

1998

Global Telecommunications Competition a Reality: United States Complies with WTO Pact

Stefan M. Meinsner

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

Recommended Citation

Meisner, Stefan M. "Global Telecommunications Competition a Reality: United States Complies with WTO Pact." American University International Law Review 13, no. 5 (1998): 1345-1381.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University International Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

GLOBAL TELECOMMUNICATIONS COMPETITION A REALITY: UNITED STATES COMPLIES WITH WTO PACT

STEFAN M. MEISNER *

I.	Introduction	1346
II.	Fourth Protocol on Basic Telecommunications	1351
	A. The Negotiations	1351
	B. The Reference Paper	1354
III.	United States Law on Foreign Participation	1356
	A. The 1995 Foreign Entry Order	1356
	1. The Goals of the 1995 Foreign Entry Order	1357
	2. The ECO Test	1359
	3. Safeguards	1361
	B. The 1997 Foreign Entry Order	1362
	1. An Open Entry Standard for WTO Members Replaces ECO Test	1362
	2. The Public Interest Standard	1366
IV.	Reconciling the Fourth Protocol With the 1997 Foreign Entry Order	1368
	A. Open Markets	1368
	B. Transparent Regulation	1369
V.	Evaluation of European Union Claims	1371
	A. Potential European Union Action Before the WTO ...	1372
	1. Potential Action Based on Enactment of the 1997 Foreign Entry Order	1373
	2. Potential European Union WTO Action Taken at a Future Date	1375

* J.D. Candidate, May 1999, Washington College of Law, American University; Editor-in-Chief of the *American University International Law Review*, 1998-1999. I would like to thank my wife, Rachel L. White, for her enduring support, sage advice, and unbounded love throughout this project and in life.

B. Potential European Union Action Before a United States Circuit Court.....	1378
VI. Recommendations & Conclusion	1380

I. INTRODUCTION

The basic telecommunications¹ industry comprises a vast portion of the world's economy.² People from different nations increasingly use this means to communicate with one another.³ In an effort to foster international telecommunications, fifty-five governments,⁴ un-

1. See John H. Harwood et al., *Competition in International Telecommunications Services*, 97 COLUM. L. REV. 874, 875 n.3 (1997) (defining basic telecommunications service as "the unmodified transmission of voice or other basic data"). Harwood describes the enormous wireline network necessary to provide basic telecommunications services. See *id.* at 880. In many nations one entity has created a monopoly controlling the facilities that provide these basic telecommunications services. See *id.*; see also ROBERT R. BRUCE ET AL., *FROM TELECOMMUNICATIONS TO ELECTRONIC SERVICES* 175 (1986) (describing the enormous expense of constructing another privately owned wireline system and the resulting economic inefficiencies if such an investment were made).

Wireless mobile services, otherwise known as personal communication service or radio common carrier service, also provide basic telecommunications service. See Harwood et al., *supra*, at 876 n.36. These wireless services, however, are not adequate substitutes for the traditional wireline service. See *id.* (noting that wireless services cannot match the low price and higher quality of wireline service).

2. See Laura B. Sherman, *Introductory Note to the Fourth Protocol to the General Agreement on Trade in Services*, 36 I.L.M. 354, 354 (1997); see also *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market* (visited Nov. 25, 1997) (statement of William E. Kennard, FCC Chairman) <<http://www.fcc.gov/Speeches/Kennard/Statements/stwek705.html>> [hereinafter Kennard Statement] (stating that there is a \$600 billion global basic telecommunications market).

3. See generally Kennard Statement, *supra* note 2 (setting forth Kennard's expectations that increased competition will bring about greater access to telecommunication services around the world).

4. See Agreement on Telecommunications Services, April 30, 1996, Attachment to Fourth Protocol to the General Agreement on Trade in Services, WTO Doc. S/L/20, 36 I.L.M. 354, 373-74 (1997) (listing the governments that are signatories to the Fourth Protocol as: Antigua and Barbuda, Argentina, Australia, Bangladesh, Belize, Bolivia, Brazil, Brunei Darussalam, Bulgaria, Canada, Chile, Colombia, Côte d'Ivoire, Czech Republic, Dominica, Dominican Republic, Ecuador, El Salvador, European Communities and their Member States, Ghana, Grenada, Guatemala, Hong Kong, Hungary, Iceland, India, Indonesia, Israel, Jamaica, Japan, Republic of Korea, Malaysia, Mauritius, Mexico, Morocco, New Zealand, Norway, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Romania, Sene-

der the auspices of the World Trade Organization ("WTO"), negotiated the historic Fourth Protocol to the General Agreement on Trade in Services ("Fourth Protocol").⁵ The Fourth Protocol was closed for participation on February 15, 1997.⁶

The Fourth Protocol advocates granting Most Favored Nation ("MFN") treatment to other WTO Members regarding entry regulations that address participation in the Member's basic telecommunications market.⁷ To participate in the Fourth Protocol, a WTO Member must substantially alter its existing approach to the delivery of basic telecommunications service.⁸ WTO Members and their citizens are expected to gain substantial benefits from these changes.⁹ Originally, participants were required to comply with the Fourth Protocol's commitments by January 1, 1998.¹⁰ Delays by a few participants in implementing the Fourth Protocol postponed the effective

gal, Singapore, Slovak Republic, South Africa, Sri Lanka, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, the United States of America, and Venezuela).

5. Agreement on Telecommunications Services, April 30, 1996, Fourth Protocol To The General Agreement on Trade In Services, WTO Doc. S/L/20; 36 I.L.M. 354, 366 (1997) [hereinafter Fourth Protocol].

6. See Harwood et al., *supra* note 1, at 880-84 (describing the lengthy and arduous negotiations leading up to the Fourth Protocol).

7. See Sherman, *supra* note 2, at 354 (establishing that sixty-nine countries agreed to allow market access to all or some of their basic telecommunications services).

8. See generally Harwood et al., *supra* note 1, at 881 n.36 (describing the monopolies that are prevalent in the delivery of basic telecommunications service around the world). But see *id.* at 881 n.37 (describing the competition that exists or is slated to begin in certain basic telecommunications services in Australia, Canada, Chile, El Salvador, the European Union, Japan, Mexico, and Singapore).

9. See, e.g., *In re Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Market Entry and Regulation of Foreign-Affiliated Entities, IB Docket Nos. 97-142, 95-22, FCC No. 97-398 (Nov. 25, 1997), available in 1997 WL 735476, para. 4 [hereinafter 1997 Foreign Entry Order] (describing the Federal Communication Commission's ("FCC") interpretation of the effects that the Fourth Protocol will have on global competition, namely "tangible benefits to U.S. consumers, U.S. companies, and the world at large"). See also Erik W. Schmidt, Note, *International Telecommunications Transactions: A Critique of the FCC's "Effective Competitive Opportunities" Analysis*, 7 DUKE J. COMP. & INT'L L. 629, 629 (1997) (stating that the United States' telecommunications industry desperately needs capital from foreign sources while the European telecommunications industry, for example, could benefit from American managerial skills).

10. See Fourth Protocol, *supra* note 5, para. 3 (stating that the Fourth Protocol shall enter into force on January 1, 1998).

date to February 5, 1998.¹¹ Fourth Protocol signatories whose law is not in accord with the Fourth Protocol by the new implementation date have until July 31, 1998 to comply.¹² The United States is one of the nations that was prepared to meet the Fourth Protocol's commitments on January 1, 1998.¹³

The United States, through the Federal Communications Commission ("FCC"), radically changed its regulation of basic telecommunications services with the promulgation of the 1997 Foreign Entry Order.¹⁴ This order greatly streamlines the entry procedures that basic telecommunications providers from nations that are part of the WTO

11. See *WTO Telecoms Deal Will Ring in the Changes on 5 February 1998*, WTO Doc. PRESS/87 (Jan. 26, 1998) [hereinafter *WTO Telecom Release*] (reporting February 5, 1998 as the implementation date of the Fourth Protocol); *WTO Sets Feb. 5 Date for Trade Agreement*, TR INT'L, Jan. 30, 1998, available in 1998 WL 9762352 (reporting that the WTO Members that complied with the Fourth Protocol agreed to change the implementation date to February 5, 1998). Members originally planned on January 1, 1998 as the implementation date. See *id.*

12. See *Telephony*, COMM. DAILY, Jan. 28, 1998, available in 1998 WL 2495270 (stating that thirteen Fourth Protocol participants require the extra time to achieve the necessary modifications to comply with the Fourth Protocol). The thirteen nations that have not implemented new laws include Argentina, Belgium, Bolivia, Brazil, Chile, Dominica, the Dominican Republic, Ghana, Guatemala, Papua New Guinea, the Philippines, Poland, and Romania. See *id.*

13. See 1997 Foreign Entry Order, *supra* note 9, para. 12 (stating that the United States, with the 1997 Foreign Entry Order and the International Satellite Service Order, has met its commitments under the Fourth Protocol and expects the entry of foreign carriers in the United States market "soon after January 1, 1998"). But cf. *In re Telecom New Zealand Ltd.*, 13 F.C.C.R. 363, 364 para. 3 (1998) (stating that the FCC will continue to apply the effective competition opportunity ("ECO") test until its rules are amended); *infra* pt. III.A.2 (discussing the ECO test); *FCC Prepares For a More Open Global Telecommunications Market*, COMM. TODAY, Jan. 12, 1998, available in 1998 WL 5264340 (stating that it is the goal of the United States to have its rules on foreign market participation in the telecommunications market go into effect by February 1, 1998).

The 1997 Foreign Entry Order initiated the transformation of United States' regulation of foreign entry, but until the Final Rules were published in the Federal Register, the FCC did not apply the regulatory framework contained in the 1997 Foreign Entry Order. See *Foreign Participation in the U.S. Telecommunications Market*, 63 Fed. Reg. 5743 (1998) (to be codified at 47 C.F.R. pts. 43, 63 & 64) (stating that the regulations contained in the 1997 Foreign Entry Order were effective without modification as of February 9, 1998).

14. See generally 1997 Foreign Entry Order, *supra* note 9; Kennard Statement, *supra* note 2 (describing how the old regulatory regime of foreign market participation with regard to WTO Member nations is now completely replaced by the 1997 Foreign Entry Order).

face when entering the United States market.¹⁵ Drawing from the goals of the landmark Telecommunications Act of 1996,¹⁶ the 1997 Foreign Entry Order attempts to encourage competition in the United States telecommunications industry by making it easier for a foreign entity to participate in the American basic telecommunications market.¹⁷ Affected industry participants and WTO Members have mixed reactions to the order.¹⁸

The European Union has expressed concern that the 1997 Foreign Entry Order does not reconcile American law with the United States' commitments under the Fourth Protocol.¹⁹ As a result, the European

15. See 1997 Foreign Entry Order, *supra* note 9, para. 21 (adopting a schedule of regulatory review that responds to foreign entry requests within sixty days); Kennard Statement, *supra* note 2 (describing the new entry process for foreign participants as greatly streamlined); *Commission Liberalizes Foreign Participation in the U.S. Telecommunications Market* (visited Nov. 26, 1997) <http://www.fcc.gov/Bureaus/International/News_Releases/1997/nrin7042.html> (stating that foreign participation in the United States telecommunications market will be easier with the enactment of the 1997 Foreign Entry Order).

16. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified at 47 U.S.C. § 151) (stating that Congress enacted the Act to promote competition in the telecommunications industry, reduce regulation of the industry, enhance service for American consumers, and promote developing technology in the industry).

17. See 1997 Foreign Entry Order, *supra* note 9, para. 2 (describing increased competition, lower prices, and greater options for consumers as some of the benefits that will result from the relaxation of the rules allowing foreign participation in the United States' telecommunications market).

18. See *EU Urges US to Change Telecoms Rules*, EU Release No. 54/97 (Aug 5, 1997) [hereinafter EU Release] (stating the European Commission's concerns with the 1997 Foreign Entry Order, while welcoming the FCC's removal of the ECO test); *FCC Adopts Rules for Easier Access to U.S. Market, Claims Compliance with U.S. Commitments in WTO Pact*, TELECOMM. REP., Dec. 1, 1997, available in 1997 WL 7759218 [hereinafter *FCC Adopts Rules for Easier Access to U.S. Market*] (describing AT&T Corporation's concerns about portions of the 1997 Foreign Entry Order regarding foreign telecommunications resellers who may try to lower rates below cost and engage in a price squeeze strategy).

19. See *WTO Warning to Washington Over Telecommunications Licenses*, EUR. REP., Sept. 3, 1997, available in 1997 WL 13046329 (describing the outrage expressed by the European Commission at the 1997 Foreign Entry Order when the order was a proposal); EU Release, *supra* note 18; see also 1997 Foreign Entry Order, *supra* note 9, para. 353 (acknowledging the European Commission's contention that the 1997 Foreign Entry Order is the FCC's means of retaining power to deny access to the United States' telecommunications market to prospective foreign participants).

Union has threatened to lodge a complaint before the WTO.²⁰ Although the European Union's threats have not resulted in a formal proceeding,²¹ they raise concerns that the implementation of the 1997 Foreign Entry Order may not fulfill the United States' commitment²² to the Fourth Protocol.

Part II of this Comment focuses on the United States' commitments under the Fourth Protocol and examines how the Fourth Protocol changes the competitive landscape of the basic telecommunications industry. Part III describes the development in United States law on foreign participation in its basic telecommunications industry. Part IV reconciles the 1997 Foreign Entry Order with the Fourth Protocol and argues that the 1997 Foreign Entry Order complies with

20. See *infra* pt. V (describing the European Union's issues with the 1997 Foreign Entry Order); see also General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167, 1182-83, arts. XXII & XXIII [hereinafter GATS] (setting forth the dispute resolution mechanisms available to a WTO Member). See generally C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 250-59 (1997) (outlining the dispute settlement system of the WTO); Charles M. Oliver, *WTO Agreement on Basic Telecommunications Services and FCC Implementation*, 15 COMM. LAW. 13, 14-15 (1998) (detailing the sequence of proceedings that would be necessary for a WTO dispute under the GATS); ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* 212 (1997) (discussing the differences between the GATT dispute resolution systems and the GATS dispute resolution systems). Cf. Rodrigo Bustamante, Note, *The Need for a GATT Doctrine of Locus Standi: Why the United States Cannot Stand the European Community's Banana Import Regime*, 6 MINN. J. GLOBAL TRADE 533, 553 n.109 (1997) (describing procedural steps that are followed upon the initiation of a GATT dispute).

21. See *FCC Adopts Rules for Easier Access to U.S. Market, Claims Compliance with U.S. Commitments in WTO Pact*, *supra* note 18 (confirming that the European Commission has retained the option to seek redress in a WTO proceeding regarding the 1997 Foreign Entry Order).

22. See *Schedule of Specific Commitments of the United States of America*, WTO Doc. GATS/SC/90/Suppl.2 (Apr. 11, 1997) [hereinafter *Final United States Commitments*] (detailing the exact commitments the United States must meet in opening its basic telecommunications industry); *List of Article II (MFN) Exemptions of the United States of America*, WTO Doc. GATS/EL/90/Suppl.2 (Apr. 11, 1997) [hereinafter *Final United States Exemptions*] (listing the exceptions to the Fourth Protocol made by the United States); see also Harwood et al., *supra* note 1, at 883-84 (stating that the substance of the Fourth Protocol is comprised of the commitments and exclusions that make up a WTO Member's overall obligation to the Fourth Protocol and ultimately the GATS).

the market opening mandates of the Fourth Protocol. Part V evaluates the European Union's possible claims against the 1997 Foreign Entry Order, and Part VI concludes that the European Union should refrain from initiating action until the 1997 Foreign Entry Order has been tested by actual practice.

II. FOURTH PROTOCOL ON BASIC TELECOMMUNICATIONS

A. THE NEGOTIATIONS

At the conclusion of the Marrakesh Round of trade negotiations that established the General Agreement on Trade in Services ("GATS"),²³ participants agreed to negotiate a protocol that addressed basic telecommunications service.²⁴ Key GATS participants were concerned that their markets would be harmed by immediately granting MFN status to all WTO Members.²⁵ MFN treatment would require WTO Members with open markets to grant all other WTO Members access to their markets on a non-discriminatory basis even if those other Members do not maintain open markets.²⁶ Without any additional agreement, the WTO Member with the open market would be unable to leverage another WTO Member to open its market.²⁷

23. See generally GATS, *supra* note 20.

24. See *id.* at 1196 (requiring that negotiations commence on incorporating basic telecommunications into the GATS while, in the meantime, exempting basic telecommunications from the MFN provisions of the GATS).

25. See Sherman, *supra* note 2, at 355 (describing the free rider problem that could result from granting MFN treatment in the basic telecommunications service sector without any further agreement).

26. See *id.* at 367 (citing GATS art. II and describing the MFN requirement of the GATS that does not allow a WTO Member to discriminate among other Members when applying its basic telecommunications regulations); *cf.* Kenneth Freiberg, Introductory Note to the Second Protocol to the General Agreement on Trade in Services, 35 I.L.M. 199, 199-200 (1996) (explaining that the United States' relatively open market in financial services could be a disadvantage to the United States market if MFN were immediately applied because other WTO Members would enjoy participation in the open United States market and not have to open their market to the United States; and noting that essentially the same MFN argument holds true for the basic telecommunications market).

27. See Freiberg, *supra* note 26, at 200 n.9 (arguing that the GATS MFN rule would prevent WTO Members with relatively open markets in a particular service sector from discriminating against individual WTO Members, and that members would not likely deny access to all WTO Members, which is permissible under the

Due to its outspoken concerns,²⁸ the United States led the negotiations by offering market-opening policies in its basic telecommunications market.²⁹

As the deadline for conclusion of an agreement on basic telecommunications neared,³⁰ the United States brought more offers of market reforms to the negotiating table.³¹ As the talks continued among WTO Members, many countries either improved their previous

GATS, just to legally discriminate against individual WTO Members); *see also* GATS, *supra* note 20, art. XX (allowing WTO Members to specify exceptions to commitments of the GATS and any side agreements by requiring Members to annex schedules of commitments and exceptions to the GATS).

28. *See* Harwood et al., *supra* note 1, at 882-83 (describing the demands made by the United States during the early stages of negotiation resulting from a belief that the MFN commitments of other WTO Members were "meaningless" because of its own more open market); Erik Krauland et al., *International Legal Developments in Review: 1996 Business Regulation: International Trade*, 31 INT'L LAW. 433, 437-38 (1997) (describing the United States' concerns that foreign basic telecommunications monopolies will use their market power to harm competition when providing international telecommunications service).

29. *See* Sherman, *supra* note 2, at 358 (citing WTO Doc. No. S/NGBT/W/12/Add.3) (describing the first offer by the United States, made in July of 1995, that included all basic telecommunications services except local telephone service, placed limitations on foreign ownership of undersea cables, and restricted access to satellite systems); *see also* Report of the Negotiating Group on Basic Telecommunications, WTO Doc. S/NGBT/18, (Apr. 30, 1996); 36 I.L.M. 362, 362-63 (1997) [hereinafter 1996 NGBT Report] (describing the negotiation process of the WTO as a series of offers by Members that are progressively enhanced through the negotiation process among the Members that results in specific commitments that must be annexed to the GATS or else the Members' offers will be rescinded).

30. *See* Decision on Negotiations on Basic Telecommunications, Ministerial Decisions and Declarations of the General Agreement on Tariffs and Trade, Dec. 15, 1993, 33 I.L.M. 136, 144-45 (1994) (setting the deadline for concluding the negotiations of a basic telecommunications agreement as April 30, 1996); *see also* Decision on Commitments in Basic Telecommunications, WTO Doc. S/L/20, para. 3 (Apr. 30, 1996), 36 I.L.M. 365 (1997) [hereinafter *Decision on Basic Telecommunications*] (allowing any WTO Member to change a submitted annex to the Fourth Protocol or, if the Member has not already done so, submit an annex to the Fourth Protocol during the period of time between January 15, 1996 and February 15, 1997); Harwood et al., *supra* note 1, at 882-83 (describing the withdrawal of the United States from the negotiating table before the April 30, 1996 deadline that caused the WTO to extend the deadline for participation in the Fourth Protocol to February 15, 1997).

31. *See* Sherman, *supra* note 2, at 358-59 (describing the incrementally more open offers of market access that the United States presented to the negotiation between July of 1995 and November of 1996).

commitments to the Fourth Protocol or, for those who had not previously made any commitments (including the United States),³² scheduled commitments for the first time.³³ These commitment proposals culminated when the United States offered to completely open its basic telecommunications service market to all WTO Members.³⁴

As a result, the GATS will now encompass the basic telecommunications service industry for those WTO Members that have made commitments under the Fourth Protocol.³⁵ The level of Fourth Protocol commitments varies from Member to Member.³⁶ In an attempt to create common regulatory systems among WTO Members, however,

32. See Harwood et al., *supra* note 1, at 882 (discussing the United States' withdrawal from participation in the Fourth Protocol before the first April 30, 1996 deadline).

33. See *id.* at 883 (describing the continuing negotiating period under the auspices of the WTO).

34. See Sherman, *supra* note 2, at 359 (describing the final offer of the United States to completely open the United States market to competition by foreign facilities-based carriers or resellers of basic telecommunications service regardless of the technology used, permitting limited direct ownership of United States basic telecommunications carriers by foreign entities, and allowing complete indirect ownership of United States basic telecommunications providers by foreign entities). But see *id.* (describing the United States' exception to MFN for certain satellite transmissions of broadcast services and digital audio services); *Final United States Exemptions*, *supra* note 21 (listing the final exceptions to the Fourth Protocol that were filed with the WTO).

35. See Fourth Protocol, *supra* note 5, para. 1 (incorporating each WTO Member's commitments and exceptions to the Fourth Protocol into that Member's commitments and exceptions to the GATS); see also Harwood et al., *supra* note 1, at 884 (noting that once a WTO Member has made a commitment to the Fourth Protocol, it has made a binding commitment, and therefore, the Fourth Protocol represents a permanent opening of the international basic telecommunications market).

