

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
Americatel Corporation and Telecom Italia of)	
North America, Inc.)	
)	File Nos. ITC-MOD-20020508-00243
)	and ITC-MOD-20020508-00244
Application to Modify Regulatory)	
Classification)	
From Dominant to Non-Dominant on the)	
U.S.- Brazil Route)	

MEMORANDUM OPINION AND ORDER

Adopted: May 27, 2004

Released: May 27, 2004

By the Chief, International Bureau:

I. INTRODUCTION

1. In this Order, we grant the request of Americatel Corporation (“Americatel”) and Telecom Italia of North America, Inc. (“TINA”) (together “Applicants”) to modify their regulatory classification from dominant to non-dominant on the U.S.-Brazil route.¹ We find, however, that Applicants have failed to show that Brasil Telecom (“Brasil Telecom”) has less than 50 percent market share in the local access market, or that Brasil Telecom otherwise lacks market power in the local access market. Accordingly, we deny the Applicants’ request that Brasil Telecom S.A. be removed from the Commission’s *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*.²

¹ *Application of Americatel Corporation and Telecom Italia of North America, Inc. to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S.-Brazil Route*, Application File Nos. ITC-MOD-20020508-00243 (Americatel Corporation) and ITC-MOD-20020508-00244 (Telecom Italia of North America, Inc.) (filed May 8, 2003) (“Application”).

² *International Bureau Revises and Reissues the Commission’s List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, DA 03-1812 (rel. June 5, 2003) (Int’l Bur. 2003) (“*Foreign Carriers List*”). The *Foreign Carriers List* is available at <http://www.fcc.gov/ib> as “*Resources, Foreign Carriers Presumed to Possess Market Power*.” The *Foreign Carriers List* was originally released as *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*, Public Notice, DA 99-809 (rel. May 6, 1999; erratum rel. June 18, 1999) (Int’l Bur. 1999).

II. BACKGROUND

2. In the *Foreign Participation Order*,³ the Commission established a framework to encourage competitive entry into the U.S. telecommunications market, in fulfillment of the United States' commitments under the WTO Basic Telecom Agreement.⁴ The Commission expressed concern, however, that a foreign carrier with market power⁵ in an input market⁶ on the foreign end of a U.S. international route has the ability to "leverage" that market power into the U.S. market for international telecommunications services, i.e., use market power in its home market to affect competition adversely in the U.S. market, thereby harming U.S. consumers.⁷ Firms with market power in an "upstream" input market can engage in discrimination in a "downstream" market by favoring one downstream entity at the expense of its competitors.⁸ Where the upstream firm possesses market power, downstream competitors have few, if any, alternatives for the inputs that the upstream firm provides.⁹ In order to complete a U.S. international call, a U.S. carrier must obtain as inputs various call termination services from foreign carriers in the destination country of the U.S. call, including international transport services, inter-city services within the destination country, and terminating access services within the local exchange of the called party.¹⁰ A foreign carrier with market power in these input markets could favor one U.S. international carrier at the expense of its rivals by denying rivals access to these crucial termination services, or by providing the services at non-competitive prices or inferior service quality levels.¹¹ The ultimate effect of such discrimination would be to affect adversely competition in the U.S. international services market and harm U.S. consumers.¹²

3. The Commission found that an ownership affiliation between a U.S. carrier and a foreign carrier creates a heightened ability and incentive to engage in anti-competitive behavior.¹³

³ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket 97-142, 95-22, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*"); Order on Reconsideration, FCC 00-339, 15 FCC Rcd 18158 (2000) ("*Foreign Participation Reconsideration Order*").

⁴ The results of the World Trade Organization's ("WTO") basic telecommunications services negotiations are incorporated into the General Agreement on Trade in Services ("GATS") by the Fourth Protocol to the GATS, April 30, 1996, 36 I.L.M. 366 (1997). These results, as well as the basic obligations contained in the GATS, are referred to herein as the "WTO Basic Telecom Agreement."

⁵ The Commission has defined market power as a carrier's ability to raise prices by restricting its output of services. See *Foreign Participation Order*, 12 FCC Rcd at 23951-52, para. 144.

⁶ In producing goods or services, firms must obtain labor, capital, raw materials, and intermediate goods and services as "inputs" to the production process. The markets in which these inputs are obtained are termed "input markets." *Id.* at 23952-53, para. 145.

⁷ *Id.* at 23952-53, para. 145, and 23958, para. 157.

⁸ *Id.* at 23952-53, para. 145. Markets in which a firm buys inputs to its production process are termed "upstream" relative to the market in which the firm sells its product, and a market in which a firm sells its product is termed "downstream" relative to the input markets.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 23952-53, para. 145, and 23958, para. 157.

¹² *Id.* at 23958, para. 157.

¹³ *Id.* at 23954, para. 147 and 23992, para. 223.

Accordingly, the Commission adopted certain safeguards to ensure that U.S. affiliates of foreign carriers with market power on the foreign end of the route do not harm competition in the United States. Under the Commission's rules, a U.S. carrier that is affiliated with a foreign carrier that has market power on the foreign end of a route is presumptively classified as dominant for the provision of international telecommunications services on that route (with limited exceptions).¹⁴ U.S. international carriers classified as dominant on a particular route are subject to certain requirements to safeguard competition.¹⁵ These requirements include separation requirements,¹⁶ reporting requirements,¹⁷ and certain conditions related to benchmark settlement rates.¹⁸ Reclassification as non-dominant relieves a U.S. carrier of these requirements.

4. The Commission also found that a foreign carrier with market power can act anti-competitively with respect to the U.S. market even in the absence of a U.S. affiliate (e.g., through a contractual agreement with a U.S. carrier).¹⁹ Accordingly, the Commission established several competitive safeguards with which all U.S. international carriers must comply when providing international telecommunications services that terminate on the network of a foreign carrier with market power on the foreign end of a U.S. international route. These safeguards include the "No Special Concessions" rule,²⁰ contract filing requirements,²¹ the international settlements policy

¹⁴ 47 C.F.R. § 63.10(a)(3) – (a)(4) (2003).

¹⁵ 47 C.F.R. § 63.10(c), (e) (2003). *See also Foreign Participation Order*, 12 FCC Rcd at 23897-24022, paras. 215-292.

¹⁶ The U.S.-authorized carrier must provide service as an entity that is separate from its foreign affiliate. 47 C.F.R. § 63.10(c)(1) (2003). The U.S. carrier must have separate books of account and not jointly own transmission or switching facilities with its affiliate. 47 C.F.R. § 63.10(c)(1)(i)-(ii) (2003).

