

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

In the Matter of	)	
	)	
VSNL America Inc.	)	
	)	ITC-214-20030728-00376
Application for Authority under Section 214 of	)	
the Communications Act of 1934, as amended, to	)	
Operate as a Facilities-Based Carrier and as a	)	
Resale Carrier for the Provision of International	)	
Switched and Private Line Services to All	)	
International Points	)	

**ORDER, AUTHORIZATION AND CERTIFICATE**

**Adopted:** August 25, 2004

**Released:** August 26, 2004

By the Chief, International Bureau:

**I. INTRODUCTION**

1. In this Order, we grant, subject to certain conditions, the Application of VSNL America Inc. (“VAI” or “Applicant”) for authority pursuant to section 214 of the Communications Act of 1934, as amended, to provide facilities-based and resale services to all international points.<sup>1</sup> Specifically, we classify VAI as a dominant carrier in its provision of service to India and require VAI to comply with the Commission’s dominant carrier safeguards on this route. We also condition this grant on compliance with a network security agreement between VAI and various Executive Branch agencies. Finally, we note that VAI may not provide facilities-based service between the United States and India until the Commission determines that the U.S.-India route is benchmark-compliant.

**II. BACKGROUND**

2. VAI is a wholly-owned subsidiary of Videsh Sanchar Nigam Ltd. (“VSNL”). VSNL is the incumbent provider of international telecommunications services in India. The Government of India owns 26.12% of VSNL.<sup>2</sup> Through its Application, VAI seeks an international section 214 authorization to operate in the United States as an international facilities-based and resale carrier.

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<sup>1</sup> See VSNL America Inc., Application for Authority Under Section 214 of the Communications Act of 1934, as Amended, to Operate as a Facilities-Based Carrier and as a Resale Carrier for the Provision of International Switched and Private Line Services to All International Points, File No. ITC-214-20030728-00376 (filed July 28, 2003) (“Application”). See also 47 U.S.C. § 214(a) of the Communications Act of 1934, 47 U.S.C. § 151 *et al.*; 47 C.F.R. § 63.18 (applications for international section 214 authority).

<sup>2</sup> See Application at Attachment 1, at 1 and 3. In addition to the Government of India, VSNL’s 10%-or-greater owners include: Panatone Finvest Ltd., an Indian investment company owned by the Tata Group, an Indian commercial conglomerate, with 45%; and the Bank of New York, holding 10.68% as depository receipts. See Application at Attachment 1, at 3.

3. On September 4, 2003, the Commission placed the Application on public notice.<sup>3</sup> FLAG Telecom Group Limited (“FLAG”), the owner of the FLAG Europe-Asia cable (the “FEA” cable), an international submarine cable serving India, petitioned to deny the Application.<sup>4</sup> VAI opposed the Petition, and FLAG filed a Reply.<sup>5</sup> In addition, the Executive Branch and VAI jointly asked the Commission to defer action in the proceeding pending resolution of potential national security, law enforcement, and public safety issues.<sup>6</sup> On June 7, 2004, the Executive Branch asked the Commission to condition grant of the Application on compliance with a network security agreement.<sup>7</sup> Subsequent to the end of the formal pleading cycle, the parties filed a number of *ex parte* letters.<sup>8</sup>

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<sup>3</sup> See Public Notice, Report No. TEL-00708NS, *Non-Streamlined International Applications Accepted for Filing* (Int’l Bur. Sept. 4, 2003). See also *VSNL America Inc., Pending Non-Streamlined International Section 214 Application*, Informative, File No. ITC-214-20030728-00376, Public Notice, Report No. TEL-00738, DA 03-3878, 18 FCC Rcd 25127, 25129 (Int’l Bur. 2003) (informing public of need for additional time to review Application).

