign carrier already found to be affiliated with that U.S. carrier under this section.

(ii) Foreign carrier is defined as any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country within the meaning of the International Telecommunication Regulations, see Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, 1988 (WATTC-88), Art 1.

(2) In support of the required certification, each applicant shall also provide the name, address, citizenship and principal businesses of its 10 percent or greater direct and indirect shareholders or other equity holders and identify any interlocking directorates.

(3) Each applicant that proposes to acquire facilities through the resale of the international switched or private line services of another U.S. carrier shall additionally certify as to whether or not the applicant has an affiliation with the U.S. carrier(s) whose facilities-based service(s) the applicant proposes to resell (either directly or indirectly through the resale of another reseller's service). For purposes of this paragraph, affiliation is defined as in paragraph (r)(1)(i) of this section, except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(4) Each applicant that certifies under this section that it has an affiliation with a foreign carrier and that proposes to acquire facilities through the resale of

the international private line services of another U.S. carrier shall additionally certify as to whether or not the affiliated foreign carrier owns or controls telecommunications facilities in the particular country(ies) to which the applicant proposes to provide service (i.e., the destination country(ies)). For purposes of this paragraph, telecommunication facilities are defined as the underlying telecommunications transport means, including intercity and local access facilities, used by a foreign carrier to provide international telecommunications services offered to the public.

(5) Each applicant and carrier authorized to provide international communications service under this part is responsible for the continuing accuracy of the certifications required by paragraphs (r)(3) and (4) of this section. Whenever the substance of any such certification is no longer accurate, the applicant/carrier shall as promptly as possible and in any event within 30 days file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided. This information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

(6) Each applicant that certifies that it is, or that it has an affiliation, a foreign carrier, as defined in paragraphs (r)(1)(i)(B) and (r)(1)(ii) of this section, in a named foreign country and that desires to operate as a U.S. facilities-based international carrier to that country from the United States shall provide information in its application filed under this part to demonstrate that either:

(i) The named foreign country (i.e., the destination foreign country) provides effective competitive opportunities to U.S. carriers to compete in that country's international facilities-based market; or

(ii) Its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the destination country.

(A) The demonstration specified by paragraph (r)(6)(i) of this section should address the following factors:

(1) The legal, or *de jure*, ability of U.S. carriers to enter the foreign market and provide facilities-based international services, in particular, international message telephone service (IMTS);

(2) Whether there exist reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities for

termination and origination of international services;

(3) Whether competitive safeguards exist in the foreign country to protect against anticompetitive practices, including safeguards such as:

(i) Existence of cost-allocation rules in the foreign country to prevent cross-subsidization;

(ii) Timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities;

(iii) Protection of carrier and customer proprietary information; and

(4) Whether there is an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other safeguards; and

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

(B) The demonstration specified in paragraph (r)(6)(ii) of this section should include the same information requested by paragraph (r)(8) of this section.

(7) Each applicant that certifies that it is, or that it has an affiliation with, a foreign carrier, as defined in paragraphs (r)(1)(i)(B) and (r)(1)(ii) of this section, in a named foreign country and that desires to resell the international switched or non-interconnected private line services, respectively, of another U.S. carrier for the purpose of providing international communications services to the named foreign country from the United States shall provide information in its application filed under this part to demonstrate that either:

(i) The named foreign country (i.e., the destination foreign country) provides effective competitive opportunities to U.S. carriers to resell international switched or noninterconnect private line services, respectively; or

(ii) Its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the destination country.

(A) The demonstration specified by paragraph (r)(7)(i) of this section should address the following factors:

(1) The legal, or *de jure*, ability of U.S. carriers to enter the foreign market and provide resold international switched services (for switched resale applications) or non-interconnected private line services (for non-interconnected private line resale applications);

(2) Whether there exist reasonable and nondiscriminatory charges, terms and conditions for the provision of the relevant resale service;

(3) Whether competitive safeguards exist in the foreign country to protect against anticompetitive practices, including safeguards such as:

(i) Existence of cost-allocation rules in the foreign country to prevent cross-subsidization;

(ii) Timely and nondiscriminatory disclosure of technical information needed to use, or interconnect with, carriers' facilities;

(iii) Protection of carrier and customer proprietary information; and

(4) Whether there is an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other safeguards; and

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

(B) The demonstration specified in paragraph (r)(7)(ii) of this section should include the same information requested by paragraph (r)(8) of this section.