¹⁷ The U.S.-authorized carrier must file quarterly traffic and revenue reports as well as quarterly provisioning and maintenance reports. 47 C.F.R. § 63.10(c)(2)-(3) (2003). The U.S.-authorized carrier also must file quarterly circuit status reports. 47 C.F.R. § 63.10(c)(4) (2003).

¹⁸ The U.S. carrier may not provide facilities-based switched services on the route on which it is classified as dominant, unless its foreign affiliate on that route charges U.S. international carriers termination rates at or below benchmark settlement rates. 47 C.F.R. § 63.10(e) (2003). *See also International Settlement Rates*, IB Docket No. 96-261, Report and Order, FCC 97-280, 12 FCC 19806 (1997) ("*Benchmarks Order*"); Report and Order on Reconsideration and Order Lifting Stay, FCC 99-124, 14 FCC Rcd 9256 (1999) ("*Benchmarks Reconsideration Order*"), *aff'd sub nom. Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

¹⁹ *See Foreign Participation Order*, 12 FCC Rcd at 23954, para. 147; 23958, para. 157.

²⁰ Under the Commission's "No Special Concessions" rule, a U.S.-authorized international carrier is prohibited from accepting special concessions from a foreign carrier with respect to a route on the foreign end of which the foreign carrier possesses market power. 47 C.F.R. § 63.14(a) (2003). For U.S. international carriers, special concessions are defined as exclusive arrangements involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services where the arrangements are not offered to similarly situated U.S.-licensed carriers. 47 C.F.R. § 63.14(b) (2003). Such arrangements include operating agreements for the provision of basic services; distribution arrangements or interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operating characteristics such as provisioning and maintenance times; and any information, prior to public disclosure, about a foreign carrier's basic network services that affects either the provision of basic or enhanced services or interconnection to the foreign country's domestic network by U.S. carriers or their U.S. customers. 47 C.F.R. § 63.14(b)(1)-(3) (2003). If the international route is exempt from the international settlements policy ("ISP") under 47 C.F.R. § 43.51(e)(3) (2003), the "No Special Concessions" rule does not apply to the rates, terms, and conditions in an agreement between a U.S. carrier and a foreign carrier that govern the settlement of international traffic, including the method for allocating return traffic. 47 C.F.R. § 63.14(c) (2003). We note that the Commission recently adopted a more limited application of the ISP and related rules in the *International Settlements Policy Reform, International Settlement*

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(“ISP”),²² and requirements regarding the provision of switched services over private lines.²³ Similarly, the Commission also has established competitive safeguards that apply to U.S. cable landing licensees when connecting with the network of a foreign carrier with market power on the foreign end of the U.S. international route.²⁴ The Commission’s *Foreign Carriers List* identifies those foreign carriers with which exchange of traffic is subject to the requirements described above.²⁵ Removal of a foreign carrier from the *Foreign Carriers List* relieves U.S.-authorized

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Rates, IB Docket No. 02-324, IB Docket No. 96-261, First Report and Order, FCC 04-53 (2004) (“*2004 ISP Reform Order*”). The rule changes adopted in the *2004 ISP Reform Order*, most of which take effect on May 28, 2004, are not relevant to our consideration of the issues raised in this proceeding.

²¹ A U.S.-authorized carrier that enters into a contract regarding the exchange of services, routing of traffic, or accounting rates with a foreign carrier with respect to a route on the foreign end of which the foreign carrier possesses market power is required to file a copy of the contract within 30 days. 47 C.F.R. § 43.51(a)(1), (b)(2), and Note 3 to § 43.51 (2003).

²² Under the ISP, if a U.S.-authorized carrier files an operating agreement with a foreign carrier regarding the exchange of switched traffic with respect to a non-exempt route on the foreign end of which the foreign carrier possesses market power, the operating agreement must comport with certain requirements; otherwise, the U.S. carrier must file a modification request with the International Bureau. 47 C.F.R. § 43.51(e) (2003). The operating agreement is required to have terms and conditions pertaining to the exchange of services, routing of traffic, accounting rates, and the proportionate share of return traffic that are identical to that of other carriers providing the same or similar service. 47 C.F.R. § 43.51(e)(1)-(2) (2003). The restriction of the ISP to operating agreements between U.S. carriers and foreign carriers that possess market power is described in 47 C.F.R. § 43.51(e)(1) (2003), with reference to § 43.51(a)(1), (b)(2), and Note 3 to § 43.51 (2003). The exempt routes are described in the Note to § 43.51(e)(3).

²³ The Commission’s ISR policy allowed U.S.-authorized carriers to provide switched basic services over its authorized private lines if the foreign carrier with which traffic is exchanged is in a destination country that appears on the Commission’s list of authorized destinations. 47 C.F.R. § 63.22 (e)(1) (2003); 47 C.F.R. § 63.23(d)(1) (2003); with reference to 47 C.F.R. § 63.16(a) (2003). See Resources, “ISR-Approved Routes” at www.fcc.gov/ib (“*International Simple Resale*” or “*ISR*”). Also, a U.S. carrier may provide switched basic services over its authorized private lines if the foreign carrier with which traffic is exchanged lacks market power on the foreign end of the route. 47 C.F.R. § 63.22(e)(2)-(3) (2003); 47 C.F.R. § 63.23(d)(2)-(3) (2003). Because Brazil has been on the list of ISR-approved routes, U.S. carriers have been allowed to provide switched basic services over authorized private lines to any carrier in Brazil. Therefore, a finding by the International Bureau that Brasil Telecom lacks market power on the foreign-end of the U.S.-Brazil route would not confer any privileges upon Brasil Telecom or U.S. carriers regarding the exchange of switched basic services over authorized private lines on the U.S.-Brazil route that they do not already possess. This is not changed by the recent *2004 ISP Reform Order* that eliminated the ISR policy and removed the ISP from certain routes, including Brazil. See *2004 ISP Reform Order* at paras. 26-38, and Appendix D.

²⁴ U.S. cable landing licensees are prohibited from accepting special concessions from any foreign carrier, including any entity that owns or controls a foreign cable landing station, with respect to a route on the foreign end of which the foreign carrier possesses sufficient market power to affect competition adversely in the U.S. market. 47 C.F.R. § 1.767(g)(5)(i) (2003) and Note to paragraph (g)(5). In the case of cable landing licenses, special concessions are defined as exclusive arrangements involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary to land, connect, or operate submarine cables, where the arrangement is not offered to similarly situated U.S. submarine cable owners. 47 C.F.R. § 1.767(g)(5)(ii) (2003).