<sup>4</sup> See Petition to Deny Application, File No. ITC-214-20030728-00376 (filed Oct. 2, 2003) (“Petition”). FLAG is a Bermuda company indirectly wholly owned by Reliance Infocomm Limited (“Reliance Infocomm”), an Indian entity licensed to provide competitive wireline and wireless voice and data services in India. See, e.g., *FLAG Telecom Group Network Limited, Grant of Authority to Transfer Control of the Cable Landing License for the FLAG Atlantic-1 Cable*, Transfer of Control, File No. SCL-T/C-20031024-00031, Public Notice, DA 03-3937, 18 FCC Rcd 25849, 25851 n.9 (Int’l Bur. 2003). See also *Reliance Communications, Inc., International Telecommunications Certificate*, Grant of Authority, File No. ITC-214-20021107-00535, Public Notice, International Authorizations Granted, DA 03-2, 18 FCC Rcd 3 (Int’l Bur. 2003) (Reliance Infocomm’s indirect parent Reliance Industries Limited indirectly owns Reliance Communications, an international section 214 authorization holder).

<sup>5</sup> See Opposition to Petition to Deny Application, File No. ITC-214-20030728-00376 (filed Oct. 16, 2003) (“Opposition”); Reply to Opposition to Petition to Deny Application, File No. ITC-214-20030728-00376 (filed Oct. 28, 2003) (“Reply”).

<sup>6</sup> See Joint Petition to Defer, File No. ITC-214-20030728-00376 (filed Dec. 9, 2003) (“Petition to Defer”); see also *infra* ¶¶ 23-25.

<sup>7</sup> See Petition to Adopt Conditions to Authorizations and Licenses, File No. ITC-214-20030728-00376 (filed June 7, 2004) (“Petition to Adopt Conditions”).

<sup>8</sup> This is a permit-but-disclose proceeding. See 47 C.F.R. § 1.1206. The *ex parte* filings include FLAG’s January 14, 2004 *ex parte* letter referring to a November 24, 2003 letter from the U.S. industry association CompTel/Ascent Alliance to the Indian Ambassador to the United States and the Indian Ministry of Communications & Information Technology about international cable access in India, and updating FLAG’s concerns in File No. ITC-214-20030728-00376. See Letter from Tom W. Davidson, Counsel for FLAG, to Secretary, Federal Communications Commission, File No. ITC-214-20030728-00376 (filed Jan. 14, 2004); see also Letter from Carol Ann Bischoff, Chief Legal Officer, CompTel/Ascent Alliance, to the Indian Ambassador to the United States and the Director (IP), Department of Telecommunications, Indian Ministry of Communications & Information Technology (dated Nov. 24, 2003), available at [www.comptelascent.org/public-policy/international/documents/2003/india\\_cable\\_nov24\\_2003.pdf](http://www.comptelascent.org/public-policy/international/documents/2003/india_cable_nov24_2003.pdf) (visited Mar. 18, 2004). Additional *ex parte* letters, filed during the period of April 2004 through July 2004, describe the status of contractual negotiations between FLAG and VSNL. See Letter from Tom W. Davidson, Counsel for FLAG, to Secretary, Federal Communications Commission, ITC-214-20030728-00376 (filed Apr. 15, 2004); Letter from Tom W. Davidson, Counsel for FLAG, to Secretary, Federal Communications Commission, File No. ITC-214-20030728-00376 (filed June 2, 2004) (“June 2 Letter”); Letter from Robert J. Aamoth, Counsel for VAI, to Secretary, Federal  
(continued....)

### III. DISCUSSION

4. The Application and pleadings present three issues. First, FLAG contends that grant of the Application would pose a very high risk to competition in the United States. Second, the Executive Branch requests that we condition grant of the Application on VAI's compliance with a network security agreement. Finally, as the Bureau stated in the Public Notice accepting the Application for filing, VAI may not provide switched facilities-based telecommunications services on the U.S.-India route unless and until the Commission determines that VSNL settles with U.S. carriers at benchmark-compliant rates. We discuss each of these issues below.

#### A. Foreign Carrier Entry and Regulation

5. In the *Foreign Participation Order*, the Commission adopted a rebuttable presumption that applications for international section 214 authority filed by carriers from World Trade Organization ("WTO") Member countries, such as India, do not pose concerns that would justify denial of the applications on competition grounds.<sup>9</sup> At the same time, the *Foreign Participation Order* revisited and improved the Commission's competitive safeguards governing the provision of U.S. international services.<sup>10</sup> Specifically, the rules adopted in the *Foreign Participation Order* reflect the Commission's concern that a foreign carrier with market power has control over essential inputs needed by U.S. authorization holders and licensees to provide U.S. international services.<sup>11</sup> In particular, the Commission's rules are designed to deter a foreign carrier with market power from discriminating in its treatment of U.S. carriers and from favoring a U.S. affiliate.<sup>12</sup>