(8) Each applicant that certifies that it has an affiliation with a foreign carrier in a named foreign country and that desires to be regulated as non-dominant for the provision of international communications service to that country may provide information in its application filed under this part to demonstrate that its affiliated foreign carrier does not have the ability to discriminate against unaffiliated U.S. international carriers through control of bottleneck services or facilities in the named foreign country. See § 63.10, Regulatory Classification of U.S. International Carriers.

(i) Such a demonstration should address the factors that relate to the scope or degree of the foreign affiliate's bottleneck control, such as:

(A) The monopoly, oligopoly or duopoly status of the destination country; and

(B) Whether the foreign affiliate has the potential to discriminate against unaffiliated U.S. international carriers through such means as preferential operating agreements, preferential routing of traffic, exclusive or more favorable transiting agreements, or preferential domestic access and interconnection arrangements.

(ii) Such a demonstration may also address other factors the applicant deems relevant to its demonstration, such as the effectiveness of public regulation in the destination country.

(s) Each applicant shall certify that the applicant has not agreed to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the U.S. and any foreign country which the applicant

may serve under the authority granted under this part and will not enter into such agreements in the future.

(1) For purposes of this paragraph, and of §§ 63.11(c)(2)(iii), 63.13(a)(4), and 63.14, special concession is defined as any arrangement that affects traffic or revenue flows to or from the U.S. that is offered exclusively by a foreign carrier or administration to a particular U.S. international carrier and not also to similarly situated U.S. international carriers authorized to serve a particular route.

(2) The special concessions certification required by this paragraph and by §§ 63.11(c)(2)(iii) and 63.13(a)(4) shall be viewed as an ongoing representation to the Commission, and applicants/carriers shall immediately inform the Commission if at any time the representations in their certifications are no longer true. Failure to so inform the Commission will be deemed a material misrepresentation to the Commission.

Note 1 to paragraph (r): The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

Note 2 to paragraph (r): The term "U.S. facilities-based international carrier" means one that holds an ownership, indefeasible-right-of-user, or leasehold interest in bare capacity in an international facility, regardless of whether the underlying facility is a common or noncommon carrier submarine cable, or an INTELSAT or separate satellite system.

Note 3 to paragraph (r): The assessment of "capital stock" ownership will be made under the standards developed in Commission case law for determining such ownership. See, e.g., Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995). "Capital stock" includes all forms of equity ownership, including partnership interests.

Note 4 to paragraph (r): In applying the provisions of this section, ownership and other interests in U.S. and foreign carriers will be attributed to their holders and deemed cognizable pursuant to the following criteria: Attribution of ownership interests in a carrier that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. (For example, if A owns 30% of company X, which owns 60% of company Y, which owns 26% of "carrier," then X's interest in "carrier" would be 26% (the same as Y's interest because X's interest in Y exceeds 50%), and A's interest in "carrier" would be 7.8% (0.30x0.26). Under the 25% attribution benchmark, X's interest in

"carrier" would be cognizable, while A's interest would not be cognizable.)

3. Section 63.10 is amended by revising paragraphs (a)(1) through (a)(3), and adding paragraph (c) to read as follows:

§ 63.10 Regulatory classification of U.S. international carriers.

(a) * * *

(1) A U.S. carrier that has no affiliation with, and that itself is not, a foreign carrier in a particular country to which it provides service (i.e., a destination country) will presumptively be considered non-dominant for the provision of international communications services on that route;

(2) A U.S. carrier that is, or that has or acquires an affiliation with a foreign carrier that is a monopoly in a destination country will presumptively be classified as dominant for the provision of international communications services on that route; and

(3) A U.S. carrier that is, or that has or acquires an affiliation with a foreign carrier that is not a monopoly in a destination country and that seeks to be regulated as non-dominant on that route bears the burden of submitting information to the Commission sufficient to demonstrate that its foreign affiliate lacks the ability to discriminate against unaffiliated U.S. carriers through control of bottleneck services or facilities in the destination country. Such a demonstration should address the factors that relate to the scope or degree of the foreign affiliate's bottleneck control, including those listed in § 63.01(r)(8).