²⁵ See *Foreign Carriers List*. See also 47 C.F.R. § 1.767(g)(5) (2003) and Note to Paragraph (g)(5); 47 C.F.R. § 43.51(b)(2) (2003) and Note 3 to § 43.51; and 47 C.F.R. § 63.14(a) (2003) and Note to Paragraph (a); 47 C.F.R. § 63.22 (e)(2-3) (2003); and 47 C.F.R. § 63.23(d)(2-3) (2003). In the *ISP Reform Order*, the Commission modified its rules to remove its requirement that agreements between U.S. telecommunications carriers and foreign carriers that lack market power in foreign telecommunications markets conform to the ISP and stated that it would issue a list of foreign carriers that do not qualify for the presumption that they lack market power on the foreign end of U.S.

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carriers with which it corresponds of these requirements.

III. THE APPLICATIONS

5. Americatel and TINA are authorized to provide U.S. international telecommunications services pursuant to Section 214 of the Communications Act of 1934, as amended.²⁶ Telecom Italia, S.p.A controls Americatel and TINA (through majority ownership of intervening subsidiaries) and has an ownership share of Brasil Telecom. Americatel and TINA are each classified as dominant on the U.S.-Brazil route pursuant to Section 63.10(a) of the rules.²⁷ As an incumbent local exchange carrier in Brazil, Brasil Telecom is included in the *List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets*.²⁸

6. On May 8, 2002, the Applicants filed a request²⁹ to modify their regulatory classification from dominant to non-dominant on the U.S.-Brazil route and to have Brasil Telecom removed from the Commission's *Foreign Carriers List*. The Applicants explain that in 1998, the state-owned telephone monopoly, Telecomunicações Brasileiras S.A. ("Telebras") was successfully privatized. The privatization resulted in the break-up of Telebras into twelve companies, which consisted of: (1) three local fixed-line operators (currently, Telemar, Brasil Telecom, and Telefónica), each providing local and intra-regional long distance services in one of three regions into which Brazil had been divided for purposes of fixed-line telecommunications; (2) a long distance operator (Empresa Brasileira de Telecomunicações S.A. ("Embratel")), providing, throughout the entire territory of Brazil (known as Region IV), domestic intra-regional and inter-regional long distance telecommunications service and international long distance telecommunications service; and (3) eight cellular operators, each operating in one of the eight regions into which Brazil has been divided for purposes of cellular telecommunications services.³⁰

7. According to the Applicants, the three local fixed line operators (together, the "Concessionaires") were sold to private consortia, most of which are controlled by local

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international routes. See *1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements, Regulation of International Accounting Rates, Market Entry and Regulation of Foreign – affiliated Entities*, IB Docket No. 98-148, Report and Order and Order on Recon., FCC 99-73, 14 FCC Rcd 7963, 7971, para. 20, 7978-79, para. 43, 7980-81, paras. 47-49, and 7988, para. 65 (1999) ("*1999 ISP Reform Order*"). Subsequently, the Commission issued the *Foreign Carriers List*.

²⁶ 47 U.S.C. § 214. See Application at 1, n.1.

²⁷ 47 C.F.R. § 63.10(a) (2003). The Commission conditioned grants of Americatel's Transfer of Control Application and TINA's Section 214 Application on the commitment of Americatel and TINA respectively to accept dominant carrier classification on the U.S.-Brazil route without prejudice to the right to petition for reclassification at a later date. See *International Authorizations Granted*, Public Notice, DA 01-476, rel. Feb. 22, 2001 (granting the Americatel Transfer of Control Application) and *International Authorizations Granted*, Public Notice, DA 00-1408, rel. June. 23, 2000 (granting the TINA Transfer of Control Application).

²⁸ *Foreign Carriers List* at 3.

²⁹ See Application.

³⁰ *Id.* at 3-4.

investment banks, pension funds and foreign telecommunications carriers.³¹ Under Brazil's General Plan of Concessions and Licenses, Brasil Telecom was the privatized local and intra-regional long distance carrier for Region II, and was sold to a consortium consisting of the Brazilian investment bank Opportunity, Telecom Italia S.p.A. and a Brazilian pension fund.³² Following privatization, the Brazilian government authorized the entrance of an additional carrier into each fixed-line region (together, the "mirror companies") to compete directly with each Concessionaire. In Region II, Brasil Telecom's mirror company is Global Village Telecom Ltda. ("Global Village Telecom"), which began its operations in December 2000.³³ Additionally, Applicants state that now an unlimited number of operators have the opportunity (i.e., are eligible to apply for licenses) to compete directly against Brasil Telecom in Region II.³⁴ The Applicants, however, assert that Brasil Telecom is prohibited from offering inter-regional and international long distance service within Region II and from offering any type of fixed service outside Region II until December 31, 2003, unless it complies with certain coverage requirements³⁵ prior to that date.³⁶

8. The Applicants argue that they should be re-classified as non-dominant on the U.S.-Brazil route because they are no longer affiliated with Brasil Telecom within the meaning of Section 63.09 of our rules. In support, on November 18, 2002, Applicants filed an amendment stating that Telecom Italia S.p.A., which previously held an indirect 37.29 percent interest in Solpart Participações S.A. ("Solpart"), the indirect parent of Brasil Telecom,³⁷ reduced its stake in the ordinary share capital of Solpart from 37.29 percent to 19 percent. The Applicants assert that Telecom Italia now holds less than 25 percent of the ordinary share capital of Solpart, and that Telecom Italia does not control Brasil Telecom. Hence, according to the Applicants, Telecom Italia, and thus Americatel and TINA, are no longer "affiliated" with Brasil Telecom under Section 63.09 of the Commission's rules. Accordingly, the Applicants request that the Commission modify their regulatory status from dominant to non-dominant for the provision of international services on the U.S.-Brazil route pursuant to Section 63.10(a)(1) of the

³¹ *Id.* at 4.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 5.

³⁵ The Application states that Brazil's public telecommunications regime provides that incumbent regional and international long distance providers (*e.g.* the Concessionaires) are subject to a special set of restrictions regarding the services they may offer, as well as to special obligations regarding network expansion, modernization and service quality. The Concessionaires in particular are generally not permitted to offer any fixed services outside of their respective regions, or any inter-regional or international long distance services within their respective regions until December 31, 2003. However, if a Concessionaire met its network expansion and universal service targets ("coverage requirements") within its home region on an accelerated basis, then beginning December 31, 2001, it became eligible to apply for a license to offer any type of telecommunications services, including domestic and international long distance services, in its home region or elsewhere, beginning in 2002. *Id.* at 6.

³⁶ *Id.* The Applicants have updated the record to state that Brasil Telecom met its year 2003 universal service objectives, and therefore has obtained authorization to provide inter-regional or international long distance services throughout Brazil. See Letter from Troy F. Tanner, Counsel for Telecom Italia of North America and Americatel Corp., to Marlene H. Dortch, Secretary, FCC (dated May 17, 2004).