6. In adopting this regulatory framework, the Commission noted that foreign market power can

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Communications Commission, File No. ITC-214-20030728-00376 (filed June 21, 2004); Letter from Kees van Ophem, General Counsel, FLAG, to Secretary, Federal Communications Commission, File No. ITC-214-20030728-00376 (filed July 6, 2004) ("July 6 Letter"). See also Letter from Nicholas G. Alexander, Counsel for FLAG, to Secretary, Federal Communications Commission, File No. ITC-214-20030728-00376 (filed Aug. 11, 2004) (withdrawing June 2 Letter).

<sup>9</sup> See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891, 23913-14, ¶ 50 (1997) ("*Foreign Participation Order*"), Order on Reconsideration, FCC 00-339, 15 FCC Rcd 18158 (2000). In circumstances where an affiliated foreign carrier possesses market power in a non-WTO Member country, the Commission applies the "effective competitive opportunities," or "ECO," test as part of its public interest inquiry under section 214(a). See *Foreign Participation Order*, 12 FCC Rcd at 23944, ¶ 124. India is a WTO Member and thus ECO is not applicable here.

<sup>10</sup> The Commission concluded that the new competitive safeguards were necessary to restrain the leveraging of market power on the foreign end of a U.S. international route into the U.S. market to the detriment of competition and U.S. consumers. See *Foreign Participation Order*, 12 FCC Rcd at 23955, ¶ 149.

<sup>11</sup> See *id.* at 23952-53, ¶ 145.

<sup>12</sup> See, e.g., 47 C.F.R. §§ 63.14 (the "No Special Concessions" rule) and 63.10(c) (dominant carrier conditions).

be abused with or without a U.S. affiliate.<sup>13</sup> Thus, the Commission's rules include general safeguards applicable to all international section 214 authorization holders, such as the "No Special Concessions" rule that prohibits any U.S. international carrier from agreeing to accept, from any carrier with market power on the foreign end of the route, an exclusive arrangement involving services, facilities or functions not offered to similarly-situated U.S. carriers.<sup>14</sup> Moreover, because affiliation between a U.S. carrier and a foreign carrier with market power creates a heightened ability and incentive to engage in anti-competitive activity, the Commission's rules include additional safeguards applicable to dealings between such affiliated entities.<sup>15</sup> Accordingly, the Commission classifies a U.S. carrier as "dominant" on a particular route, and therefore subject to dominant carrier safeguards in its provision of service on that route, if it is, or is affiliated with, a foreign carrier that has market power on the foreign end of the route.<sup>16</sup> The dominant carrier safeguards are designed to make a carrier's interaction with its affiliated foreign carrier transparent and thereby guard against discriminatory conduct.<sup>17</sup>

7. The Commission concluded that the general and dominant carrier safeguards would be adequate to detect and deter anti-competitive conduct in virtually all circumstances.<sup>18</sup> If the Commission finds that these measures would be ineffective in preventing anti-competitive conduct in a particular context, the Commission may impose additional conditions on a grant of authority.<sup>19</sup> Finally, the Commission reserves the right to deny an application in the exceptional case where the applicant's entry into the U.S. market would pose a very high risk to competition that existing safeguards and other potential conditions could not effectively address.<sup>20</sup>

8. *Entry.* FLAG alleges that grant of the Application, which would allow VAI to enter the U.S. market for international services, would pose a very high risk to competition that existing safeguards and other conditions would not address.<sup>21</sup> FLAG makes three points in support of its petition to deny. First,

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<sup>13</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23954, ¶ 147; see also *Review of Commission Consideration of Applications under the Cable Landing License Act*, Report and Order, IB Docket No. 00-106, FCC 01-332, 16 FCC Rcd 22167, 22180, ¶ 24 (2001).

<sup>14</sup> See 47 C.F.R. § 63.14.

<sup>15</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23954, ¶ 147.