* * * * *

(c) Any carrier classified as dominant for the provision of particular services on particular routes under this section shall comply with the following requirements in its provision of such services on each such route:

(1) File international service tariffs on 14-days notice without cost support;

(2) Maintain complete records of the provisioning and maintenance of basic network facilities and services procured from its foreign carrier affiliate or from an allied foreign carrier, including, but not limited to, those it procures on behalf of customers of any joint venture for the provision of U.S. basic or enhanced services in which the U.S. and foreign carrier participate, which information shall be made available to the Commission upon request;

(3) Obtain Commission approval pursuant to § 63.01 before adding or discontinuing circuits; and

(4) File quarterly reports of revenue, number of messages, and number of

minutes of both originating and terminating traffic within 90 days from the end of each calendar quarter.

4. Section 63.11 is revised to read as follows:

§ 63.11 Notification by and prior approval for U.S. international carriers that have or propose to acquire ten percent investments by, and/or an affiliation with, a foreign carrier.

(a) Any carrier authorized to provide international communications service under this part that, as of the effective date of this rule as amended in IB Docket No. 95-22, is, or has an affiliation with, a foreign carrier within the meaning of § 63.01(r)(1)(i)(A) or (r)(1)(i)(B), or that as of such date knows of an existing ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier by a foreign carrier, or that after the effective date of this rule becomes affiliated with a foreign carrier within the meaning of § 63.01(r)(1)(i)(A), shall notify the Commission within thirty days of the effective date of this rule or within thirty days of the acquisition of the affiliation, whichever occurs later. For purposes of this section, "foreign carrier" is defined as set forth in § 63.01(r)(1)(ii).

(1) The notification shall certify to the information specified in paragraph (c) of this section.

(2) Any carrier that has previously notified the Commission of an affiliation with a foreign carrier, as defined by § 63.01(r)(1) immediately prior to the rule's amendment in IB Docket No. 95-22, need not notify the Commission again of the same affiliation.

(b) Any carrier authorized to provide international communications service under this part that knows of a planned investment by a foreign carrier of a ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier shall notify the Commission within sixty days prior to the acquisition of such interest. The notification shall certify to the information specified in paragraph (c) of this section.

(c) The notification required under paragraphs (a) and (b) of this section shall contain a list of all affiliated foreign carriers and shall state individually the country or countries in which the foreign carriers named in paragraphs (a) and (b) of this section are authorized to provide telecommunications services offered to the public. It shall additionally specify which, if any, of these countries the U.S. carrier is authorized to serve under this part; what services it is authorized to provide to each such country; and the

FCC File No. under which each such authorization was granted.

(1) The carrier should also specify, where applicable, those countries named in paragraph (c) for which it provides a specified international communications service solely through the resale of the international switched or private line services of U.S. facilities-based carriers with which the resale carrier does not have an affiliation. Such an affiliation is defined as in § 63.01(r)(1)(i), except that the phrase "U.S. facilities-based international carrier" shall be substituted for the phrase "foreign carrier."

(2) The carrier shall also submit with its notification:

(i) The ownership information as required to be submitted pursuant to § 63.01(r)(2);

(ii) Where the carrier is authorized as a private line reseller on a particular route for which it has an affiliation with a foreign carrier, as defined in § 63.01(r)(1)(i), a certification as required to be submitted pursuant to § 63.01(r)(4); and

(iii) A "special concessions" certification as required to be submitted pursuant to § 63.01(s).