³⁷ *Amendment to the Application to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S.-Brazil Route*, filed November 18, 2002, at 2.

Commission's rules.³⁸

9. The Applicants also argue that Brasil Telecom lacks sufficient market power on the foreign end of the U.S.-Brazil route to affect competition adversely in the U.S. market and that, consequently, the Applicants should be re-classified as non-dominant on the U.S.-Brazil route, and Brasil Telecom should be removed from the Commission's *Foreign Carriers List*.³⁹ In support of their argument, the Applicants claim that Brasil Telecom has less than 50 percent market share of the local access and international transport markets on the foreign end of the route and, therefore, under the Commission's rules, presumptively lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market.⁴⁰ The Applicants also argue that under a full economic analysis of market power, in which market share is just one factor, Brasil Telecom does not have market power on the foreign end of the route.⁴¹

10. The International Bureau placed the Application on public notice.⁴² AT&T Corp. (AT&T) and WorldCom, Inc. (now MCI) filed oppositions to the Application.⁴³ AT&T and MCI argue that Brasil Telecom's monopoly control of its franchise region remains intact and, therefore, the Application should be denied.⁴⁴ AT&T and MCI contend that the Applicants have provided no evidence that Brasil Telecom has less than 50 percent market share in the relevant international transport and local access markets on the foreign end of the U.S.-Brazil route.⁴⁵ According to AT&T and MCI, the Applicants' assertion that Brasil Telecom has less than 50 percent market share in the local access market is based on an erroneous assumption that the relevant geographic market for measuring Brasil Telecom's local access market share is the entire country of Brazil rather than Brasil Telecom's local franchise area.⁴⁶ AT&T and MCI also assert that the Applicants have not shown any other basis for finding that Brasil Telecom lacks market power on the foreign end of the U.S.-Brazil route.⁴⁷

11. The Applicants filed a reply to the oppositions of AT&T and MCI,⁴⁸ and the

³⁸ 47 C.F.R. § 63.10(a)(1).

³⁹ Application at 1-2, and 10-11.

⁴⁰ Application at 2-3; 5-6 (citing 47 C.F.R. § 63.10(a)(3) (2003) and § 43.51(2003) and 47 C.F.R. § 43.51, Note 3 to § 43.51 (2003)). See also *Foreign Participation Order*, 12 FCC Rcd at 23959-62, paras. 161-163 and 23996, paras. 232-233.

⁴¹ Application at 9 (citing *Foreign Participation Order*, 12 FCC Rcd at 23959-60, para. 161).

⁴² *Application of Americatel Corporation and Telecom Italia of North America, Inc. to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S. - Brazil Route*, Public Notice, DA 02-1259 (rel. May 28, 2002) (Int'l Bur. 2002).

⁴³ Opposition of AT&T Corp., to Application, File Nos. ITC-MOD-20020508-00243, ITC-MOD-20020502-00244 (filed June 28, 2002) ("AT&T Opposition"); Opposition of MCI, Inc., to Application, File Nos. ITC-MOD-20020508-00243, ITC-MOD-20020502-00244 (filed June 28, 2002) ("MCI Opposition"). MCI formerly was known as WorldCom, Inc., to which we hereinafter refer to as MCI

⁴⁴ AT&T Opposition at 1-2, 4-5, and 7; MCI Opposition at 2-4.

⁴⁵ AT&T Opposition at 1-5; MCI Opposition at 2-4.

⁴⁶ AT&T Opposition at 4; MCI Opposition at 3 (citing *Foreign Participation Order*, 12 FCC Rcd at 23952-53, 145).

⁴⁷ AT&T Opposition at 2 (citing 47 C.F.R. § 43.51 Note 3 (2003)); MCI Opposition at 4-6.

⁴⁸ See Applicants' Reply. The Applicants filed for and were granted an extension of time to reply to AT&T's Opposition. *Americatel Corporation and Telecom Italia of North America, Inc., Application to Modify Regulatory*

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parties made *ex parte* presentations.⁴⁹ In their reply, the Applicants argue that they have correctly identified the relevant geographic market for local access services as the entire country of Brazil.⁵⁰ The Applicants further argue that they have provided information sufficient to show that Brasil Telecom controls less than 50 percent of the relevant markets in Brazil.⁵¹ The Applicants also argue that Brasil Telecom lacks sufficient market power to be able to affect competition adversely on the U.S.-Brazil route because of pro-competitive conditions in Brazil's telecommunications sector.⁵²

IV. DISCUSSION

12. We find that the Applicants have demonstrated that they should be reclassified as non-dominant carriers on the U.S.-Brazil route because Brasil Telecom is no longer affiliated with the Applicants, as the term is defined by Section 63.09(e) of the Commission's rules.⁵³ The Commission's rules provide that "a U.S. carrier that has no affiliation with, and that itself is not, a foreign carrier in a particular country to which it provides service (i.e., a destination country) shall presumptively be considered non-dominant for the provision of international communications services on that route."⁵⁴ The rules also provide that "[t]wo entities are affiliated with each other if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one."⁵⁵

13. The Applicants have stated that Telecom Italia, through its subsidiary STET Netherlands N.V., has recently reduced its stake in the ordinary share capital of Solpart, the indirect parent of Brasil Telecom, from 37.29 percent to 19 percent.⁵⁶ Telecom Italia now holds less than 25 percent of the ordinary share capital of Solpart, and there is no information in the record that Telecom Italia controls Brasil Telecom. Accordingly, we find that Americatel and TINA are no longer "affiliated," within the meaning of Section 63.09(e) of the Commission's rules, with Brasil Telecom and that Applicants should be reclassified as non-dominant on the

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Classification from Dominant to Non-Dominant on the U.S.-Brazil Route, Order, DA 02-1259, ITC-MOD-20020508-00243 and ITC-MOD-20020508-00244, DA 02-1259 (IB/PD, 2002).

⁴⁹ Letter from James R. Talbot, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC (dated Aug. 2, 2002); Letter from James R. Talbot, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC (dated Aug. 5, 2002); Letter from Troy F. Tanner, Counsel for Telecom Italia of North America and Americatel Corp., to Marlene H. Dortch, Secretary, FCC (dated Sept. 5, 2002).

⁵⁰ Applicants' Reply at 1-6.

⁵¹ *Id.* at 4-6.

⁵² *Id.* at 7-9.

⁵³ 47 C.F.R. § 63.09(e) (2003).

⁵⁴ 47 C.F.R. § 63.10(a)(1) (2003).