<sup>16</sup> See *id.* at 23987, ¶ 215, 23991-99, ¶¶ 221-39; see also 47 C.F.R. § 63.10(c) and (e). The Commission recognized that an applicant might be, or be affiliated with, a foreign carrier with market power over foreign-end facilities or services that are essential inputs for the provision of U.S. international services, and therefore adopted dominant carrier safeguards to protect against the possibility that the foreign carrier would exercise this power to discriminate in favor of the applicant and against unaffiliated U.S. carriers. See *Foreign Participation Order*, 12 FCC Rcd at 23913, ¶ 51.

<sup>17</sup> See, e.g., *VoiceStream/DT*, 16 FCC Rcd 9779, 9835-36, ¶ 102 (citing to *Foreign Participation Order*, 12 FCC Rcd at 23991-24022, ¶¶ 221-292).

<sup>18</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23913-14, ¶ 51.

<sup>19</sup> See *id.* at 23914, ¶ 51.

<sup>20</sup> See *id.*

<sup>21</sup> See Petition at 9-10.

FLAG alleges that VSNL is exercising its market power over bottleneck facilities in India to restrict the amount of capacity available into India and thereby maintain artificially high prices for international circuits terminating in India, to the detriment of carriers serving, among others, the U.S.-India route.<sup>22</sup> In particular, FLAG contends that VSNL – as a signatory in, and the landing party for, the two international submarine cables landing in India – currently is harming competition in the U.S. market by leveraging control over its cable landing facilities, including the cable landing station for the FEA cable,<sup>23</sup> to restrict available capacity on the U.S.-India route.<sup>24</sup> FLAG states that VSNL’s refusal to allow FLAG to activate its “readily available capacity” on the FEA cable damages FLAG and all international telecommunications carriers by creating an artificial capacity shortage resulting in artificially high prices for capacity on the U.S.-India route.<sup>25</sup> Thus, FLAG contends that VSNL already has demonstrated its ability to harm U.S. companies and their customers that use the U.S.-India route.<sup>26</sup>

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<sup>22</sup> See Petition at i (stating that VSNL refuses to allow FLAG to activate its “readily available capacity on the FEA and to sell such capacity to carriers that provide service on, among others, the U.S.-India route”) and 1 (stating that VSNL is “currently restricting the amount of capacity available into India and causing international circuits terminating in India to be priced at artificially high levels”).

<sup>23</sup> The FEA cable is one of the two primary submarine cable systems providing international coverage to India. FLAG and VSNL, among others, are signatories to the 1995 Fiber Optic Link Around the Globe (FLAG) Cable System – Construction and Maintenance Agreement, which, in relevant part, according to FLAG, obligated VSNL to activate FEA capacity into India at the cable landing station in Mumbai. See Petition at i, 2, 2 n.5, and 3. In addition, there are three other submarine cables landing in India: SEA-ME-WE 3 (a consortium cable partially owned by VSNL that lands in India at a VSNL-owned and –controlled landing station); SAFE (a regional cable for which VSNL controls the cable landing station); and i2i (a cable owned by Bharti, India’s largest mobile services provider, and Singapore Telecom). See *id.* at i, 2 n.5, 3, and 6 n.16, Reply at 5 and 12; see also [www.bhartiteleventures.com](http://www.bhartiteleventures.com) (visited Mar. 11, 2004).

<sup>24</sup> See Petition at ii and 1 (stating that such control restricts the amount of available capacity on the U.S.-India route, causes all carriers in the U.S. market to pay artificially high rates for circuits on that route, and prevents some carriers from obtaining capacity) and 7 (stating that such restrictions cause all carriers in the U.S. market, and ultimately U.S. customers, to pay artificially high prices for circuits on the route). FLAG also contends that VSNL refuses to enter into discussions about activating additional capacity “currently lying idle on the FEA.” See *id.* at 9.

<sup>25</sup> See Petition at 4 (stating that VSNL has refused to honor its contractual obligation to FLAG to activate FEA capacity that FLAG has sold into India). FLAG states that, in early 2003, it entered into an access agreement with VSNL permitting FLAG to activate 15 of the 64 STM-1 circuits on the FEA cable that are currently available for access into India. See *id.* at 4-5. The Petition contends that: (1) VSNL’s access charges for the 15 STM-1s considerably exceed what FLAG believes are actual costs; (2) VSNL refuses to activate 6 of the 15 STM-1s because FLAG’s parent Reliance Infocomm is a VSNL competitor; (3) VSNL refuses to agree to activate capacity beyond the 15 STM-1s; (4) VSNL has imposed high interconnection charges on Reliance Infocomm for the connection between the FEA equipment and Reliance Infocomm equipment located in a single building; and (5) VSNL has stated that FLAG must provide STM-1 circuits to certain of FLAG’s customers as preferred by VSNL in lieu of others. See *id.* at 6 and 6 n.15. Additionally, FLAG asserts that VSNL, among all landing parties to the FEA cable, refuses to negotiate an upgrade of FEA capacity from 10 Gbps to 80 Gbps. See *id.* at 6. See also Reply at 6.