(3) The carrier is responsible for the continuing accuracy of the certifications provided under this section. Whenever the substance of any certification provided under this section is no longer accurate, the carrier shall as promptly as possible, and in any event within 30 days, file with the Secretary in duplicate a corrected certification referencing the FCC File No. under which the original certification was provided, *except that* the carrier shall immediately inform the Commission if at any time the representations in the "special concessions" certification provided under paragraph (c)(2)(iii) of this section are no longer true. See § 63.01(s)(2). This information may be used by the Commission to determine whether a change in regulatory status may be warranted under § 63.10.

(d) Unless the carrier notifying the Commission of a foreign carrier affiliation under paragraph (a) of this section qualifies for the presumption of non-dominant regulation pursuant to § 63.10(a)(4), it should submit the information specified in § 63.01(r)(8) to retain its non-dominant status on any affiliated route.

(e) The Commission will issue public notice of the submissions made under this section for 14 days.

(1) In the case of a notification filed under paragraph (a) of this section, the Commission, if it deems it necessary, will by written order at any time before or after the submission of public

comments impose dominant carrier regulation on the carrier for the affiliated routes based on the provisions of § 63.10.

(2) In the case of a planned investment by a foreign carrier of a ten percent or greater interest, whether direct or indirect, in the capital stock of the authorized carrier, the Commission will, unless it notifies the carrier in writing within 30 days of issuance of the public notice that the investment raises a substantial and material question of fact as to whether the investment serves the public interest, convenience and necessity, presume the investment to be in the public interest. If notified that the acquisition raises a substantial and material question, then the carrier shall not consummate the planned investment until it has filed an application under § 63.01 and submitted the information specified under paragraphs (r) (6) or (7), as applicable, and (8) of that section, and the Commission has approved the application by formal written order.

5. Section 63.12 is amended by revising paragraph (c)(1) to read as follows:

§ 63.12 Streamlined processing of certain international resale applications.

* * * * *

(c) * * *

(1) The applicant has an affiliation within the meaning of § 63.01(r)(3), with the U.S. facilities-based carrier whose international switched or private line services the applicant seeks authority to resell (either directly or indirectly through the resale of another reseller's services); or

* * * * *

6. Section 63.13 is amended by revising the last sentences of paragraphs (a)(3) and (a)(5), and by revising paragraph (a)(4) to read as follows:

§ 63.13 Streamlined procedures for modifying regulatory classification of U.S. international carriers from dominant to nondominant.

(a) * * *

(3) * * * For purposes of paragraph (a)(3), "telecommunications facilities" are defined as in § 63.01(r)(4).

(4) Any carrier filing a certified list pursuant to paragraph (a)(2) of this section must also provide the "special concessions" certification as required to be submitted pursuant to § 63.01(r)(3).

(5) * * * See § 63.01(s)(2).

7. Section 63.14 is revised to read as follows:

§ 63.14 Prohibition on agreeing to accept special concessions.

Any carrier authorized to provide international communications service

under this part shall be prohibited from agreeing to accept special concessions directly or indirectly from any foreign carrier or administration with respect to traffic or revenue flows between the United States and any foreign country served under the authority of this part and from agreeing to enter into such agreements in the future. For purpose of this section, foreign carrier is defined as in § 63.01(r)(1)(ii); and special concession is defined as in § 63.01(s).

8. A new § 63.17 is added to read as follows:

§ 63.17 Special Provisions For U.S. International Common Carriers.

(a) Unless otherwise prohibited by the terms of its Section 214 certificate, a U.S. common carrier authorized under this part to provide international private line service, whether as a reseller or facilities-based carrier, may interconnect its authorized private lines to the public switched network on behalf of an end user customer for the end user customer's own use.

(b) Except as provided in paragraph (b)(5) of this section, a U.S. common carrier, whether a reseller or facilities-based, may engage in "switched hubbing" to countries not found to offer equivalent resale opportunities under § 63.01(k) (5) and (6) under the following conditions:

(1) U.S.-outbound switched traffic shall be routed over the carrier's authorized U.S. international private lines to an equivalent country, and then forwarded to a third, nonequivalent country only by taking at published rates and reselling the International Message Telephone Service (IMTS) of a carrier in the equivalent country;

(2) U.S.-inbound switched traffic shall be carried to an equivalent country as part of the IMTS traffic flow from a non-equivalent third country and then terminated in the United States over U.S. international private lines from the equivalent hub country;

(3) U.S. common carriers that route U.S.-outbound traffic via switched hubbing through an equivalent country shall tariff their service on a "through" basis from the United States to the ultimate foreign destination.