36. See *WTO Telecom Release*, *supra* note 11 (describing the levels of commitment of WTO Members to the Fourth Protocol by surveying each Member's commitment to discrete basic telecommunications services); Harwood et al., *supra* note 1, at 883-84 (describing the varying levels of commitment but emphasizing that the overall result of the Fourth Protocol is to open a substantial portion of the global basic telecommunications industry). See, e.g., *id.* at n.48 (citing Mark Landler, *Communications Pact to Favor Growing Giants*, N.Y. TIMES, Feb. 18, 1997, at B1) (describing the exceptions to the Fourth Protocol announced by Canada and Japan)); *Final United States Exemptions*, *supra* note 22 (listing the United States' exceptions to the Fourth Protocol).

the WTO promulgated a Reference Paper³⁷ that suggested the form of basic telecommunications regulation and highlighted conduct that would warrant regulation.³⁸ Although the Reference Paper is not an official WTO document,³⁹ the fact that fifty-five countries have adopted it as part of their commitments to the Fourth Protocol indicates its critical importance.⁴⁰

B. THE REFERENCE PAPER

The Reference Paper provides a roadmap by which a WTO Member can fully comply with the Fourth Protocol.⁴¹ The Reference Paper also defines the types of anti-competitive behavior against which a WTO Member must guard.⁴² Examples of the anti-competitive behavior described in the Reference Paper include: exploitation of "essential facilities" by a "major supplier,"⁴³ cross-subsidization of af-

37. See *Reference Paper to the Fourth Protocol to the General Agreement on Trade in Services*, 36 I.L.M. 367 (1997) [hereinafter *Reference Paper*]; see also *infra* pt. II.B. (analyzing the *Reference Paper*).

38. See 1996 NGBT Report, *supra* note 29, at 362-63 (reporting on the compilation of a Reference Paper to guide WTO Members when implementing the market opening commitments in their countries). See generally Harwood et al., *supra* note 1, at 884 (discussing the Reference Paper's suggested regulatory approach and scope).

39. See 1996 NGBT Report, *supra* note 29, at 363 (stating that the Reference Paper is an informal document).

40. See Sherman, *supra* note 2, at 357 n.23. The countries that adopted the Reference Paper were: Argentina, Australia, Austria, Belgium, Brunei, Bulgaria, Canada, Chile, Colombia, Côte d'Ivoire, Czech Republic, Denmark, Dominica, Dominican Republic, El Salvador, Finland, France, Germany, Ghana, Greece, Grenada, Guatemala, Hong Kong, Hungary, Iceland, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Korea, Luxembourg, Malaysia, Mexico, Netherlands, New Zealand, Norway, Papua New Guinea, Peru, Poland, Portugal, Romania, Senegal, Singapore, Slovak Republic, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Trinidad and Tobago, the United Kingdom, the United States, and Venezuela. See *id.* Countries are distinguished from governments by the WTO—for example, the EU is one government comprised of fifteen countries.

41. See generally *Reference Paper*, *supra* note 37 (describing the *Reference Paper* as merely a tool to define the regulatory principles for basic telecommunications services).

42. See *id.* at 367.

43. See *id.* (defining "essential facilities" as a public telecommunications network, either wire-based or radio-based). The *Reference Paper* further explains that the exploitation of an essential facility can occur when a single entity or a group of entities supplies the essential facility and there is no economically-feasible substitute for the essential facility. See *id.* It also defines a major supplier as one that has

filiates,⁴⁴ and misapplication of proprietary information.⁴⁵ In addition, the Reference Paper describes the type of regulation that a WTO Member should adopt to address this behavior.⁴⁶

The Reference Paper suggests the creation of an independent regulatory agency in each WTO Member nation to ensure certain market conditions.⁴⁷ These suggested regulatory agencies should ensure interconnection⁴⁸ so that any telecommunications service provider can have access to a WTO Member's basic telecommunications market.⁴⁹ Furthermore, they should promulgate public licensing standards so that a prospective market participant will know how to gain

either a monopoly in the essential service or market power in the provision of the essential service. *See id*; *see also supra* note 1 (describing the prevalence of monopolies in the basic telecommunications service industry); *cf. infra* note 103 (describing the United States antitrust law's interpretation of "essential element" and the harm that can result from the exploitation of control of such an element).

44. *See Reference Paper, supra* note 37, at 367 (stating that cross-subsidization is anti-competitive behavior). *See generally* Douglas B. McFadden, *Antitrust and Communications: Changes After the Telecommunications Act of 1996*, 49 FED. COM. L.J. 457, 466-67 (1997) (describing the harmful competitive effects that occur when a telecommunications provider with monopoly power in one market segment uses its monopoly profits to subsidize its business activities in another market segment that is competitive).

45. *See Reference Paper, supra* note 37, at 367 (listing improper use of proprietary information by a competitor).

46. *Cf. Oliver, supra* note 20, at 14 (stating that the *Reference Paper* provides a synopsis of the regulatory regime promulgated by the 1996 Telecommunications Act that completely altered the United States' regulation of its telecommunications industry).

47. *See Reference Paper, supra* note 37, at 369 (requiring the proposed regulator be separate and independent from suppliers of basic telecommunications services).

48. *See generally* CHARLES H. KENNEDY & M. VERONICA PASTOR, AN INTRODUCTION TO INTERNATIONAL TELECOMMUNICATIONS LAW 26 (1996) (describing interconnection as the process by which a telecommunications provider attaches its equipment to an existing wireline network).

49. *See Reference Paper, supra* note 37, at 368 (requiring that a major supplier offer interconnection to other telecommunications service providers under the same conditions as the major supplier enjoys, thereby ensuring the same quality at a reasonable price and at the appropriate network termination points). The *Reference Paper* also requires that the negotiation of interconnection agreements involving a major supplier be made by terms that are publicly available. *See id.* Finally, it requires that an independent regulatory body in the WTO Member state resolve disputes arising from interconnection issues. *See id.*

access to the market.⁵⁰ Finally, the WTO Member nation should charge the agencies with preventing anti-competitive behavior prevalent in the basic telecommunications market.⁵¹

III. UNITED STATES LAW ON FOREIGN PARTICIPATION

A. THE 1995 FOREIGN ENTRY ORDER

Prior to the announcement of the 1997 Foreign Entry Order, the FCC regulated the participation of foreign telecommunications providers through its previous order, *In re Market Entry and Regulation of Foreign-Affiliated Entities* ("1995 Foreign Entry Order").⁵² The FCC applied an "effective competition"⁵³ opportunity ("ECO") analysis⁵⁴ to satisfy its statutory public interest review of prospective foreign telecommunications service providers' participation in the United States market.⁵⁵ The FCC crafted the ECO analysis and other

50. See *id.* at 368-69 (requiring that a WTO Member's independent regulatory body provide standards for determining licensing decisions and a time frame for reaching these decisions).

51. See *id.* at 367 (stating that WTO Members should take "appropriate measures" to combat anti-competitive behavior); Harwood et. al, *supra* note 1, at 884 (stating that the suggested regulatory body should also prevent anti-competitive behavior); *supra* notes 43-45 and accompanying text (describing anti-competitive behavior prevalent in the basic telecommunications industry); see also Harwood et al., *supra* note 1, at 884 (citing Carter Dougherty, *U.S. Officials Say Delay Produced Better WTO Telecom Agreement*, INSIDE U.S. TRADE, Feb. 18, 1997, at S-3) (stating that the United States particularly desired that an independent regulatory body combat telecommunications providers' anti-competitive behavior because such conduct would undermine the whole effect of the Fourth Protocol).

52. *In re Market Entry and Regulation of Foreign-Affiliated Entities*, 11 F.C.C.R. 3873 (1995) [hereinafter 1995 Foreign Entry Order].

53. See *id.* at 3875, para. 1 (defining "effective competition" as a condition where competition exists among telecommunications carriers that create innovative technology, lower prices, and increase consumer choice for service).

54. See *id.* at 3875-76, para. 2 (adopting the ECO test for all applications of foreign entities before the FCC pursuant to Sections 214 and 310(b)(4) of title 47 of the United States Code); Schmidt, *supra* note 9, at 630-31 (outlining the applicants that are subject to the ECO test).

55. See 47 U.S.C. § 214(a) (1994) (requiring the FCC to review any new telecommunications service that crosses state lines to ensure that the "present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional [service]"); 47 U.S.C. § 310(b)(4) (1994) (limiting the foreign ownership and/or control of a domestic

safeguards to promote the specific goal of enhancing competition in international telecommunications service.⁵⁶

1. The Goals of the 1995 Foreign Entry Order

The FCC primarily endeavors to enhance global competition in telecommunications service.⁵⁷ The agency has always maintained that competition benefits all interested parties—consumers, providers, and regulators.⁵⁸ Increased competition in telecommunications service inherently promotes the FCC's public interest mandates⁵⁹ and ultimately its overall mission.⁶⁰

Preventing anti-competitive behavior in the provision of international telecommunications service was another goal of the 1995 Foreign Entry Order.⁶¹ The FCC observed that foreign telecommunications providers with market power in their home market had the ability to distort the market for international telecommunications service in the American market.⁶² Therefore, the FCC concluded that regulating the United States market was the sole means of addressing potential anti-competitive conduct.⁶³

common carrier to one-fourth of the capital stock of the common carrier and limiting the number of foreign directors on the common carrier's board of directors to one fourth the total number of directors if the FCC "finds that the public interest will be served by the refusal or revocation of such license").

56. See 1995 Foreign Entry Order, *supra* note 52, at 3877, para. 6 (setting forth the FCC's goals in regulating the United States international telecommunications market).

57. See *id.* at 3877, para. 8 (clarifying previous FCC statements that curbing anti-competitive behavior was merely one of three goals to promote competition).

58. See *id.* at 3878, para. 9 (finding that increased competition lowers prices for consumers and reduces the need for burdensome regulation that, in turn, saves the resources of regulated businesses and the regulatory body).

59. See *supra* note 55 (detailing the public interest mandates the FCC must protect).

60. See 47 U.S.C. § 151 (1994) (creating the FCC to "make available . . . to all the people of the United States . . . a rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"); 1995 Foreign Entry Order, *supra* note 52, at 3878, para. 10 (citing 47 U.S.C. § 151).

61. See 1995 Foreign Entry Order, *supra* note 52, at 3875-76, para. 2.

62. See *id.* at 3879-80, paras. 13-14 (detailing the harmful practices that a foreign market participant with monopoly power in its home market can wreak on the United States market).

63. See *id.* at 3879, para. 13 (stating that effective competition can only come about through regulation of the telecommunications market due to the prevalence

Finally, the FCC hoped to encourage foreign governments to open their markets to outside competitors.⁶⁴ The FCC appreciated the advantages a foreign telecommunications carrier would enjoy if it had access to the United States market.⁶⁵ By subjecting the foreign telecommunications carrier to the ECO test, the FCC ensured that a United States carrier had the same opportunity to compete in the foreign market.⁶⁶ If such an opportunity did not exist, the foreign applicant would be denied access or only granted conditional access to the United States market.⁶⁷ It was in the interest of the prospective foreign market participant to pressure its government to enact market-opening policies and, thus, allow the participant to enter the United States market.⁶⁸ The FCC repeatedly emphasized that it was not requiring foreign governments to open their markets, but rather was providing a strong incentive for the foreign governments to do so.⁶⁹

of market participants with market power); *see also id.* at 3878, para. 8 (clarifying that the FCC is regulating the "U.S. international telecommunications services market," which is within the FCC's jurisdiction); *id.* at 3957-64, paras. 223-38 (discussing the jurisdictional foundation by which the FCC may regulate the market for international telecommunications service based upon the potential harm anti-competitive forces can have on American consumers and telecommunications providers); *supra* note 55 (describing the public interest obligations charged to the FCC). *But see* Schmidt, *supra* note 9, at 640-44 (arguing that the statutory grant of jurisdiction by Congress to the FCC does not extend to regulation of foreign markets using coercive means such as the ECO test).