<sup>26</sup> See Petition at 8. See also Reply at 9 (contending that despite recent reforms in India, VSNL continues to engage in anti-competitive behavior and non-compliance with its contractual obligations and thus “retains effective control over international access to India”). In response, VAI contends that with four submarine cables landing in India today, a fifth cable scheduled to land in 2006, and satellite systems serving India, market (continued....)

9. In addition, FLAG alleges that VAI's entry into the U.S. international services market would permit VSNL to market international services between the United States and India directly to U.S. customers, giving it an unfair advantage over U.S. competitors, and enhancing VSNL's incentive to prevent FLAG from activating additional capacity by routing VAI's traffic over undersea cables landing at a cable landing station owned by VSNL.<sup>27</sup> FLAG claims that the Commission's dominant carrier safeguards are insufficient to protect U.S. carriers against this type of activity, and therefore urges the Commission to deny the Application until such time as VSNL "ceases its anti-competitive activity."<sup>28</sup> Finally, FLAG argues that Commission denial of the Application is "the most readily available means of incentivizing VSNL to cease its anti-competitive conduct," observing that VSNL, to date, "has failed to comply with India's telecommunications policies" and that the WTO dispute resolution process "is slow, and may not be available."<sup>29</sup>

10. We find that FLAG has not demonstrated that the grant of international section 214 authority to VAI will result in a very high risk to competition in the U.S. market. FLAG has not shown that the Commission's general safeguards and dominant carrier safeguards, which will apply to VAI in its provision of service on the U.S.-India route, will be ineffective in detecting and deterring unreasonable discrimination by VSNL in favor of VAI.<sup>30</sup> Nor has FLAG provided any other basis sufficient for us to (Continued from previous page) \_\_\_\_\_

forces can be relied upon to ensure the availability of sufficient international capacity into India at market-based rates. *See* Opposition at 8. Additionally, VAI states that an "authorized carrier" may build new cables or satellite systems to serve India. *See id.*

<sup>27</sup> *See* Petition at 8. FLAG contends that VSNL, by refusing to allow FLAG to activate circuits into India, is restricting the amount of India's international capacity and is in the position to ensure that the prices for international circuits on the U.S.-India route are maintained at artificially high levels and that capacity is available only to carriers with which VSNL is allied and not to carriers VSNL views as competitors. *See id.* at 6. FLAG also suggests that VSNL's actions have had an impact on service quality by impeding carrier purchases of FEA cable capacity and thus denying carriers redundancy in the event of service outages. *See id.* at 6. VAI both disputes the allegation that VSNL has engaged in anti-competitive conduct in India and contends that VSNL's conduct will not enable VAI to undermine competitive conditions in the U.S. market. *See* Opposition at 6.

<sup>28</sup> *See* Petition at ii, 1-2 and 9-10. FLAG contends that VSNL's behavior cannot be addressed by the dominant carrier or other conditions because, it states, the reports required by these conditions will not reflect the anti-competitive harms caused by VSNL's actions. *See id.* at 9. FLAG suggests that such behavior would not be reflected in the quarterly traffic and revenue reports, quarterly provisioning and maintenance reports, or quarterly circuit status reports because: (1) VAI and VSNL will not need to negotiate interconnection and access charges that VSNL routinely negotiates with other U.S. carriers; and (2) VSNL could deny U.S. carriers access to the Indian market, or provide capacity at higher than competitive rates, by controlling the amount of available capacity into India. *See id.* at 9.