(4) No U.S. common carrier may engage in switched hubbing under this section to a country for which it has an affiliation with a foreign carrier unless and until it receives specific authority to do so under § 63.01. For purposes of this paragraph, "affiliation" and "foreign carrier" are defined as set forth in § 63.01(r)(1) (i)(B) and (ii), respectively.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 625

[I.D. 122695B]

Summer Flounder Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, (NOAA), Commerce.

ACTION: Notification of commercial quota transfer.

SUMMARY: NMFS announces that the State of New Jersey is transferring 20,000 lb (9,072 kg) of commercial summer flounder quota to the State of New York. NMFS adjusted the quotas and announces the revised commercial quota for each state involved.

EFFECTIVE DATE: December 26, 1995.

FOR FURTHER INFORMATION CONTACT: Lucy Helvenston, 508-281-9347.

SUPPLEMENTARY INFORMATION: Regulations implementing Amendment 2 to the Fishery Management Plan for the Summer Flounder Fishery (FMP) are found at 50 CFR part 625. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from North Carolina through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 625.20.

The commercial quota for summer flounder for the 1995 calendar year was set equal to 14,690,407 lb (6,663,569 kg), and the allocations to each state were published February 16, 1995 (60 FR 8958). At that time, New Jersey was allocated a quota of 2,456,969 (1,114,462 kg) and New York was allocated a quota of 1,123,374 lb (509,554 kg). On August 30, 1995, the State of North Carolina transferred 7,229 lb (3,279 kg) to the State of New Jersey, and the revised quota for New Jersey was set equal to 2,464,198 lb (1,117,741 kg) (60 FR 45107). On November 17, 1995, the State of Maryland transferred 50,000 lb of its commercial quota to the State of New York, and the revised quota for New York was set equal to 1,173,374 lb (532,233 kg) (60 FR 57685). On December 15, 1995, the State of Maryland made two further transfers to the State of New York that were published as one notification (60 FR 64349). The first transfer was for 20,000 lb (9,072 kg), and the second was for 30,000 lb (13,608 kg), and the revised quota for New York was set equal to 1,223,374 lb (554,913 kg).

The final rule implementing Amendment 5 to the FMP was published December 17, 1993 (58 FR 65936), and allows two or more states, under mutual agreement and with the concurrence of the Director, Northeast Region, NMFS (Regional Director) to transfer or combine summer flounder commercial quota. The Regional Director is required to consider the criteria set forth in § 625.20(f)(1), in the evaluation of requests for quota transfers or combinations.

New Jersey has agreed to transfer 20,000 lb (9,072 kg) of commercial quota to New York. The Regional Director has determined that the criteria set forth in § 625.20(f)(1) have been met, and publishes this notification of quota transfers. The revised quotas for the calendar year 1995 are: New Jersey, 2,444,198 lb (1,108,670 kg); and New York, 1,243,374 lb (563,985 kg).

This action does not alter any of the conclusions reached in the environmental impact statement prepared for Amendment 2 to the FMP regarding the effects of summer flounder fishing activity on the human environment. Amendment 2 established procedures for setting an annual coastwide commercial quota for summer flounder and a formula for determining commercial quotas for each state. The quota transfer provision was established by Amendment 5 to the FMP and the environmental assessment prepared for Amendment 5 found that the action had no significant impact on the environment. Under section 6.02b.3(b)(I)(aa) of NOAA Administrative Order 216-6, this action is categorically excluded from the requirement to prepare additional environmental analyses. This is a routine administrative action that reallocates commercial quota within the scope of previously published environmental analyses.

Classification

This action is taken under 50 CFR part 625 and is exempt from review under E.O. 12866.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 26, 1995.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

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