64. *See* 1995 Foreign Entry Order, *supra* note 52, at 3875-76, para. 2 (stating that a goal of the FCC was to encourage other governments to eliminate barriers to competition in telecommunications services).

65. *See id.* at 3886, paras. 32-33 (describing the benefits of participation in the United States market by either foreign-facilities based carriers, foreign resellers, or investment in domestic telecommunications providers by foreign telecommunications providers).

66. *See infra* pt. III.A.2 (analyzing the ECO test).

67. *See* 1995 Foreign Entry Order, *supra* note 52, at 3888, para. 36 (recognizing that if the ECO test found that there were few competitive opportunities for American providers in a particular foreign market it is likely the FCC would either limit or deny that foreign telecommunications provider's application to enter the United States market).

68. *See id.* at 3886-87, paras. 32-34 (detailing the incentives that exist for foreign telecommunications carriers to lobby their governments to meet the standards created by the ECO test); *id.* at 3945, para. 187 (stating that it is not "unfair to hold foreign carriers accountable for the policies of their home governments").

69. *See id.* at 3887, para. 35 (stressing that the ultimate decision to change its laws and regulations regarding foreign telecommunications competition lies in the hands of the foreign government).

2. The ECO Test

The FCC adopted the ECO test to promote international competition in the telecommunications industry.⁷⁰ The ECO test evaluates the existence of competitive opportunities for a United States telecommunications provider in the home country of the prospective foreign participant.⁷¹ The ECO analysis requires the evaluation of six factors to determine whether effective competitive opportunities exist for domestic market participants in the foreign market.⁷² These factors encompass much of the scope of the public interest review performed by the FCC.⁷³

Although the ECO test was the overwhelming criterion, failing or satisfying the ECO test was not the end of the inquiry for an application.⁷⁴ For example, the FCC could determine that negative findings

70. See *id.* at 3881, para. 18 (stating that adopting the ECO test is the best means to achieve fair global competition).

71. See Harwood et al., *supra* note 1, at 885 (describing the ECO test's ability to detect competitive opportunities for American businesses in foreign countries).

72. See 1995 Foreign Entry Order, *supra* note 52, at 3889, para. 40. It lists the six factors of an ECO analysis as:

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 anti-competitive 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.

Id.; see also Schmidt, *supra* note 9, at 632 (stating the four main factors in the FCC's ECO analysis: whether there are actual barriers to entry into the foreign market, whether reasonable opportunities for interconnection exist to the foreign telecommunications network, whether there are competitive safeguards in the foreign market, and whether the foreign market is effectively regulated).

73. See 1995 Foreign Entry Order, *supra* note 52, at 3881, para. 18 (stating that adopting the ECO test with additional safeguards serves the goals of increased competition).

74. See *id.* at 3876, para. 3 (retaining the additional public interest considerations outside the ECO test as the "general significance of the proposed entry to promotion of competition in the U.S. communications services market, the presence of cost-based accounting rates (under Section 214), as well as national security, law enforcement issues, foreign policy, and trade concerns"); Schmidt, *supra* note 9, at 633 (stating that an ECO determination may be outweighed by other

identified by the ECO analysis did not outweigh the benefits to American consumers that would result from a foreign participant's entry into the United States market.⁷⁵ Those benefits would then prompt the approval of the application. Furthermore, the FCC may identify problems in its ECO analysis that would be addressed by pending legislation in the foreign market participant's home country.⁷⁶ In this situation, the FCC may grant the application despite the harms revealed by the ECO test.⁷⁷

Nevertheless, the ECO test was the primary regulatory test that the FCC performed when reviewing applications of foreign market participants that wished to enter the United States basic telecommunications market.⁷⁸ The FCC designed the ECO test to protect the American market while at the same time giving foreign telecommunications providers a framework under which they could evaluate whether or not to pursue an application to enter the American market.⁷⁹ Despite the existence of the Fourth Protocol and the

public interest factors such as national security concerns and the likelihood of competitive harms that the application poses).

75. See, e.g., Harwood et al., *supra* note 1, at 885 n.57 (describing the FCC's action in approving an application despite the absence of effective competitive opportunities in the Netherlands for terrestrial microwave services because the existing public interest factors favoring approval, coupled with the regulatory changes in the Netherlands, outweighed the negative ECO finding).

76. See, e.g., *id.* at 890 (describing the FCC's approval of an application that raised ECO concerns on the condition that France and Germany approve market-opening legislation).

77. See, e.g., *In re Western Wireless Corp. and Western PCS Corp.*, 13 F.C.C.R. 64, 71 para. 20 (1997) (stating that even if there were ECO problems with an application, Hong Kong's participation in the Fourth Protocol would likely prompt the FCC to approve the application nevertheless); *In re Telecom Finland Ltd.*, 12 F.C.C.R. 17648, 17656-57 para. 24 (1997) (stating that Finland's participation in the Fourth Protocol would have likely overcome any ECO concerns). *But see In re The Merger of MCI Communications Corp. and British Telecom. PLC*, 12 F.C.C.R. 15351, 15356 para. 8 (1997) (stating that even if Britain were to implement completely the Fourth Protocol at the time of the instant proceeding, that alone would not warrant approval of the application).

78. See 1997 Foreign Entry Order, *supra* note 9, para. 22 (reviewing the application of the ECO test beginning with its adoption in 1995 to all applications by foreign market participants under 47 U.S.C. §§ 214 & 310(b)(4) (1994)).

79. See 1995 Foreign Entry Order, *supra* note 52, at 3890, para. 44 (responding to foreign governments' concerns that the ECO test is ambiguous by stating that the factors utilized in the ECO test actually provide "clear guidance" on the scope of the FCC's analysis); see also discussion, *supra* note 72 (describing the factors of the ECO analysis).

1997 Foreign Entry Order, the FCC continues to apply the ECO test to applications originating from nations not part of the WTO.⁸⁰

3. Safeguards

The 1995 Foreign Entry Order contains safeguards to correct anti-competitive harm that occurs after approval of an application.⁸¹ These safeguards include the "no special concessions" requirement⁸² and extensive reporting requirements for foreign service providers.⁸³ The safeguards are intended to ensure that the applicant does not

80. See 1997 Foreign Entry Order, *supra* note 9, para. 15 (finding that applicants from non-WTO countries will be subjected to the analysis created by the 1995 Foreign Entry Order, which includes the ECO test); *FCC Declines to Open Foreign Capital Floodgates Early*, PCS WEEK, July 9, 1997, available in 1997 WL 7364431 (quoting FCC International Bureau Chief as stating: "Until the commission adopts final rules to implement the WTO agreement, however, . . . we will continue to apply the current public interest analysis . . ."); see also *In re Telecom New Zealand Ltd.*, 13 F.C.C.R. 363, 364 para. 3 (F.C.C. Jan. 7, 1998) (applying the ECO test to an applicant from a WTO Member nation until the rules announced in the 1997 Foreign Entry Order take effect); *WTO Implementation Date Evaporates; FCC Schedules Briefing on New Rules*, TELECOMM. REP., Dec. 22, 1997, available in 1997 WL 7759330 (describing the reason for the delayed implementation of the 1997 Foreign Entry Order due to the public regulatory review requirements mandated by United States law). But see Foreign Participation in the U.S. Telecommunications Market, *supra* note 13, at 5743 (stating that the regulatory scheme contained in the 1997 Foreign Entry Order is effective as of February 9, 1998).

81. See 1995 Foreign Entry Order, *supra* note 52, at 3876, para. 5 (applying the competitive safeguards to United States telecommunications carriers that are already affiliated with foreign telecommunications providers).

82. See *id.* at 3972, para. 258 (stating that any United States telecommunications carrier may not agree to accept a special concession from any foreign carrier unless the foreign carrier does not have market power in its home country, in which case the FCC has the discretion to waive this requirement).

83. See *id.* at 3973-74, para. 262 (requiring that foreign-affiliated carriers that have market power file a tariff change request at least fourteen days prior to effecting the change). The 1995 Foreign Entry Order requires a domestic telecommunications carrier with market power to file authorization requests when adding or removing circuits. See *id.* at 3974-75, paras. 263-65. It also requires domestic telecommunications carriers that have market power as a result of an affiliation with a foreign carrier to file quarterly traffic and revenue reports. See *id.* at 3974-75, para. 265. Finally, it requires that a foreign-affiliated telecommunications provider with market power maintain detailed records related to the provision and maintenance of its facilities and services that it purchases from the foreign providers for review upon request by the FCC. See *id.* at 3975, para. 266.

have the opportunity to exploit its market power in its home market to the detriment of American consumers or service providers.⁸⁴

B. THE 1997 FOREIGN ENTRY ORDER

On November 25, 1997, seeking to bring United States law into accord with the Fourth Protocol and to pass on the benefits of increased competition in basic telecommunications services to American consumers,⁸⁵ the FCC announced the 1997 Foreign Entry Order.⁸⁶ To meet the obligations imposed by the Fourth Protocol, the 1997 Foreign Entry Order replaces the ECO test with an open entry standard that presumes that the entry of foreign market participants from WTO nations does not threaten competition.⁸⁷ To ensure American consumers the benefits of increased competition, the 1997 Foreign Entry Order preserves the public interest review as a backstop to prevent any anti-competitive behavior by a prospective foreign market participant.⁸⁸

1. An Open Entry Standard for WTO Members Replaces ECO Test

Perhaps the most significant change in the FCC's regulation of foreign participation is the removal of the ECO test for applicants

84. *See id.* at 3880, para. 15 (stating that the purpose and function of competitive safeguards is to protect against practices that are harmful to competition and consumers).

85. *See* 1997 Foreign Entry Order, *supra* note 9, para. 2 (surveying the change in international law brought about by the Fourth Protocol, the need to change United States law in response to the Fourth Protocol, and the belief that increased competition will benefit American consumers).

86. *See id.*

87. *See id.* para. 9.

88. *See* 1997 Foreign Entry Order, *supra* note 9, para. 46 (stating that notwithstanding the Fourth Protocol, the FCC must still "ensure that all applications are consistent with the public interest"); *infra* pt. III.B.2 (analyzing the public interest standard); *supra* note 55 and accompanying text (describing the statutory responsibility of the FCC); *see also* 1997 Foreign Entry Order, *supra* note 9, paras. 13-14 (defining the prospective foreign market participant that benefits from the rules as one that files (i) an application for permission to provide international basic telecommunication service using its own facilities or by reselling private wireline service, (ii) an application for a cable landing license into the United States, or (iii) an application for authorization to exceed the 25% threshold of foreign ownership permitted by existing law).

from WTO nations.⁸⁹ The FCC designed the open entry standard that replaces the ECO test to give prospective foreign market participants from WTO Member nations a relatively unobstructed path into the United States market.⁹⁰ Most importantly, this new standard presumes that the prospective foreign market participant is from a nation that will open its market to foreign participation,⁹¹ especially to United States basic telecommunications providers.⁹² Although some WTO Members have not fully committed to completely opening their markets to competition,⁹³ and others are currently phasing in their commitments to open competition,⁹⁴ the open entry standard applies regardless of the degree of commitment made by individual WTO Members to the Fourth Protocol.⁹⁵ The FCC does not require that a

89. See 1997 Foreign Entry Order, *supra* note 9, para. 9; see also *id.* para. 10 (noting the benefits that American consumers will enjoy when foreign market participants are allowed to participate in the American market more liberally). The FCC maintains that the elimination of the ECO test will substantially reduce prospective foreign market participants' regulatory burden. See *id.* para. 30. To support its position, the FCC cites industry comments that argue that abandoning the ECO test will save valuable time and resources of the FCC and other interested parties. See *id.* para. 31.