<sup>29</sup> *See* Petition at 12-13. Additionally, FLAG contends that grant of the Application would conflict with U.S. trade policies seeking to promote liberalization of foreign markets – including fostering competition through an independent regulator – and to protect U.S. markets from unfair competition. *See id.* at 11-12. VAI disputes this contention, stating that "India plainly has one of the more liberalized telecommunications markets in the world" and that FLAG has not pointed to any definite expression of U.S. trade policy regarding the availability of international transmission capacity in India or any alleged anti-competitive activities by VSNL regarding such capacity. *See* Opposition at 9.

<sup>30</sup> Because we find no basis to conclude that these safeguards will be ineffective in protecting against anti-competitive conduct in this case, we do not need to consider other potential conditions on the grant of authority. *See supra* ¶ 7.

conclude that the grant of VAI's international section 214 application, conditioned on its regulation as a dominant carrier on the U.S.-India route, will result in a very high risk to competition in the U.S. market.

11. To deny an application or impose additional conditions on the authorization of a foreign-affiliated applicant such as VAI, the Commission must find that a risk to competition in the U.S. international services market warrants such action.<sup>31</sup> In such a case, the Commission must determine that its general and dominant carrier safeguards would be ineffective in preventing the foreign carrier affiliate from engaging in anti-competitive conduct against unaffiliated U.S. carriers and, as a result, that the foreign carrier would be able to raise the costs of these carriers to the degree that U.S. consumers would be injured.<sup>32</sup>

12. FLAG alleges that VSNL has denied access to cable landing facilities in India and in the future might favor VAI at the expense of other carriers. Access to foreign cable landing facilities is necessary for the provision of U.S. international services.<sup>33</sup> We would be concerned if VSNL leveraged its market power over these facilities in India into the U.S. market to the detriment of competition and consumers.<sup>34</sup> As the holder of an international section 214 authorization, VAI will be subject to the No Special Concessions rule, which prohibits a U.S. international carrier from agreeing to accept special concessions from any carrier possessing market power on the foreign end of a U.S. route.<sup>35</sup> In filing its Application, VAI has certified that it will abide by this rule.<sup>36</sup> The No Special Concessions rule prohibits a U.S. international carrier from accepting, among other things, any exclusive arrangement involving distribution or interconnection, including pricing or quality and operational characteristics.<sup>37</sup> In this

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<sup>31</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23914, ¶ 52.

<sup>32</sup> See *id.* at 23914, ¶ 51.

<sup>33</sup> Foreign cable landing station access and backhaul facilities are components of the international transport facilities and services market, which is an input market on the foreign end of a U.S. international route that involves services and facilities necessary for the provision of U.S. international services. See *Foreign Participation Order*, 12 FCC Rcd at 23953, ¶ 145. See also 47 C.F.R. § 63.10(a) (relevant markets on foreign end of U.S. international route include international transport facilities and services, including cable landing station access and backhaul facilities).

<sup>34</sup> In adopting its general and dominant carrier safeguards, the Commission stated its concern that, absent such effective regulation, a foreign carrier with market power in an "upstream" input market, that is, an input market on the foreign end of a U.S. international route, would have the ability to exercise, or leverage, its market power into the U.S. end-user market to the detriment of competition and consumers by favoring one "downstream" entity at the expense of its competitors. See *Foreign Participation Order*, 12 FCC Rcd at 23952, ¶ 145.

<sup>35</sup> See 47 C.F.R. § 63.14 (the No Special Concessions rule). The No Special Concessions rule prohibits a carrier from agreeing to accept a special concession directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. See 47 C.F.R. § 63.14(a).

<sup>36</sup> VAI certified, in its Application, that it has not agreed to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses market power on the foreign end of the route and will not enter into such agreements in the future. See Application at answer to question 17; see also 47 C.F.R. § 63.18(n).

