

FCC Eliminates ECO Test, Easing Review of International Section 214 and Cable Landing License Applications and Affiliate Notifications

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By [Order dated April 22, 2014](#), the Federal Communications Commission ("FCC") eliminated the effective competitive opportunities ("ECO") Test applicable to certain foreign carriers and submarine cable landing licensees. Going forward, once the rule changes become effective, international Section 214 applications and cable landing license applications filed by foreign carriers or licensees or their affiliates that have market power in countries that are not members of the World Trade Organization ("WTO") (such providers and licensees referred to as ("Affected Providers")), as well as foreign carrier affiliation notifications filed by Affected Providers, will be reviewed by the FCC using a less burdensome process. Such filings will still be subject to interested party comment, United States Trade Representative (and potentially other federal agency) input, and the FCC power to request additional information as part of the FCC review of whether they are in the public interest. The Commission will also retain its dominant carrier safeguards and reporting requirements and its "no special concession" rules.

Specifically, since 1995, an Affected Provider that sought international Section 214 authority to provide service to a foreign point where the Affected Provider or its affiliate has market power, has been subject to the ECO Test and required to demonstrate that there are no legal or practical restrictions on U.S. carriers' entry into such foreign market. Affected Providers have also been subject to the ECO Test when seeking cable landing licenses to serve a non-WTO Member country where the Affected Provider or its affiliate has market power, in which case the Affected Provider must demonstrate that U.S. providers in that country have the legal ability to hold ownership interests in the foreign end of international cables. The Order also addresses the timing and level of review applicable to foreign carrier affiliation notifications filed by U.S.-international carriers authorized under Section 214 and submarine cable landing licensees when submitted by Affected Providers. The FCC eliminated the ECO Test for Affected Providers because of the small numbers of non-WTO countries (relative to global GDP), the limited number of applications and notifications that have been filed by Affected Providers and absence of comment on such applications and notifications by U.S. carriers, and the availability of other public and government agency input regarding applications and notifications submitted by Affected Providers.

Although the Commission has eliminated the ECO Test for Affected Providers, it has not extended to Affected Providers the rebuttable presumption that section 214 and cable landing license applications filed by foreign providers or their foreign carrier affiliates from WTO Member countries

“do not pose concerns that would justify denial of the application on competition grounds.” Rather, Affected Providers will maintain the burden of demonstrating that any non-WTO country in question supports open entry. The Order explains that the FCC “will closely analyze only those applications where competitive issues are raised concerning U.S. carriers experiencing competitive problems in that market, and will determine whether the public interest would be served by authorizing a foreign carrier with market power to enter the U.S. market.”

Under the new approach, where a Section 214 applicant is itself, or is affiliated with, a foreign carrier with market power in a proposed non-WTO Member destination country, then the application will not be eligible for streamlined processing but will be placed by the FCC on a 28-day public notice period. In addition, where an authorized U.S.-international carrier intends to assume an affiliation with a foreign carrier with market power in a non-WTO Member country for which the U.S. carrier is authorized to provide U.S.-international service under Section 214, a foreign carrier affiliation notification must be filed by the Affected Provider 45 days *in advance* (rather than within thirty days after the transaction, which is the rule for certain other affiliations such as those with carriers that do not have market power or do not own facilities in the destination market).

The FCC will now take a similar approach to cable landing license applications and notifications of foreign carrier affiliation by submarine cable licensees. An applicant or notification filer from a non-WTO Member country must still demonstrate whether or not it has market power in the non-WTO Member country where the cable lands. As under current rules, if an applicant for a cable landing license is itself, or is affiliated with, a foreign carrier with market power in the proposed cable's non-WTO Member destination country, then the application will not be eligible for streamlined processing. Concerning foreign carrier affiliation notifications by submarine cable licensees, the disclosure of market power in the non-WTO Member country will trigger the existing 45-day waiting period after the foreign carrier notification is filed before the transaction can be consummated.

The implementing rule changes adopted in the Order, as a whole, are subject to approval by the Office of Management and Budget review prior to taking effect. The FCC's Order appears to reflect a trend of simplifying international service regulations and eliminating infrequently used regulations, although applications and notifications filed by Affected Providers will still be subject to a greater level of review than those involving only WTO member countries. However, the FCC emphasized in the Order that questions regarding national security, law enforcement, foreign policy and trade policy raised by an application or an affiliate notification would be resolved in the same manner regardless of the WTO status of the provider's home country.