90. Compare 1997 Foreign Entry Order, *supra* note 9, paras. 33-34 (describing the remaining regulatory issues facing a prospective foreign market participant and the significant reduction in time and expense caused by removal of the ECO test) with 1995 Foreign Entry Order, *supra* note 52, at 3891-95, paras. 47-56 (describing the detailed analysis required when applying the ECO test), and *In re Telecom New Zealand Ltd.*, No. 13 F.C.C.R. 363 (1998) (applying the burdensome ECO analysis to a prospective foreign market participant's application).

91. See 1997 Foreign Entry Order, *supra* note 9, para. 9 (finding that the commitments made by WTO Members to the Fourth Protocol will cause them to open their markets and enact pro-competitive foreign participation regulations).

92. See *id.* paras. 4, 9 (noting that American basic telecommunications providers will benefit from more open markets that will result from the Fourth Protocol and the enactment of the 1997 Foreign Entry Order); see also *U.S. Industry Praises Definite Date for WTO Pact*, TR DAILY, Jan. 26, 1998, available in 1998 WL 6571113 (reporting the high praise that MCI Telecommunications Corporation and AT&T Corporation have heaped upon the Fourth Protocol).

93. See 1997 Foreign Entry Order, *supra* note 9, para. 36 (citing industry concerns that some WTO Members have not fully committed to the Fourth Protocol).

94. See *id.* para. 27 (identifying ten WTO members that will adopt the commitments contained in the Fourth Protocol "in part or at a future date"); *WTO Telecom Release*, *supra* note 11, para. 8 (reporting that twenty-five governments, about forty percent of WTO Members, will be phasing in their commitments to the Fourth Protocol).

WTO Member have a certain quality of commitment to the Fourth Protocol but merely requires that the prospective foreign market participant be from a WTO Member nation.⁹⁶ With this wholesale change, the FCC believes that it has brought United States law into conformity with the terms and goals of the Fourth Protocol.⁹⁷

The FCC submits that the Fourth Protocol will help eliminate anti-competitive conditions that an American basic telecommunications provider might face.⁹⁸ Also, the FCC hopes the increased competition resulting from the removal of these barriers, coupled with the opportunity to participate in a large international market, will ensure continued compliance with the Fourth Protocol.⁹⁹ In light of these

95. See 1997 Foreign Entry Order, *supra* note 9, para. 9 (stating that the open entry standard applies to all applicants from WTO Member countries without reservation).

96. See 1997 Foreign Entry Order, *supra* note 9, para. 37 (stating that the FCC will not consider the quality of commitment to the Fourth Protocol because of the increased pressure on all WTO Members to open their markets to competition and that treating individual WTO Members differently would not be appropriate); see also *id.* paras. 38-39 (explaining that the benefits of increased competition will encourage WTO Members to make greater commitments to the Fourth Protocol). The FCC proclaims that the United States must lead the way toward an open global market for basic telecommunications by strictly adhering to the Fourth Protocol and opening its markets completely to foreign participation. See *id.* para. 40. In arriving at its conclusion that the ECO test must be dropped, the FCC expressed concern that any sliding scale of ECO review would likely violate the terms of the Fourth Protocol and could ironically prompt other WTO Member nations to bring actions against the United States. See *id.*

97. See 1997 Foreign Entry Order, *supra* note 9, para. 29 (concluding that it is no longer appropriate to continue ECO analysis when presented with an application from a prospective market participant from a WTO Member nation); Harwood et al., *supra* note 1, at 886 (noting that the FCC's application of the ECO test is inconsistent with GATS because it focuses the attention of the FCC on the nationality of the prospective foreign market participant).

98. See 1997 Foreign Entry Order, *supra* note 9, para. 33 (concluding that the open competitive environment created by the Fourth Protocol coupled with the competitive safeguards outlined in the 1997 Foreign Entry Order adequately protect against anti-competitive harms); see also Harwood et al., *supra* note 1, at 884 (concluding that the Fourth Protocol has made substantial progress toward liberalizing competition in the basic telecommunications service industry); *infra* pt. III.B.2 (analyzing the public interest standard).

99. See 1997 Foreign Entry Order, *supra* note 9, para. 38 (describing the predicted effect that increased competition and global opportunity to enter basic telecommunications markets will cause foreign market participants to pressure their governments to comply with the Fourth Protocol as quickly as possible); see also *id.* para. 39 (arguing that the United States Trade Representative and other WTO

commitments to competition and competitive effects that result from implementation of the Fourth Protocol, the FCC concludes that the ECO test is not necessary for applicants from WTO nations.¹⁰⁰

The FCC also has competitive safeguards¹⁰¹ in place to eliminate most of the anti-competitive issues arising from the implementation of the open entry standard.¹⁰² These safeguards are triggered by specific conduct¹⁰³ of a foreign market participant occurring after the

Members' trade watchdogs are poised to seek redress for any perceived violation of GATS and the Fourth Protocol that may harm competition in the provision of international basic telecommunications service).

100. *See id.* para. 43.

101. *See id.* para. 34 (listing the competitive safeguard mechanisms that are in place to combat anti-competitive behavior). The 1997 Foreign Entry Order refines the "No Special Concessions" safeguard that presumes that a foreign telecommunications provider with market power in its home market may not form agreements with an American telecommunications provider involving: provision of basic telecommunications service, the distribution of customers and allocation of resources to provide seamless telecommunications service, and the disclosure of information related to the foreign telecommunications service provider's basic network. *See id.* para. 165. It further describes the benchmark rate safeguard that applies to facilities-based telecommunications service providers that have foreign market affiliates. *See id.* para. 192. The 1997 Foreign Entry Order summarizes the dominant carrier safeguards that require a telecommunications provider with market power on a specific communications route, regardless of whether the carrier is American or foreign. *See id.* para. 222. That carrier must: file tariff filings one day before tariff changes, structurally separate the foreign affiliate from the domestic carrier, file quarterly traffic reports with the FCC, file quarterly reports with the FCC regarding maintenance contracts provided by foreign affiliates, and file quarterly circuit reports with the FCC. *See id.* para. 222.

102. *See id.* para. 41 (stating that the competitive safeguards will deter most anti-competitive conduct).

103. *See, e.g., id.* para. 145 (expressing the concern that telecommunications providers with control over foreign input markets can discriminate against unaffiliated competitors); *id.* para. 146 (declining to rely on the antitrust laws to address typical anti-competitive behavior in the telecommunications market.) The anti-competitive behavior includes: price discrimination by a monopolist foreign telecommunications provider against unaffiliated American telecommunications providers, non-price discrimination by a monopolist foreign telecommunications provider against unaffiliated American telecommunications providers, and participation in a price squeeze strategy by which a monopolist foreign telecommunications service provider substantially lowers its prices to affiliated American telecommunications providers in an attempt to squeeze out other non-affiliated American telecommunications providers. *See id.; cf.* 1 ABA ANTITRUST SECTION, ANTITRUST L. DEV. 276-82 (4th ed. 1997) (describing the "essential facilities doctrine" that exists in United States antitrust law preventing the restriction of an essential resource by a monopolist denying competitors the opportunity to compete).

FCC has approved its application to operate in the United States market.¹⁰⁴ These safeguards, therefore, provide remedial relief against anti-competitive conduct that would not have happened if the FCC denied the applicant access to the United States market.

The FCC retained its traditional public interest review to address allegedly extreme anti-competitive behavior.¹⁰⁵ The open entry standard only creates a strong presumption that the applicant will not engage in anti-competitive conduct.¹⁰⁶ The removal of the ECO test invites interested parties to attack this presumption under the FCC's public interest review.¹⁰⁷

2. *The Public Interest Standard*

Once an applicant has met the open entry standard, the FCC is statutorily bound to consider whether the application is "consistent with the public convenience and necessity,"¹⁰⁸ as well as "consistent with the public interest."¹⁰⁹ While this standard appears to be quite broad,¹¹⁰ the FCC has indicated that the statutory requirements will be applied very narrowly to the foreign entry process.¹¹¹

The FCC analyzes the public interest using two tests.¹¹² First, the FCC considers whether the application is consistent with the public

104. See 1997 Foreign Entry Order, *supra* note 9, para. 34 (noting that the competitive safeguards apply when the foreign market participant has entered the United States market).

105. See *id.* para. 46 (reserving the traditional public interest review as a method of deterring conduct that poses a very high risk to competition); *infra* pt. IV.B (discussing transparent regulation).

106. See 1997 Foreign Entry Order, *supra* note 9, para. 50 (adopting the presumption that WTO Members have complied with market opening policies for basic telecommunications service and, therefore, should be allowed open entry into the United States market).

107. See 1997 Foreign Entry Order, *supra* note 9, para. 349 (permitting interested parties the opportunity to file comments regarding pending license applications before the FCC); 47 C.F.R. § 1.225(a) (1997) (stating that any party can appear before the FCC).

108. 47 U.S.C. § 214(a) (1994).

109. 47 U.S.C. § 310(b)(4).

110. See 1997 Foreign Entry Order, *supra* note 9, para. 63 (noting the concerns about the supposed broad language describing the public interest standard).

111. See *id.* (predicting that the application of the public interest standard as defined in the order will rarely jeopardize an application).

112. See *id.* para. 44 (stating that the FCC applies a public interest analysis to a section 214 or section 310(b)(4) application).

convenience and necessity.¹¹³ Since the FCC concedes that the presumption that an application does not threaten competition is rebuttable,¹¹⁴ the FCC reserves the power to attach conditions to the application if it decides that the presence of a foreign participant might threaten competition.¹¹⁵ Furthermore, in exceptional circumstances, the FCC could deny the application due to the potential harm to competition.¹¹⁶

The second test considers the effect of the application upon "national security, law enforcement, or obligations arising from international agreements to which the United States is a party."¹¹⁷ The FCC, however, expects that if an application presents issues related to this prong of the public interest analysis, the Executive Branch will raise

113. *See id.* para. 47 (finding that even though there is a rebuttable presumption that the entry of WTO Members' basic telecommunication providers serves the public interest, the FCC must nonetheless consider whether the application presents such an extraordinary risk to competition that would require the FCC to either impose conditions on the application or deny it).

114. *See id.* para. 51 (stating that there may be a possibility where a foreign based carrier from a "WTO Member may pose competitive risks by virtue of the applicant's ability to exercise market power in a relevant foreign market"). For example, a foreign carrier with market power in its home country may team with a United States carrier on more favorable terms than other United States carriers. *See id.* Furthermore, a foreign carrier could disrupt service to unaffiliated United States carriers and thus undermine the international telecommunication services that these carriers could offer. *See id.*

The reputation of the applicant is another important FCC consideration. *See id.* para. 53. If the FCC believes that the applicant may, on its own, violate the laws of the United States, then the FCC may exercise its right to deny the application. *See id.* Of course, the FCC's reputation consideration applies to both domestic applicants and foreign applicants and thus defeats the argument that foreign carriers are treated differently than American carriers. *See id.* Similarly, WTO Members are required to treat all service providers equally regardless of nationality. *See GATS, supra* note 20, art. II, para. 1, annex 1B (citing the general principles underlying WTO Members' agreements for reciprocity regarding trade in services).