<sup>37</sup> See 47 C.F.R. § 63.14(b)(2).

regard, should VSNL deny, restrict or otherwise degrade the access of U.S. carriers, except VAI, to the Indian market by virtue of VSNL's ability to control the amount of capacity into India, as FLAG alleges could occur,<sup>38</sup> such action would raise questions that would require scrutiny under our No Special Concessions rule.<sup>39</sup>

13. Moreover, as discussed below, our grant of authority imposes dominant carrier safeguards that will require VAI to provide services as an entity separate from VSNL, maintain separate books of account and not jointly own transmission or switching facilities.<sup>40</sup> These structural separation requirements, along with the required filing of the dominant carrier quarterly reports, are designed specifically to enable VAI's competitors and the Commission to detect and guard against anti-competitive activity that might cause harm to U.S. customers, including such anti-competitive favoritism in which FLAG claims VSNL will be able to engage in its provision of international capacity to its affiliate VAI and at the expense of other U.S. carriers seeking to conduct business on the U.S.-India route.<sup>41</sup>

14. We reject FLAG's argument that our dominant carrier and other safeguards cannot address potential discrimination by VSNL in favor of VAI because the dominant carrier quarterly reports will not reflect the anti-competitive harms caused by VSNL's actions.<sup>42</sup> As noted, VAI will be subject to structural separation requirements that, contrary to FLAG's assertions, will require VAI to negotiate interconnection and access charges with VSNL. The structural separation requirements in section 63.10(c)(1) of the rules will preclude VSNL and VAI from operating as a fully-integrated entity on an end-to-end basis.<sup>43</sup> The Commission has found that this dominant carrier requirement, in conjunction with the quarterly dominant carrier reporting requirements, provides "sufficient transparency to determine whether the foreign carrier has discriminated in favor of its affiliate in violation of our rules and policies."<sup>44</sup>

15. As a dominant carrier, VAI will be required to file quarterly circuit status information for the U.S.-India route on a facility-specific basis.<sup>45</sup> The Commission's purpose in requiring the quarterly circuit status report is to enable unaffiliated U.S. carriers to determine whether a foreign carrier with

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<sup>38</sup> See Petition at 9.

<sup>39</sup> The Commission has ample authority to investigate allegations that a violation of our rules has occurred. See 47 U.S.C. § 218; see also *Foreign Participation Order*, 12 FCC Rcd at 24022-23, ¶ 294 (investigations might include audits of revenue and traffic reports). In the event that the Commission were to find anti-competitive conduct, it has several different remedies available to it, such as forfeitures, the imposition of additional conditions, or revocation for adjudicated misconduct. See *id.* at 24023, ¶ 295.

<sup>40</sup> See 47 C.F.R. § 63.10(c)(1).

<sup>41</sup> See Reply at 9.

<sup>42</sup> See Petition at 9. See also *supra* note 28.

<sup>43</sup> See 47 C.F.R. § 63.10(c)(1). See generally *Foreign Participation Order*, 12 FCC Rcd at 24003-12, ¶¶ 252-269.

<sup>44</sup> See *Foreign Participation Order*, 12 FCC Rcd at 24007 ¶ 260.

<sup>45</sup> See 47 C.F.R. § 63.10(c)(4).



market power is unreasonably denying access to circuits on particular U.S. international transport facilities.<sup>46</sup> In adopting this reporting requirement, the Commission noted that the fact that a U.S. affiliate is able to obtain and activate circuits on a particular facility to an affiliated market while an unaffiliated carrier cannot may be evidence of anti-competitive conduct.<sup>47</sup> VAI will be required to file its circuit status data on the U.S.-India route no later than 90 days after the close of each calendar quarter, and unaffiliated U.S. carriers can readily compare this information to their own circuit status data. The Commission and VAI's competitors will also be able to compare VAI's quarterly data to the annual circuit status reports filed by all U.S. international facilities-based carriers pursuant to section 43.82 of the rules.<sup>48</sup>

16. In addition to the circuit status reports, VAI will be required to file quarterly reports summarizing the provisioning and maintenance of all basic network facilities and services that VAI procures from VSNL.<sup>49</sup> The Commission found in the *Foreign Participation Order* that this reporting requirement would allow unaffiliated carriers to monitor and detect whether a U.S. carrier is receiving favorable treatment from its foreign carrier affiliate and to notify the Commission if they believe undue discrimination is occurring.<sup>50</sup> FLAG provides no evidence or policy basis to contradict the Commission's conclusion that "[s]uch a reporting requirement will serve as a strong deterrent from engaging in unduly discriminatory behavior."<sup>51</sup> The quarterly traffic and revenue reporting requirement that will also apply to VAI as a dominant carrier on the U.S.-India route will provide an additional means to monitor carrier activity on this route.<sup>52</sup> These reports provide U.S. carriers and the Commission with information to determine the source of deviations in traffic flows on particular routes. For example, to the extent unaffiliated carriers experience an unexpected loss of U.S.-inbound or U.S.-outbound traffic between the United States and India, these reports can assist in determining whether VAI may be carrying that traffic on circuits that it uses to exchange traffic with VSNL.