⁵⁵ 47 C.F.R. § 63.09(e). See also *Foreign Participation Order*, 12 FCC Rcd at 23992, para. 223, in which the Commission stated that a "greater than 25 percent" affiliation standard represents a level of investment that allows a carrier to provide substantial influence with regard to, and to reap substantial rewards from, anticompetitive conduct.

⁵⁶ *Amendment to the Application to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S.-Brazil Route*, filed November 18, 2002, at 2.

U.S.-Brazil route.⁵⁷

14. We find, however, that the Applicants have not demonstrated that Brasil Telecom should be removed from the *Foreign Carriers List*. As discussed below, the Applicants fail to show that Brasil Telecom has less than 50 percent market share in the local access market on the foreign end of the U.S.-Brazil route or that Brasil Telecom nevertheless lacks sufficient market power in the local access market to affect competition adversely in the U.S. market for telecommunications services to Brazil. Such a demonstration is required by the Commission's rules for removal of a foreign carrier from the *Foreign Carriers List* (and reclassification of its U.S. affiliates as non-dominant on the route for which the foreign carrier was listed).⁵⁸ Because the Applicants' failure to make such a demonstration is by itself fatal to their petition, we need not evaluate whether Brasil Telecom lacks market power in any of the other markets necessary for the termination of U.S. international services (e.g., the international transport market).

15. Under section 43.51 of the Commission's rules⁵⁹ a party seeking to remove a foreign carrier from the Commission's *Foreign Carriers List* bears the burden of submitting information to the Commission sufficient to demonstrate either that the foreign carrier on the *Foreign Carriers List* lacks 50 percent market share in the international transport and local access markets on the foreign end of the route served by the foreign carrier or that the foreign carrier nevertheless lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market.⁶⁰ The Commission reviews the latter showing under an "appropriate economic analysis of market power," discussed in detail below.⁶¹ The input markets that are relevant to examining market power on the foreign end of a U.S. international route are the markets that involve services or facilities on the foreign end that are necessary for the provision of U.S. international services and include: (1) international transport facilities or services; (2) inter-city facilities or services; and (3) local access facilities or services.⁶²

16. In the *Foreign Participation Order*, the Commission recognized that "for purposes of identifying the relevant geographic market for inter-city services and local access facilities, it may be appropriate in some instances to examine a discrete geographic region rather than the national market of a foreign country."⁶³ Although the *Foreign Participation Order* does not identify the circumstances in which examination of a discrete geographic region would be appropriate, the International Bureau has held that if a local franchise area⁶⁴ generates a

⁵⁷ 47 C.F.R. § 63.09(e) (2003).

⁵⁸ See 47 C.F.R. § 43.51 Note 3 (2003). See also, *id.* § 63.10(a)(3).

⁵⁹ 47 C.F.R. § 43.51 Note 3 (2003). See *Foreign Participation Order*, 12 FCC Rcd at 23952, para. 145, 23959-62 paras. 161-63, and n.317 and n.318. See also *Foreign Participation Order*, 12 FCC Rcd at 23995-96, paras. 231-233.

⁶⁰ *Id.*

⁶¹ See *infra* paras. 20-28. See also *Foreign Participation Order*, 12 FCC Rcd at 23960-61, para. 162, n.317.

⁶² See *Foreign Participation Order*, 12 FCC Rcd 23952-53, para. 145.

⁶³ *Id.*

⁶⁴ For the purposes of this Order, the International Bureau defines "local franchise area" to include any geographic area in which a carrier is incumbent, regardless of whether it has exclusive operating authority in that area or whether its operating authority has been extended beyond the area in which it is incumbent.

significant share of international traffic,⁶⁵ then the local franchise area is the relevant geographic market for purposes of determining whether a carrier possesses sufficient market power to affect competition adversely in the United States.⁶⁶ For example, in *Telecom Argentina*, the International Bureau determined that Telecom Argentina's local franchise area was the relevant geographic market for purposes of determining whether it possessed sufficient market power in the provision of local access services and facilities in Argentina to affect competition adversely in the United States.⁶⁷ Having defined the relevant geographic market as Telecom Argentina's local franchise area, the Bureau found that Telecom Argentina had sufficient market power on the foreign end of the U.S.-Argentina route to affect competition adversely in the U.S. market.⁶⁸ In *Bell Canada*, the International Bureau determined that Bell Canada's local franchise area, which included Canada's two largest provinces and generated more than 60 percent of Canada's international traffic, was the relevant geographic market for purposes of determining whether Bell Canada possessed sufficient market power in Canada to affect competition adversely in the United States.⁶⁹ We found that Bell Canada had the ability to discriminate against and among U.S. carriers seeking to terminate traffic in Canada as a result of its near ubiquitous control of access to end-users in its franchise area.⁷⁰ In *Cable & Wireless - China*, the Telecommunications Division of the International Bureau examined the market power of Cable and Wireless Inc.'s affiliate, Shenda Telephone Company, in a single region that generated a significant portion of China's international traffic, in determining whether Cable and Wireless, Inc. should be subject to dominant carrier safeguards on the U.S.-China route.⁷¹ The Telecommunications Division found that Shenda's dominant position in a market that generates a significant portion of China's international traffic was one of several factors indicating a substantial risk to competition.⁷²

17. The Applicants contend that the relevant local access market is the "entire country of Brazil, not Brasil Telecom's former service area."⁷³ According to the Applicants, the identification of the local access market as a discrete geographic region rather than the entire foreign country is an exception applied only under unique circumstances rather than the general

⁶⁵ If a large percentage of a foreign country's international traffic originates in a discrete geographic area, it is reasonable to assume that a similarly large percentage of international traffic bound for the foreign country terminates in the same geographic area.

⁶⁶ See *Americatel Corporation and Telecom Italia of North America, Inc., Application to Modify Regulatory Classification from Dominant to Non-Dominant on the U.S.-Argentina Route*, DA 03-4115, paras. 14-15 (2003) ("*Telecom Argentina*"). See also *1998 Biennial Regulatory Review - Reform of the International Settlements Policy and Associated Filing Requirements; Bell Canada Petition for Declaratory Ruling*, IB Docket No. 98-148, Order, DA 01-1421, 16 FCC Rcd 12465 (2001) ("*Bell Canada*") and *Cable and Wireless, Inc., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Provide Resold and Facilities-Based Switched and Private Line Service between the United States and China*, File No. ITC-214-19980515-00326 (previous File No. ITC-98-380), Order, Authorization, and Certificate, DA 98-2498, 14 FCC Rcd 1863 (1998) ("*Cable & Wireless - China*").

⁶⁷ See *Telecom Argentina*, *supra* note 66, at paras. 14-15.

⁶⁸ *Id.* at 14.

⁶⁹ See *Bell Canada*, 16 FCC Rcd at 12468-69, paras. 8-9.