115. *See* 1997 Foreign Entry Order, *supra* note 9, para. 51 (describing the types of conditions, including additional reporting requirements, that could be imposed upon an applicant).

116. *See id.* para. 52 (describing the type of competitive harm that must be presented by an application as "the ability to harm competition in the U.S. market in addition to the ability to exercise [the applicant's] foreign market power"). The FCC explains that this anti-competitive harm would manifest itself in the form of an applicant's ability to raise domestic prices by restricting supply. *See id.* The FCC predicts, however, that denial of an application by a foreign carrier from a WTO Member nation would be extremely rare. *See id.*

117. 1997 Foreign Entry Order, *supra* note 9, para. 63.

them.¹¹⁸ Moreover, the FCC has noted that this portion of the public interest analysis has not changed and has rarely been the grounds for denial of an application.¹¹⁹

IV. RECONCILING THE FOURTH PROTOCOL WITH THE 1997 FOREIGN ENTRY ORDER

A. OPEN MARKETS

Fourth Protocol participants must meet their scheduled commitments, subject to their scheduled exclusions, by the time the Fourth Protocol comes into force.¹²⁰ Participants with exclusions related to basic telecommunications service do not have to accord MFN treatment to other participants in the excluded sector.¹²¹ Thus, depending upon the commitments and exclusions, a participant may not have to completely open its basic telecommunications market to competition.¹²²

118. *See id.* para. 66 (stating that it is the responsibility of the Executive Branch to raise concerns about “national security, law enforcement, foreign, and foreign policy” for independent consideration by the FCC); *see also* 47 C.F.R. pt. 1.1524 (1997) (permitting any interested party the opportunity to file comments with the FCC regarding any pending application).

119. *See id.* para. 64 (noting that the United States Trade Representative has made comments to the FCC regarding foreign entry applications only on four occasions during the past two years).

120. *See Decision on Basic Telecommunications*, *supra* note 30, para. 2 (prohibiting parties to the Fourth Protocol that made schedules of commitments from enacting or enforcing any legislation or policies in their home countries that is inconsistent with their commitments); *see also* Fourth Protocol, *supra* note 5, para. 1 (incorporating the commitments and exceptions made as a result of the Fourth Protocol into the participants’ Schedule of Specific Commitments and List of Article II Exemptions to the GATS).

121. *See* GATS, *supra* note 20, art. II para. 2 (allowing any WTO Member to maintain a list of exclusions to MFN treatment that must be annexed to the GATS). *See, e.g., Final U.S. Exemptions*, *supra* note 22 (excluding certain basic telecommunications services from the Fourth Protocol and, by extension, excluding these services from the GATS).

122. *See* Harwood et al., *supra* note 1, at 880 (describing the limitations of MFN resulting from the services excluded under GATS Article II). *But cf.* General Agreement on Trade in Services, Dec. 15, 1993, Annex on Article II Exceptions, 33 I.L.M. 44, 68-69 (stating that exceptions to the GATS should not last longer than ten years).

The 1997 Foreign Entry Order effectively opens the United States market for basic telecommunications service to any WTO Member.¹²³ In fact, the 1997 Foreign Entry Order actually provides more market access than is called for in the Fourth Protocol.¹²⁴ Any WTO Member has open access to the United States market,¹²⁵ and a WTO Member will only be denied access when significant anti-competitive harm will result in the United States market for international telecommunications services.¹²⁶ Regardless, every WTO Member will enjoy the 1997 Foreign Entry Order's open market entry standard.

The 1997 Foreign Entry Order complies with the market-opening purposes of the Fourth Protocol. According to the FCC, only in rare circumstances will the FCC deny an application from a foreign basic telecommunications provider from a WTO Member.¹²⁷ The FCC will likely approve the application of a WTO Member that is a Fourth Protocol participant in nearly all situations.¹²⁸ Therefore, the 1997 Foreign Entry Order has effectively opened the United States market.

B. TRANSPARENT REGULATION

The Fourth Protocol also calls for transparent regulation by an independent body in each WTO Member nation that is also a Fourth Protocol participant.¹²⁹ This requirement, which the Reference Paper suggests, calls for a WTO Member to publicize the standards by

123. See *supra* notes 89-100 and accompanying text (analyzing the market-opening effects of the 1997 Foreign Entry Order).

124. Compare *supra* note 88 (describing the entities to whom the FCC will apply its regulations under the 1997 Foreign Entry Order) with *supra* notes 93-94 and accompanying text (describing the varying degrees of participation in the Fourth Protocol because WTO Members have filed exceptions to MFN) and *supra* notes 26-28 (describing the inherent limitations of the MFN mechanism).

125. See *supra* note 96 (describing the 1997 Foreign Entry Order's regulations that apply the open market standard to any WTO Member).

126. See *supra* note 114 (discussing the circumstances whereby a WTO Member may be denied access).

127. See *id.*

128. See 1997 Foreign Entry Order, *supra* note 9, para. 52 (predicting that only under the rarest of circumstances will a participant in the Fourth Protocol be denied access to the United States market); *FCC Eases Carriers' Access to U.S. Market*, TR INT'L, Dec. 5, 1997, available in 1997 WL 12641621 (reporting FCC officials' comments that it would be "extremely rare" for a WTO Member to have its application denied).

129. See *Reference Paper*, *supra* note 37, at 366-69.

which it will regulate foreign participation in its basic telecommunications market.¹³⁰ These standards must be readily interpreted by prospective market participants.¹³¹

The 1997 Foreign Entry Order meets this requirement by stating exactly to whom the new open entry standard applies.¹³² Also, the 1997 Foreign Entry Order narrowly defines the remaining statutory obligation of the FCC to review the application's effect on the public interest.¹³³ This public interest review is permitted by the Fourth Protocol and the GATS.¹³⁴

The Fourth Protocol requires that regulatory review of licensing of foreign telecommunications providers occur within a reasonable amount of time.¹³⁵ Indeed, the FCC specified time periods for the review of applications in its 1997 Foreign Entry Order.¹³⁶ These time periods are substantially shorter than those previously used under the ECO analysis.¹³⁷

130. *See id.* at 368.

131. *See id.* at 368-69 (describing the requirement of the independent regulatory body to provide public license criteria).

132. *See FCC Eases Carriers' Access to U.S. Market*, *supra* note 128 (listing the applications to which the 1997 Foreign Order Applies as applications for authorization to provide facilities-based and resold services by a foreign telecommunications carrier, applications to exceed the 25% indirect foreign ownership threshold, and applications for undersea cable landing licenses); *see also* 1997 Foreign Entry Order, *supra* note 9, para. 2; *cf.* Schmidt, *supra* note 9, at 630-31 (describing to whom the 1995 Foreign Entry Order applied and the type of applications that trigger the application of the ECO test).

133. *See supra* pt. III.B.2 (detailing the public interest analysis set forth by the 1997 Foreign Entry Order).

134. *See Decision on Basic Telecommunications*, *supra* note 30, para. 2 (stating that the implementation of the commitments and exclusions by the WTO Members that have participated in the Fourth Protocol must be "consistent with their existing legislation and regulations").

135. *See Reference Paper*, *supra* note 37, at 369 (stating that the suggested regulatory body should publicize the amount of time that is "normally required" to complete its review of a license application).

136. *See* 1997 Foreign Entry Order, *supra* note 9, para. 327 (stating that the streamlined process the vast majority of applications will enjoy under the 1997 Foreign Entry Order will take thirty-five days from the time the FCC places the application on its docket); *see also id.* para. 328 (stating that applications not qualifying for the streamlined process will receive renewable ninety-day time periods under which the FCC can complete its review).

137. *Compare id.* para. 327 (creating a thirty-five day review period for streamlined applications), *with id.* para. 35 (noting that removal of the ECO test will save substantial time and money).

V. EVALUATION OF EUROPEAN UNION CLAIMS

The European Union has expressed concerns regarding the 1997 Foreign Entry Order and has threatened action before the WTO.¹³⁸ The European Union complains that the public interest analysis of the FCC is not well-defined¹³⁹ and that the 1997 Foreign Entry Order assumes that special competitive safeguards are necessary for United States companies affiliated with foreign telecommunications carriers that have market power.¹⁴⁰ The European Union could pursue action with the WTO, as it has indicated,¹⁴¹ or appeal the 1997 Foreign Entry Order through an action before the United States Courts of Appeals.¹⁴²

138. See EU Release, *supra* note 18 (expressing the European Union's concern that the FCC's Notice on Proposed Rule-Making on Foreign Participation in the United States Telecommunications Market violates WTO obligations).

139. See *id.* (citing such vague public interest factors as "law enforcement" and "foreign policy"); see also *supra* pt. III.B.2 (describing the remaining public interest review the FCC will perform under the 1997 Foreign Entry Order).

140. See *id.*; see also notes 101-04 and accompanying text (describing the competitive safeguards that remain at the FCC's disposal to address anti-competitive harm).

141. See *id.*; Frances Williams, *Date Agreed for Telecoms Pact*, FIN. TIMES, Jan. 27, 1998, at 7 (stating that the European Union continues to warn that it may issue a challenge in the WTO regarding the United States' alleged non-fulfillment of its commitments to the Fourth Protocol); Jeffrey Silva, *WTO Accord Could Hit Snags: FCC, EU Spar Over Free Trade*, RCR RADIO COMM. REP., Dec. 8, 1997, available in 1997 WL 16672232 (reporting that European Union spokesman Nigel Gardiner has said that the European Union retains the right to seek redress through the WTO for alleged problems with the 1997 Foreign Entry Order); *FCC Eases Carriers' Access to U.S. Market*, *supra* note 128 (describing the continuing European Union concerns with the 1997 Foreign Entry Order despite the FCC's modifications of the order in response to the concerns expressed by the European Union).

142. See 47 U.S.C. § 402(a) (1994) (permitting the appeal of any order by the FCC); 47 U.S.C. § 405(a) (permitting an appeal of an order by a party in an FCC rulemaking action regardless of whether the party pursues a reconsideration of the order by the FCC); 47 U.S.C. § 2342 (granting any court of appeals, except for the United States Court of Appeals for the Federal Circuit, the power to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission").

A. POTENTIAL EUROPEAN UNION ACTION BEFORE THE WTO

To initiate a claim under the enforcement mechanisms of the WTO,¹⁴³ the European Union must first allege a justiciable claim under the GATS.¹⁴⁴ Causes of action under the GATS include either violations¹⁴⁵ or non-violations.¹⁴⁶ Since the 1997 Foreign Entry Order directly addresses the Fourth Protocol, which is part of the GATS, the European Union must allege a violation cause of action to attack the retention of public interest review by the FCC.¹⁴⁷ The following section will analyze a potential action by the European Union arising from the enactment of the 1997 Foreign Entry Order and then

143. See GATS, *supra* note 20, arts. XXII & XXIII (describing the GATS enforcement mechanisms that consist of consultations between WTO Members and dispute settlement bodies ("DSB") that resolve conflicts that are not satisfactorily addressed in consultations).

