



## FCC INITIATES RULEMAKING TO REFORM MARKET-ENTRY RULES FOR INVESTORS AND CARRIERS FROM NON-WTO-MEMBER COUNTRIES

On October 11, 2012, the U.S. Federal Communications Commission (“FCC”) issued a notice of proposed rulemaking (“NPRM”) in IB Docket No. 12-229 proposing to simplify or eliminate entirely the burdensome market-entry rules that currently apply to carriers and investors from countries that are not members of the World Trade Organization (“WTO”). The FCC’s current rules impose significant delays and expenses on such carriers and investors seeking access to the U.S. market and on U.S. carriers seeking to invest in foreign carriers operating in non-WTO-member countries. The proposed reforms would do away with these burdens in whole or in part and benefit non-WTO members, particularly small island nations, though the reforms are not as ambitious as some had hoped. Comments will be due within 30 days of publication of the NPRM in the *Federal Register*, which has not yet occurred.

***The ECO Test.*** In 1995, the FCC began requiring that a carrier or investor make a showing of effective competitive opportunities (the “ECO test”) before it could (a) obtain a Section 214 authorization to provide international telecommunications services directly between the United States and the foreign carrier/investor’s home market using undersea-cable or satellite capacity, (b) obtain a cable landing license to land an undersea cable in the United States or its territories, or (c) acquire an affiliation (cross-ownership of greater than 25 percent) with a licensed U.S. carrier. Under the ECO test, the foreign carrier or investor must make extensive legal and factual submissions to demonstrate that its home market: provides effective opportunities to compete in that country’s market for the service which the foreign carrier or investor seeks to provide in the United States; provides reasonable and nondiscriminatory charges, terms, and conditions for interconnection to a foreign carrier’s domestic facilities; provides competitive safeguards; provides an effective regulatory framework to develop, implement and enforce legal requirements, interconnection arrangements, and other safeguards.

***Disparate Treatment After the WTO Deal.*** In 1997 (and effective from February 5, 1998), an initial sixty-nine countries made commitments to liberalize trade in basic telecommunications services under the WTO General Agreement on Trade in Services (“GATS”). (These commitments are sometimes known as the WTO Basic Telecommunications Agreement.) To implement U.S. GATS commitments in basic telecommunications services, the FCC adopted the *Foreign Participation Order* and related liberalizing rules in 1997. For carriers and investors from WTO-member countries, the FCC replaced the ECO test with a presumption that market entry by the foreign investor/carrier would serve the public interest. To take advantage of the presumption, a foreign carrier or investor need only show that its home country or market is an actual (not prospective) WTO-member country. It need not show that its home country or market has made specific commitments in basic telecommunications under the GATS. For countries outside the WTO, however, their investors and carriers must still complete the time-consuming and expensive process of satisfying the FCC’s ECO test. In the most recent cases of carriers seeking to satisfy the ECO test, it took the FCC more than a year to act.

*Many Smaller Countries Would Benefit from Reform.* Consequently, the FCC's proposals to reform or eliminate the ECO test entirely would greatly benefit investors and carriers from non-WTO-member countries. Although the list has grown smaller since 1997, a considerable number of countries remain outside the WTO. These include (by region) the following:

- **Pacific:** Cook Islands, Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Niue, Palau, Tokelau, and Tuvalu.
- **Africa:** Algeria\*, Comoros\*, Equatorial Guinea\*, Eritrea, Ethiopia\*, Liberia\*, Libya\*, São Tomé and Príncipe\*, Seychelles\*, Somalia, South Sudan, and Sudan\*.
- **Middle East and Central Asia:** Afghanistan\*, Azerbaijan\*, Iran\*, Iraq\*, Kazakhstan\*, Lebanon\*, Syria\*, Tajikistan\*, Turkmenistan, Uzbekistan\*, and Yemen\*.
- **East and Southeast Asia:** Bhutan\*, Laos\* (WTO membership expected by end of 2012), North Korea, and Timor Leste.
- **Americas:** Aruba, Bahamas\*, and Bermuda (status disputed).
- **Europe:** Andorra\*, Belarus\*, Bosnia and Herzegovina\*, Channel Islands (Jersey and Guernsey), Kosovo, Monaco, San Marino, and Serbia\*.

Countries marked with an asterisk (\*) have undertaken WTO accession negotiations. Many of the countries which have not undertaken accession negotiations are small island states, particularly in the Pacific.

*Two Alternatives Proposed.* As the FCC notes in the NPRM, “the detailed ECO Test requirements were designed to be applied to countries that could support advanced regulatory regimes, but most of the remaining non-WTO Member countries are smaller countries and may be without resources to support a regulatory framework that meets the detailed ECO Test requirements.” The FCC therefore proposes to eliminate the ECO test and instead analyze on a case-by-case basis as part of its public interest determination “whether U.S. carriers are experiencing competitive problems in that market, and whether the public interest would be served by authorizing the foreign carrier to enter the U.S. market.” License applications would still not be eligible for “streamlined processing”—the FCC’s 15-day auto-grant procedure, and the foreign carrier affiliation notifications would continue to require a 45 day notification prior to consummation of the investment transaction resulting in cross-ownership. The FCC also reserves the right to consult with the Office of the United States Trade Representative (“USTR”) and other agencies as to any anticompetitive problems that may exist for U.S. companies in the home market of the applicant. As an alternative to outright elimination of the ECO test, the FCC proposes to retain but simplify the ECO test, principally by eliminating certain of the criteria for demonstrating a practical, ability of a U.S. carrier to enter the applicant’s home market.

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*No Discussion of Dependent Territories.* In the NPRM, the FCC does not expressly consider issues involving the WTO status of overseas territories, possessions, and dependencies. Some dependent territories (*e.g.*, Aruba and the British Virgin Islands) are expressly covered by the WTO commitments of the sovereign nations that control those territories' foreign and trade relations, while some dependent territories (*e.g.*, Channel Islands and Tokelau) are expressly excluded from the sovereign nations' WTO commitments. In some cases, WTO status is simply not clear. In fact, sometimes the United States disagrees with its trading partners regarding the WTO status of dependent territories. The U.S. Government (including the FCC) has long treated Bermuda as subject to U.K. WTO commitments, even though the U.K. Government itself takes the position that Bermuda is not covered by the United Kingdom's WTO membership or commitments, as Bermuda (unlike other U.K. overseas territories) declined to be covered. Nevertheless, USTR could weigh in on this particular issue, USTR tends to take a more restrictive view of the WTO status of dependent territories.

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For more information regarding U.S. market-entry rules or Wiltshire & Grannis's international telecommunications and undersea cable practices, or for assistance in preparing comments to be filed in this proceeding once it formally commences, please contact Kent Bressie at +1 202 730 1337 or [kbressie@wiltshiregrannis.com](mailto:kbressie@wiltshiregrannis.com).

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