⁷⁰ *Id.* at 12469, para. 10.

⁷¹ See *Cable & Wireless - China*, 14 FCC Rcd at 1868-69, paras. 14-18.

⁷² *Id.* at 1869, para. 18.

⁷³ Applicants' Reply at 2-5. See also Application at 4-5.

rule.⁷⁴ Contrary to the Applicants' assertions, the decisions in these cases are not exceptional. In all cases subsequent to the adoption of the *Foreign Participation Order* (in which relevant markets are defined) in which the foreign operator's local franchise area has comprised a discrete geographic region rather than the entire foreign country, the International Bureau and the Telecommunications Division have found that the local franchise area is the relevant geographic market for local access services.⁷⁵

18. *Telecom Argentina, Bell Canada and Cable & Wireless – China* establish the proposition that a foreign carrier operating in a discrete geographic region, i.e., a local franchise area, may possess sufficient market power to affect competition adversely in the United States if a significant amount of U.S. international traffic is terminated in the region. Accordingly, in cases where a significant amount of the U.S. international traffic is terminated in an incumbent's local franchise area, it is appropriate to identify the local franchise area as the relevant geographic market and to examine the foreign carrier's market power within the franchise area rather than throughout the entire country.⁷⁶ In the case before us, Brasil Telecom is the incumbent provider of local service in Region II of Brazil, which includes Brasilia, the capital of Brazil, and three other metropolitan areas with populations of over one million,⁷⁷ covers one third of the total land area of Brazil, and has a total population of approximately 40 million.⁷⁸ The Applicants state that market share data for the international long-distance market is not publicly available for Brazil due to its commercially sensitive nature.⁷⁹ In the absence of specific data proving otherwise, it is reasonable to assume that a substantial amount of international traffic on the U.S.- Brazil route is terminated in Brasil Telecom's franchise area because the franchise area comprises approximately one-third of Brazil and because the area includes the country's capital and three other large cities. Therefore, we find that it is appropriate in this instance to consider Brasil Telecom's local franchise area as the relevant geographic market for the purpose of determining whether it possesses sufficient market power in the provision of local access services and facilities to affect competition adversely in the United States.

19. Having determined that the relevant geographic market for local access services and facilities is Brasil Telecom's franchise area, we next examine whether Brasil Telecom has market power in that market. The first step in such an analysis is to determine whether Brasil Telecom satisfies the presumption that it lacks market power based on having less than 50 percent

⁷⁴ Applicants' Reply at 2-3.

⁷⁵ See *Telecom Argentina*, *supra* note 66, paras. 14-15, and *Bell Canada*, 16 FCC Rcd 12468-9, paras. 8-9. See also *Cable and Wireless – China*, 14 FCC Rcd at 1868-69, para. 14-18. See also *Cable & Wireless, Inc., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, As Amended, to Provide Resold and Facilities-based Switched and Private Line Services between the United States and Russia and to be Held Non-Dominant for All Services on This Route*, File No. ITC-97-290, Order, Authorization and Certificate, 13 FCC Rcd 6671, 6672-3, paras. 6-8 (1998) (“*Cable & Wireless – Russia*”). In *Cable & Wireless – Russia*, the International Bureau examined the market power of Cable & Wireless's affiliates in the Sakhalin Island region and determined that the competitive characteristics in the Sakhalin Island region were sufficiently distinct from the Russian national market to warrant treating the region as a distinct geographic market for purposes of our market power analysis.

⁷⁶ See *Foreign Participation Order*, 12 FCC Rcd at 23952-53, para. 145.

⁷⁷ The cities with over 1 million inhabitants in the region covered by Brasil Telecom are: Brasilia, Curitiba (State of Parana), Goias (State of Goiania) and Porto Alegre (State of Rio Grande do Sul).

⁷⁸ Corrected *Ex parte* of AT&T Corp., filed Aug. 5, 2002.

⁷⁹ Applicants' Reply at 5.

market share of the local access market. The Applicants have not provided Brasil Telecom's market share in the local access market, *i.e.*, the share of subscriber lines in Brasil Telecom's local franchise area that is served by Brasil Telecom.⁸⁰ Instead, the Applicants have provided estimated data suggesting that Brasil Telecom has 23.7 percent of subscriber lines in service in the whole of Brazil.⁸¹ It is not possible to extrapolate reliably from the 23.7 percent figure to find Brasil Telecom's market share in its local franchise area.⁸² The Commission has made it clear that the burden is upon the Applicants to provide information sufficient to make the findings necessary to grant the requested relief.⁸³ Therefore, we find that the Applicants have not made the required showing that Brasil Telecom has less than 50 percent market share in the local access market.

20. The next step is to determine whether Brasil Telecom lacks sufficient market power on the foreign end of the U.S.-Brazil route to affect competition adversely in the U.S. market by evaluating information provided by the Applicants under the "appropriate economic analysis of market power" standard established by the Commission in the *Foreign Participation Order*.⁸⁴ We focus on whether Brasil Telecom lacks market power in the local access market in its franchise area or lacks the ability to leverage such power in the U.S. market for telecommunications services to Brazil. The Commission's market power analysis includes consideration of several factors,⁸⁵ including: (1) the foreign incumbent's market share in the relevant terminating market on the foreign end of the particular route;⁸⁶ (2) the supply elasticity of the market;⁸⁷ (3) the demand elasticity of the market's customers;⁸⁸ and (4) the foreign

⁸⁰ See *Foreign Participation Order*, 12 FCC Rcd at 23961-62, para. 163 and n.318.

⁸¹ Applicants' Reply at 6 and Exhibit B, "Brazil and Region II General Universalization Plan" (executed May 2002) ("Exhibit B"). This figure represents a correction of the original Application, where the Applicants estimated that Brasil Telecom served approximately 23.5 percent of the total lines in service in Brazil. Application at 8.

⁸² If we assume that Brasil Telecom's local franchise area includes one-third of the subscriber lines in Brazil, then the estimate of 23.7 percent for Brasil Telecom's share of total subscriber lines for the nation as a whole translates into a market share of 71.1 percent for its local franchise area. A market share of 71.1 percent exceeds the 50 percent limit below which a carrier is presumed to lack market power.

⁸³ 47 C.F.R. § 43.51 Note 3 (2003). A U.S. carrier that seeks to use the under-50 percent market share presumption must file data with the Commission to substantiate that claim for the relevant input markets on the foreign end of the international route. See *Foreign Participation Order*, 12 FCC Rcd at 23961, para. 163, n.318.

⁸⁴ *Id.* at 23960-61, para. 162 and n.317, and 23996, para. 233.