144. See GATS, *supra* note 20, art. I (stating that the GATS applies to measures by a WTO Member that affect trade in services); cf. WTO Appellate Body Report on European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, para. 220 (Sept. 9, 1997), *available in* 1997 WL 577784 [hereinafter WTO Banana Appeal] (analyzing the language of the GATS to determine the scope of justiciable claims under the GATS).

145. See GATS, *supra* note 20, art. XXIII, para. 1 (stating that any Member can seek consultations regarding any other Member that has allegedly failed to honor its obligations under the GATS); Peter K. Morrison, *WTO Dispute Settlement in Services: Procedural and Substantive Aspects*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 377, 380-81 (Ernst-Ulrich Petersmann ed., 1997) (describing a violation case as one where a party to the GATS fails to fulfill an obligation under the GATS); cf. First Submission of the United States of America re European Communities—Regime for the Importation, Sale and Distribution of Bananas, paras. 199-211 (July 9, 1996), *available in* 1996 WL 397092 [hereinafter United States Banana Complaint] (alleging that the European Union has not met its MFN obligation under Article II of the GATS and therefore has violated the GATS).

146. See GATS, *supra* note 20, art. XXIII, para. 3 (stating that a WTO Member may seek consultations regarding "any benefit that it could *reasonably have expected* to accrue to it under a specific commitment of another Member") (emphasis added); Morrison, *supra* note 145, at 381 (describing a non-violation case as one that involves conduct by a Member that does not directly violate the terms of the GATS or an agreement to it but rather affects the Member's commitments to the GATS).

147. See GATS, *supra* note 20, art. XXIII para. 1 (stating that if any WTO Member does not satisfy its commitments that are annexed to the GATS, any other member may seek consultations); Morrison, *supra* note 145, at 381 (describing the relaxed standard of a violation under the GATS as opposed to the GATT); see also WTO Banana Appeal, *supra* note 144, para. 220 (interpreting the GATS as applying to any measure that affects trade services in any way).

hypothesize a future scenario that may cause the European Union to seek redress through the WTO.

1. Potential Action Based on Enactment of the 1997 Foreign Entry Order

The European Union must claim that the 1997 Foreign Entry Order denies it a benefit it is entitled to under the GATS.¹⁴⁸ First, the European Union contends that the public interest review standard is vague and overly broad.¹⁴⁹ As discussed above, instead of automatically approving applications by foreign telecommunications providers from WTO Member nations, under the 1997 Foreign Entry Order the FCC has reserved the right to evaluate (1) whether the prospective applicant poses a threat to "national security, law enforcement, or obligations arising from international agreements to which the United States is a party"¹⁵⁰ and (2) whether the applicant poses extraordinary anti-competitive hazards if allowed to enter the United States market.¹⁵¹ This public interest review could potentially result in denial of an application by a telecommunications provider from a WTO Member nation.¹⁵² The European Union would characterize the rejection of an application as a denial of a benefit and, hence, a violation of the GATS.

The reservation of power to deny applications does not violate the GATS.¹⁵³ The European Union asserts, however, that the ambiguous

148. See *supra* notes 145 & 147 and accompanying text (describing the causes of action under the GATS resulting from a WTO Member failing to fulfill specific commitments to the GATS); cf. United States Banana Complaint, *supra* note 145, para. 212 (concluding that the infringement of the obligations under the GATS (or any covered agreement under the GATS) is considered a prima facie case in which a violation of the GATS has occurred).

149. See EU Release, *supra* note 18 (urging the United States to change its telecommunications regulations).

150. See *supra* notes 117-19 and accompanying text (describing the public interest concerns regarding national security that the FCC will continue to evaluate under the 1997 Foreign Entry Order).

151. See *supra* notes 113-14 (describing the type of anti-competitive harm against which the FCC would guard).

152. See *supra* note 108-19 and accompanying text (discussing the public interest review).

153. See *Decision on Basic Telecommunications*, *supra* note 30, para. 2 (stating that each WTO Member participating in the Fourth Protocol must change its domestic regulations to conform with the market opening commitments for the basic

standards applied in determining denial, violate the GATS.¹⁵⁴ If the European Union complaint is deemed valid, then it would show that the United States has not lived up to its commitment to provide definite standards used to evaluate telecommunications applications for entry into its market.¹⁵⁵ Accordingly, under GATS law,¹⁵⁶ the European Union could seek consultations regarding any denial of benefits under the GATS.¹⁵⁷

The European Union has also complained that the 1997 Foreign Entry Order makes an unnecessary assumption.¹⁵⁸ The FCC assumed that safeguards are necessary to address potential anti-competitive conduct that a foreign telecommunications provider with market power in its home country might engage in with its affiliates in the United States.¹⁵⁹ The safeguards empower the FCC to require a dominant foreign telecommunications provider to offer reasonable access to its network to all United States telecommunications provid-

telecommunications service); 1997 Foreign Entry Order, *supra* note 9, para. 12 (suggesting that the FCC has taken important steps toward fulfilling the United States commitments to the Fourth Protocol with the adoption of the 1997 Foreign Entry Order).

154. *See* GATS, *supra* note 20, art. VI, para. 4 (noting that a WTO Member may have a regulatory body evaluate the qualifications of an applicant for a license to provide services, but that the standards for review must be objective and transparent); *Reference Paper*, *supra* note 37 (stating that the independent regulatory body that reviews basic telecommunications license applications must promulgate identifiable standards for review).

155. *See Final United States Commitments*, *supra* note 22 (accepting the obligations contained in the *Reference Paper*, which states that the United States will adopt transparent regulations of telecommunications providers as part of the United States commitments to the GATS).

156. *See* Morrison, *supra* note 145, at 377-78 (recognizing that there is a paucity of decisions by the WTO resolving disputes by WTO Members regarding any service industry due to the relative youth of the WTO and the GATS).

157. *See* GATS, *supra* note 20, art. XXIII, para. 1 (stating that any WTO Member may have recourse to address any alleged violation of the GATS that results from another WTO Member failing to fulfill its commitments).

158. *See* EU Release, *supra* note 18.

159. *See* 1997 Foreign Entry Order, *supra* note 9, paras. 144-47 (explaining in great detail the FCC's concerns about foreign monopolists using their market power to harm the United States international telecommunications market and concluding that special safeguards are necessary to monitor foreign telecommunications providers that have market power in their home market and United States affiliated carriers).

ers on similar terms and to make extensive reports to the FCC.¹⁶⁰ This regulatory burden could be seen as a non-tariff barrier that reduces the access of dominant foreign telecommunications providers to the United States market.¹⁶¹

The European Union might allege that the safeguards placed upon dominant foreign telecommunications providers violate the United States' commitment to the GATS.¹⁶² Since most foreign telecommunications providers are monopolies or have market power,¹⁶³ the safeguards contained in the 1997 Foreign Entry Order could apply to nearly all potential foreign participants in the United States market. Since the United States has committed to open its market in the Fourth Protocol, the application of the safeguards contained in the 1997 Foreign Entry Order arguably could nullify the benefit of open markets for which WTO Members bargained. Such nullification would be a justiciable cause of action under the GATS and, as a result, the European Union could seek consultations through the WTO.¹⁶⁴

2. Potential European Union WTO Action Taken at a Future Date

In addition to the claims resulting from the enactment of the 1997 Foreign Entry Order, the European Union could wait until several of European Union based telecommunications providers file applications with the FCC. If the FCC routinely denies or conditions foreign entry into the United States basic telecommunications market in applying the 1997 Foreign Entry Order, the European Union may have

160. See *id.* paras. 225-26 (requiring the United States affiliates of foreign telecommunications providers to file numerous reports with the FCC).

161. See GATS, *supra* note 20, art. VI, para. 4 (stating that when granting licenses for participation in a service sector, a WTO Member may not erect barriers to license acquisitions that are "not more burdensome than necessary").

162. See *Decision on Basic Telecommunications*, *supra* note 30, para. 2 (describing the Fourth Protocol's provision that prevents a party from enacting any legislation that conflicts with the participant's commitments).

163. See *supra* note 1 (describing the economic pressures that lead to monopolies in the basic telecommunications sector).

164. See Morrison, *supra* note 145, at 381-82 (stating that a GATS claim could result from the improper application of a measure designed to comply with commitments to the GATS); United States Banana Complaint, *supra* note 145, para. 212.

substantial evidence the United States has not fulfilled its commitments to the Fourth Protocol.¹⁶⁵

The Fourth Protocol calls for each participant to refrain from enacting any legislation that would hinder the participant's commitments.¹⁶⁶ The United States committed to open its basic telecommunications market completely to foreign participation, with only one exception.¹⁶⁷ The 1997 Foreign Entry Order is designed to accomplish these commitments.¹⁶⁸ If, in practice, the FCC routinely denies or conditions applications by foreign telecommunications providers,¹⁶⁹ the 1997 Foreign Entry Order would have the effect of closing the United States market.¹⁷⁰ The European Union could thus seek

165. Cf. United States Banana Complaint, *supra* note 145, paras. 143-51 (comparing the opportunities to enter the European Union banana market before and after the European Union's enactment of a regulatory regime affecting licensing for banana imports). The new regulatory regime violated Articles II and XVII of the GATS. See WTO Banana Appeal, *supra* note 144, para. 255 (affirming the DSB finding that the European Union's regulatory scheme governing the importation of bananas violated the GATS).

166. See *Decision on Basic Telecommunications*, *supra* note 30, para. 2.

167. See *supra* note 22 (discussing the exceptions to the Fourth Protocol made by the United States).

168. See 1997 Foreign Entry Order, *supra* note 9, para. 12 (stating that the 1997 Foreign Entry Order is a significant step toward fulfilling the commitments to the Fourth Protocol).

169. Cf. *In re* Application by BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Louisiana, No. 97-231, 1998 WL 42491, para. 1 (F.C.C. Feb. 3, 1998) (denying application by basic telecommunications provider to provide long distance telephone service because the provider failed to satisfy statutory requirements to provide competitors non-discriminatory access to operations support systems and offer access to its network at fair prices); *In re* Application of BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in South Carolina, No. 97-208, 1997 WL 799081 (F.C.C. Dec. 24, 1997) (denying application by basic telecommunications service provider to provide long distance phone service because provider did not satisfy competitive checklist that determines whether provider has adequately opened its market to competitors); *In re* Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan, 9 Communications Reg. (P&F) 267, 267 para. 5 (F.C.C. 1997) (denying Section 271 application by local Bell Operating Company to provide long distance telephone service, as permitted by the 1996 Telecommunications Act, because Ameritech did not adequately satisfy the competitive checklist contained in the Act).

170. See Oliver, *supra* note 20, at 18 (concluding that if the FCC conditions foreign entry applications after applying the 1997 Foreign Entry Order, the prospec-

consultations through the WTO because the United States would have violated its commitments to open its market in basic telecommunications.¹⁷¹

While claims under the GATS would be essentially the same regardless of whether the European Union seeks consultations now or later, the European Union will have a stronger claim for remedial action by the WTO if the FCC demonstrates that it will not grant applications of prospective foreign market participants without conditions. As described in the previous section, the FCC thoroughly explained the standards by which it will perform the public interest analysis.¹⁷² Additionally, the FCC has clearly demonstrated a long tradition of applying safeguards to both domestic and foreign telecommunications providers that have market power in their respective markets.¹⁷³ Because the 1997 Foreign Entry Order does not on its face contradict the commitments of the United States to the Fourth Protocol, it would appear that the European Union could not succeed on a GATS claim unless the FCC routinely denies or conditions applications by foreign telecommunications providers.

tive foreign applicant will accuse the FCC of xenophobia or nationalistic protectionism).