⁸⁵ See *Foreign Participation Order*, 12 FCC Rcd 23891, 23960-61, para. 162, n.317. See also *IDC America Inc., Application Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Provide Non-interconnected International Private Line Service between the United States and Japan*, Order, Authorization and Certificate, File No. ITC-96-685, Order, Authorization and Certificate, DA 97-571, 13 FCC Rcd 4085-86, para. 4 (1997). The preceding document cites the *Motion of AT&T Corp. to be Declared Non-dominant for International Service*, Order, FCC 96-311, 11 FCC Rcd 17963, 17977-93, paras. 37-79 (1996) ("*AT&T International Reclassification Order*") and the *Motion of AT&T Corp. to be Reclassified as a Non-dominant Carrier*, Order, FCC 95-427, 11 FCC Rcd 3271, 3293-94 (1995). See also 1992 *Department of Justice/Federal Trade Commission Merger Guidelines*, 4 Trade Reg. Rep. (CCH) 20,569, 20,570 ("*1992 DOJ/FTC Merger Guidelines*"). See also *AT&T International Reclassification Order*, 11 FCC Rcd at 17977, para. 36; *Bell Canada*, 16 FCC Rcd at 12467-68, para. 7.

⁸⁶ Brasil Telecom's market share is discussed *supra*, para. 15.

⁸⁷ Supply elasticity is a measure of the propensity of an industry to expand output for a given change in price. Two factors determine supply elasticity. The first is the supply capacity of existing competitors, and the second is low barriers to entry. See *AT&T International Reclassification Order*, 11 FCC Rcd at 17980-81, para. 48. See also

(continued....)

incumbent's cost structure, size, and resources. In evaluating market power, the Commission has recognized that neither market share, by itself, nor lower costs, sheer size, superior resources, financial strength, and technical capability, by themselves, confer market power.⁸⁹ Indeed, the Commission has stated that, consistent with well-accepted economic principles, market conditions related to demand and supply elasticities are the more crucial determinants of a firm's market power.⁹⁰ These conditions include the availability of close demand substitutes and ease of entry and expansion.⁹¹

21. The Applicants argue that Brasil Telecom lacks sufficient market power on the foreign end of the U.S.-Brazil route to affect competition adversely in the U.S. market, based on the following claims: (1) Brasil Telecom does not maintain bottleneck control of international termination facilities (*i.e.*, there are multiple options for termination); (2) there are no significant barriers to entry and expansion due to Brazil's liberal licensing regime; (3) Brasil Telecom cannot yet expand its telecommunications service offerings to include international services or direct correspondence with foreign international service providers such as U.S. international carriers; and (4) Brazil is in compliance with benchmarks.⁹² As we explain in detail below, we are not persuaded by the Applicants' arguments and find that the Applicants have failed to make the required economic showing that Brasil Telecom lacks sufficient market power on the foreign end of the U.S.-Brazil route to affect competition adversely in the U.S. market.

22. We do not find persuasive the Applicants' assertion that Brasil Telecom lacks market power due to the availability of multiple options for international termination in Brazil.⁹³ Because the local access market is an essential input for terminating international traffic, we focus our analysis on Brasil Telecom's control of the local access market to determine whether there are realistic competitive alternatives to Brasil Telecom for terminating international traffic in Brasil Telecom's local franchise area. According to the Applicants, three competitive operators,

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Petition of GTE Hawaiian Telephone Company, Inc. for Reclassification as a Non-dominant IMTS Carrier, Order, DA 98-1748, 11 FCC Rcd 20354, 20363, para. 19 (1996) ("*GTE Hawaiian Telephone Company*"). In a market characterized by many competitors and low barriers to entry, an attempt by a market incumbent to exercise market power by restricting output or raising prices would fail due to expanded supply by existing competitors or new entrants. In order to demonstrate an absence of market power in the local access market of Brasil Telecom's local franchise area, the Applicants could show that there are multiple competitors that are in a position to supply a substantial portion of the local access market or that there are low barriers to entry in the local access market.

⁸⁸ As used by the Commission in analyzing market power, demand elasticity is a measure of the propensity of an incumbent's customers to switch carriers or otherwise change the amount of service that they purchase from the incumbent in response to relative given changes in price and quality. See *AT&T International Reclassification Order*, 11 FCC Rcd at 17979, para. 42. See also *GTE Hawaiian Telephone Company*, 11 FCC Rcd at 20365, para. 22. To demonstrate an absence of market power in the local access market, the Applicants are required to show that Brasil Telecom's customers are willing to switch to other suppliers of local access services or to substitute services, *e.g.*, mobile telephony.

⁸⁹ See *Foreign Participation Order*, 12 FCC Rcd 23960-61, para. 162 and n.317.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Application at 3-5, 6-10; Applicants' Reply at 7-9, and Exhibits C and D.

⁹³ See Application at 5.

Embratel, Intelig and Global Village Telecom, entered the intra-regional long distance market following the 1998 privatization in Brazil.⁹⁴ Applicants, however, only identify one competitive carrier in the local services market in Brasil Telecom's local access franchise area, Global Village Telecom, which has provided service only since December 2000.⁹⁵ The Applicants have not shown that Global Village Telecom, or any other new entrant, is a significant competitor to Brasil Telecom in its local franchise area. In fact, the Applicants have not provided any market share data for Global Village. While it may be possible to terminate traffic bound for Brasil Telecom's franchise area with Global Village Telecom, the Applicants have not shown how Global Village Telecom could reach a significant number of customers in Brasil Telecom's franchise area without using Brasil Telecom's access facilities or undertaking an extensive network build-out program in Brasil Telecom's franchise area, which would be likely to constrain its market power in the near-term.

23. The Applicants also assert that under Brazil's regulatory regime, U.S. carriers themselves can enter the Brazilian market and provide service in Brasil Telecom's local franchise area.⁹⁶ While it may be lawful under Brazil's regulatory regime for U.S. carriers to enter the Brazilian market for the purpose of providing end-to-end services on the U.S.-Brazil route,⁹⁷ the Applicants have not shown that such entry constitutes a realistic competitive alternative for reaching the majority of customers in Brasil Telecom's franchise area, *e.g.*, residential customers and small and medium-sized businesses.

24. The Applicants argue that mobile termination is an option for U.S. carriers that wish to terminate U.S. international services in Brazil.⁹⁸ Wireless services constitute a realistic competitive alternative to wireline services only if customers consider wireless and wireline services to be close substitutes, as evidenced by studies of customer choice.⁹⁹ The Applicants have provided no evidence that customers in Brazil consider wireless and wireline services to be close substitutes. Moreover, wireless carriers would be in a position to prevent Brasil Telecom from exercising market power only if they were independently owned. The Applicants have not shown that Brasil Telecom lacks ownership interests in wireless companies providing service in its franchise area.

25. The Applicants also argue that there are no significant barriers to entry and expansion due to Brazil's liberal licensing framework. We do not find this argument persuasive. The Applicants state that the Brazilian regulator is independent and that local and long-distance telecommunications markets are open to an unlimited number of licensees, with streamlined licensing procedures, no foreign ownership restrictions, and no build-out requirements.¹⁰⁰ A

⁹⁴ *Id.* at 5.

⁹⁵ *Id.* at 9.

⁹⁶ *Id.* at 12-13.

⁹⁷ See Application at 10 (citing AT&T as an example of a U.S. carrier that has applied to provide local services in Brazil).

⁹⁸ *Id.* at 8.

⁹⁹ See, *e.g.*, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, para. 31-33 (1998).

¹⁰⁰ Application at 9-10.

country's regulatory regime is, however, only one factor that may impede entry and expansion in the local access market.¹⁰¹ There are also important economic factors. Entry into the local access market must be likely, timely, and sufficient in order to constrain an incumbent's market power.¹⁰² Entry into the local access market poses substantial risks and is very costly. It may be difficult for a new entrant to earn a satisfactory return on investment after incurring substantial sunk costs.¹⁰³ The Applicants have not made a showing that a significant amount of competitive entry into the local access market is likely despite these factors. In particular, the Applicants have not provided evidence that potential entry into Brasil Telecom's local franchise area would be sufficient to constrain the exercise of market power by Brasil Telecom in the provision of local access services within the two-year time frame contemplated in the DOJ/FTC Merger Guidelines.¹⁰⁴ Nor have the Applicants demonstrated that a significant amount of actual entry has taken place by showing, for example, a diminution of Brasil Telecom's market share in the local access market.

26. The Applicants initially argued that Brasil Telecom cannot engage in misconduct because it cannot yet expand its service offerings to include international services or direct correspondence with foreign international service providers such as U.S. international carriers. We do not find this argument persuasive. First, the service limitation has expired. Brasil Telecom was prevented from providing international services only until December 31, 2003.¹⁰⁵ Moreover, Brasil Telecom met its year 2003 universal service objectives, and therefore has obtained authorization to provide inter-regional or international long distance services throughout Brazil.¹⁰⁶ Moreover, even if Brasil Telecom does not provide international service and U.S. carriers do not deal directly with Brasil Telecom, Brasil Telecom's market power is not constrained. Such correspondence is not essential for Brasil Telecom to control international termination services destined for its franchise area. Control of the local exchange is sufficient. Applicants make no showing that local termination arrangements with direct correspondents in Brazil would not permit ready identification, and discriminatory treatment, of U.S. carriers' inbound calls by Brasil Telecom.¹⁰⁷

27. Finally, the Applicants claim that Brasil Telecom lacks market power due to Brazil's compliance with the Commission's benchmark settlement rates.¹⁰⁸ We do not find the argument persuasive. Compliance with benchmarks limits, but does not eliminate, Brasil Telecom's ability to engage in price discrimination (*e.g.*, a predatory price squeeze).¹⁰⁹

¹⁰¹ See *Foreign Participation Order*, 12 FCC Rcd at 23995, para. 230.

¹⁰² See 1992 DOJ/FTC Merger Guidelines at Section 3.

¹⁰³ *Id.* at Section 3.3. Sunk costs are costs that cannot be recovered when a firm leaves an industry. See MIT Dictionary of Modern Economics, 4th ed., David W. Pearce, ed., MIT Press, Cambridge, Massachusetts, 1997. In the case of entry into the local access market, sunk costs include one-time start-up expenses, and large capital outlays for network infrastructure that are unlikely to be recoverable in the event that the firm exits the marketplace.

¹⁰⁴ See 1992 DOJ/FTC Merger Guidelines at Section 3.2.

¹⁰⁵ See *supra* para. 7, note 36.

¹⁰⁶ *Id.*

¹⁰⁷ AT&T Opposition at 5; August 2, 2002 *Ex parte* of AT&T at 5.

¹⁰⁸ Application at 8-9; Applicants' Reply at 8-9.

¹⁰⁹ See *Foreign Participation Order*, 12 FCC Rcd at 23976-77, para. 192.

Moreover, compliance with benchmarks does not affect Brasil Telecom's incentive or ability to engage in non-price discrimination, *e.g.*, discrimination in the provisioning or maintenance of basic network facilities and services needed to terminate traffic with Brasil Telecom.¹¹⁰

28. Based on the economic analysis above, we find that the Applicants have failed to make an adequate showing that Brasil Telecom lacks market power in the local access market in its franchise area or cannot leverage such power into the U.S. market for telecommunications services between the United States and Brazil. We therefore find that the Applicants have failed to show that Brasil Telecom lacks sufficient market power on the foreign end of the U.S.-Brazil route to affect competition adversely in the U.S. market, as required by the Commission's rules in lieu of a below-50 percent market share showing.¹¹¹

V. CONCLUSION

29. We find that the Applicants have demonstrated that they should be reclassified as non-dominant carriers on the U.S.-Brazil route because Telecom Italia S.A.'s indirect ownership interest in Brasil Telecom is currently below 25 percent, and thus Brasil Telecom and the Applicants are no longer affiliated within the meaning of section 63.09(e) of our rules. On the other hand, we find that the Applicants have not demonstrated that Brasil Telecom should be removed from the *Foreign Carriers List*. The Applicants have failed to show that Brasil Telecom has less than 50 percent market share in both the international transport and the local access markets on the foreign end of the U.S.-Brazil route or that Brasil Telecom nevertheless lacks sufficient market power on the foreign end of the U.S.-Brazil route to affect competition adversely in the U.S. market, as required by the Commission's rules for purposes of removing Brasil Telecom from the *Foreign Carriers List*.¹¹²

VI. ORDERING CLAUSES

30. Accordingly, it is ORDERED that the request of Americatel Corporation and Telecom Italia of North America, Inc. to modify their regulatory classification from dominant to non-dominant on the U.S. - Brazil route is GRANTED.

31. IT IS FURTHER ORDERED that the request of Americatel Corporation and Telecom Italia of North America, Inc. to remove Brasil Telecom from the Commission's List of Foreign Telecommunications Carriers that are Presumed to Possess Market Power in Foreign Telecommunications Markets IS DENIED.

¹¹⁰ *Id.* at 23993, para. 225 and 24007, para. 259.

¹¹¹ 47 C.F.R. § 43.51, Note 3 to § 43.51(c)(3) (2003).

¹¹² *Id.*

32. This order is issued under Section 0.261 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this Order (*see* Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief, International Bureau