171. See GATS, *supra* note 20, art. XXIII (stating that no WTO Member may deny a benefit that another Member expects under the GATS by utilizing a measure consistent with the GATS); *Decision on Basic Telecommunications*, *supra* note 30, para. 2 (concluding that no party to the Fourth Protocol shall enact any legislation inconsistent with the market opening commitments resulting from the negotiations leading up to the Fourth Protocol). But see GATS, *supra* note 20, art. II, para. 1 (stating that a WTO Member is only required to accord the same treatment to a foreign service provider as it provides to any other service provider); 47 U.S.C.A. § 271(c)(2)(B) (West Supp. 1997) (itemizing a list of interconnection requirements for dominant American providers of basic telecommunications services who seek to offer long distance service in regions of the United States where the law previously excluded them from operation); Oliver, *supra* note 20, at 18 (noting that dominant American telecommunications services are extensively regulated by the FCC under the 1996 Telecommunications Act and opining that a complaint by dominant foreign telecommunications providers to the WTO regarding denial of MFN treatment would likely fail because of this extensive domestic regulation).

172. See *supra* notes 150-52 and accompanying text (describing the FCC's explanation for applying the public interest standard in the 1997 Foreign Entry Order).

173. See *supra* notes 158-60 and accompanying text (detailing the FCC's competitive safeguards).

B. POTENTIAL EUROPEAN UNION ACTION BEFORE A UNITED STATES CIRCUIT COURT

For purposes of this comment, it is assumed that the European Union has standing to seek judicial review of the 1997 Foreign Entry Order at the federal circuit court level.¹⁷⁴ The European Union's complaints—that the 1997 Foreign Entry Order inadequately defines the public interest review performed by the FCC and unnecessarily assumes that safeguards are required for dominant carrier regulation—would be reviewed under the arbitrary and capricious standard.¹⁷⁵ This standard requires that the FCC adequately consider the

174. See 47 U.S.C. § 402(a) (1994) (permitting the appeal of any order by the FCC); 47 U.S.C. § 405(a) (permitting an appeal of an order by a party in an FCC rulemaking action regardless of whether the party pursues a reconsideration of the order by the FCC); 47 U.S.C. § 2342 (granting any court of appeals, except for the United States Court of Appeals for the Federal Circuit, the power to “enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission”); 1997 Foreign Entry Order, *supra* note 9, App. A (listing the European Union as a participant in the proceeding); see also *Competitive Telecomm. Ass’n v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996) (holding that a state public utility commission has standing to challenge an FCC rule that infringes upon its sovereign powers to “create[] and enforce[] fair and effective public utility regulation.”). But see *Omnipoint Corp. v. FCC*, 78 F.3d 620, 628 (D.C. Cir. 1996) (quoting *Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 498 (D.C. Cir. 1994)) (holding that a party must “show injury in fact that is fairly traceable to the defendant’s action and is redressable by the relief requested” to have standing to appeal a FCC ruling); *DIRECT TV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997).

175. See 5 U.S.C. § 706(2)(A) (1994) (directing circuit courts to hold unlawful any agency action that is arbitrary or capricious); *Sullivan v. Zebley*, 493 U.S. 521, 528 (1990) (holding that when reviewing an agency rulemaking, courts should apply the arbitrary and capricious standard); *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (holding that an agency rule is evaluated by an arbitrary and capricious standard); see also ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 13.10 (1993) (describing the arbitrary and capricious standard of review for agency rulemaking orders). The European Union does not appear to challenge the FCC’s jurisdiction to impose the 1997 Foreign Entry Order, just the definitions of certain terms and application of assumptions. See EU Release, *supra* note 18 (identifying the use of “a broad and unclear concept of ‘very high risk to competition’ as a justification for refusing a license” as a primary concern); cf. 5 U.S.C. § 706(2)(C) (directing the circuit court to hold unlawful any agency action that exceeds the agency’s jurisdiction).

issues presented to it, but does not require that the FCC arrive at the correct decision.¹⁷⁶

In response, the European Union would have to argue that the FCC did not adequately analyze the issues before it during the 1997 Foreign Entry Order proceeding.¹⁷⁷ The FCC, however, did perform an extensive analysis of the issues raised by the European Union.¹⁷⁸ The FCC painstakingly reviewed all of the comments submitted by the European Union and other interested parties regarding the remaining public interest standard, and concluded that United States law did not permit the FCC to abandon its public interest review.¹⁷⁹ Additionally, the FCC thoroughly reviewed the safeguards, addressing potential anti-competitive conduct that could be perpetrated by dominant foreign market carriers.¹⁸⁰

The European Union should not seek judicial review of the 1997 Foreign Entry Order. The FCC has performed an extensive analysis of the two main issues that the European Union raises, and thus a cir-

176. See *State Farm*, 463 U.S. at 43 (holding that an agency must review relevant information presented to it and present a thoughtful rule that is clearly not an error in judgment); *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1388-89 (D.C. Cir. 1995) (holding that the FCC must analyze the issues presented in its order granting an application for international telecommunications service and that the circuit court will not substitute its judgment for the FCC's); accord *Freeman Engineering Assoc., Inc. v. FCC*, 103 F.3d 169, 272 (D.C. Cir. 1997); *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1490 (D.C. Cir. 1995).

177. See *State Farm*, 463 U.S. at 43 (holding that an administrative agency acts arbitrarily and capriciously when it fails to adequately consider issues raised before it or completely ignores the record when making its decision); accord *Competitive Telecomm. Ass'n*, 75 F.3d at 1358; *Atlantic Tele-Network*, 59 F.3d at 1388-89.

178. See 1997 Foreign Entry Order, *supra* note 9, paras. 59-66, 87-96, 246-92 (analyzing the remaining public interest review in the 1997 Foreign Entry Order and the need for special safeguards for dominant foreign telecommunications carriers); cf. *Competitive Telecomm. Ass'n*, 75 F.3d at 1358-61 (reviewing the analysis performed by the FCC in a proceeding to establish rules regarding caller identification services and concluding that the analysis was sufficient to satisfy the arbitrary and capricious standard).

179. See *supra* pt. III.B.2 (describing the use and application of the ECO test in FCC determinations as to the existence of competitive opportunities for American providers in foreign markets).

180. See *supra* notes 101-04 and accompanying text (outlining the operation of FCC competitive safeguard mechanisms).

cuit court is likely to conclude that the FCC's determinations are neither arbitrary nor capricious.¹⁸¹

VI. RECOMMENDATIONS & CONCLUSION

The FCC should implement its 1997 Foreign Entry Order as soon as it possibly can.¹⁸² By leading the way toward implementing the Fourth Protocol,¹⁸³ the United States can put substantial pressure on other Fourth Protocol participants.¹⁸⁴ Such action will lead to faster international deregulation of the basic telecommunications market.

The European Union should not pursue remedies available to it through the WTO. The European Union is primarily upset with the 1997 Foreign Entry Order because, according to the European Union, the FCC has not adequately defined its public interest review.¹⁸⁵ In

181. See *Competitive Telecomm. Ass'n v. FCC*, 75 F.3d 1350, 1358-59 (9th Cir. 1996) (finding that the FCC properly applied its rules after rationally considering the record before it, and that the FCC is permitted to make reasonable assumptions about the economics of its rules or decisions); *Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1390-91 (D.C. Cir. 1995) (holding that the FCC need not consider every issue raised in a proceeding but must evaluate the effect a proceeding has upon the public interest in such a manner that the court can discern the FCC's rationale); *supra* pt. III.B (describing the entire rulemaking process that the FCC engaged in to arrive at its 1997 Foreign Entry Order).

182. See *Foreign Participation in the U.S. Telecommunications Market*, *supra* note 13 (stating that the 1997 Foreign Entry Order was effective on February 9, 1998).

183. See Heather Fleming, *Speed-Dialing C for Competition*, RECORD (Northern N.J.), Nov. 26, 1997, at B1 (stating that the United States is the first WTO Member to change its law in compliance with the Fourth Protocol).

184. See *Experts See European Market Opening More Slowly Than U.S.*, COMM. DAILY, June 3, 1997, at 4-5 (reporting that the United States Trade Representative is preparing to initiate a precedent setting action with the WTO to force WTO Members to comply with their commitments to the Fourth Protocol). But see Irwin Stelzer, *Growing Trade Gap Stirs Protectionists*, SUN. TIMES (London), March 23, 1997, at C3 (describing concerns by conservative congressional officials that the WTO, through its enforcement mechanisms, could have influence on the regulations promulgated by the United States).

185. See Jeffrey Silva, *WTO Accord Could Hit Snags: FCC, EU Spar Over Free Trade*, RCR RADIO COMM. REP., Dec. 8, 1997, available in 1997 WL 16672232 (highlighting the European Union's disdain for the FCC's public interest definition); *FCC's WTO Implementation Gathers Steam—And Some Criticism*, COMM. DAILY, Aug. 8, 1997, at 1 (describing the points of contention that the European Union has with the 1997 Foreign Entry Order).

particular, the European Union alleges that the public interest standard by which the FCC could deny an application is too broad.¹⁸⁶

Since the release of the 1997 Foreign Entry Order, the European Union has softened its position by apparently taking time to assess the implementation of the 1997 Foreign Entry Order.¹⁸⁷ Although the European Union may not want to rule out future WTO action regarding the 1997 Foreign Entry Order, it should at least wait until the FCC has had an opportunity to review applications under the new rules.¹⁸⁸ Such a grace period is necessary to encourage basic telecommunications providers to seek the benefits of the 1997 Foreign Entry Order.¹⁸⁹

The Fourth Protocol is the culmination of extensive negotiation to break down the competitive barriers hindering the provision of international telecommunication service. With the expected cost reductions, enhanced service, and increased telecommunications access that are predicted to result from the Fourth Protocol, more people across the globe will be able to communicate with one another via the telephone. The FCC appreciates the benefits of this global telecommunications market and has made a remarkable effort to ensure its occurrence. Other WTO Members should follow suit quickly so that the Fourth Protocol will have its intended effects.

186. See *FCC Adopts Rules for Easier Access to U.S. Market*, *supra* note 18 (describing the Europeans' concerns that the public interest standard is so murky that it would allow the FCC to deny or condition nearly any application).

187. See *id.* (stating that the European Union will take time to study the 1997 Foreign Entry Order to determine whether their concerns have been addressed); Fleming, *supra* note 183, at B1 (citing a European Union official as saying that a WTO proceeding against the United States will be initiated if there is "active discrimination against European firms").

188. See *FCC Eases Carrier's Access to U.S. Market*, *supra* note 128 (reporting that industry sources are prepared to let the FCC apply its rules and see if they are applied as promised in the 1997 Foreign Entry Order).

189. See *id.* (citing industry officials as optimistic that if the European Union experiences the benefits promised by the 1997 Foreign Entry Order, the European Union may relax and refrain from pursuing WTO remedies).