17. The traffic and revenue reports, like the circuit status and provisioning and maintenance reports, are an important means of ensuring transparency in relations between U.S. and foreign carriers, and they provide a strong deterrent to anti-competitive conduct by a U.S. carrier and its foreign carrier affiliate. In light of the Commission's findings in the *Foreign Participation Order* as to the efficacy of its regulatory framework and the absence of any record evidence in this case that Commission regulations will be ineffective in protecting competition and consumers from anti-competitive conduct by VAI and VSNL, we conclude that grant of VAI's international section 214 application does not pose a very high

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<sup>46</sup> See *Foreign Participation Order*, 12 FCC Rcd at 24019, ¶ 284.

<sup>47</sup> See *Foreign Participation Order*, 12 FCC Rcd at 24019, ¶ 284.

<sup>48</sup> See 47 C.F.R. § 43.82.

<sup>49</sup> See 47 C.F.R. § 63.10(c)(3).

<sup>50</sup> See *Foreign Participation Order*, 12 FCC Rcd at 24016, ¶ 277.

<sup>51</sup> See *id.*

<sup>52</sup> See 47 C.F.R. § 63.10(c)(2).

risk to competition in the U.S. market and, therefore, does not warrant denial.<sup>53</sup>

18. We emphasize that, in order for the Commission to find a very high risk to competition in the U.S. market sufficient to deny an application, the applicant must possess the ability to harm competition in the *U.S. market*, in addition to the ability to exercise its foreign market power.<sup>54</sup> Although VSNL has market power in India, the Commission's rules are not intended to address every exercise of foreign market power, but rather are designed to prevent the leveraging of that power into the U.S. market through discrimination against one U.S. carrier over another.<sup>55</sup> Thus, notwithstanding FLAG's claims that Commission processes are the "most readily available means of incentivizing VSNL,"<sup>56</sup> we are not convinced, on the record before us, that the dispute between FLAG and VSNL about activation of FEA cable capacity is not a contractual issue better resolved by an appropriate court,<sup>57</sup> or an issue to be addressed by the Indian regulatory authorities or the WTO.<sup>58</sup> Indeed, it would appear that the

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<sup>53</sup> Moreover, notwithstanding FLAG's allegations about VSNL's past behavior, *see* Petition at 10, FLAG has not shown that VSNL has engaged in adjudicated violations of the Commission's rules or U.S. antitrust or other competition laws, or in demonstrated fraudulent or other behavior, such that this past behavior might indicate that its subsidiary VAI would fail to comply with the Commission's competitive safeguards and other rules. *See Foreign Participation Order*, 12 FCC Rcd at 23915, ¶ 53. In evaluating character qualifications of applicants, the Commission considers misconduct that violates the Communications Act or a Commission rule or policy and certain adjudicated non-FCC-related behavior that allows the Commission to predict whether an applicant has or lacks the character traits of truthfulness and reliability. *See, e.g., MCI Telecommunications Corp., Petition for Revocation of Operating Authority*, Order and Notice of Apparent Liability, FCC 88-24, 3 FCC Rcd 509, 515 n.14 (1988) (character qualification standards adopted in broadcast context can provide guidance in common carrier context). With regard to FLAG's argument, *see* Petition at 11, that grant of the Application will conflict with U.S. trade policy, we note that the Executive Branch, while resolving national security and law enforcement concerns, *see infra* ¶¶ 23-25, has not filed comments in this proceeding with respect to any trade policy concerns.

<sup>54</sup> *See Foreign Participation Order*, 12 FCC Rcd at 23914, ¶ 52.

<sup>55</sup> *See id.* at 23952, ¶ 145.

<sup>56</sup> *See* Petition at 12 and *supra* ¶ 9.

<sup>57</sup> *See, e.g., Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950) (Commission is not proper forum to litigate contractual disputes between licensees and others); *Applications of Arecibo Radio Corporation*, Memorandum Opinion and Order, 101 F.C.C. 2d 545, 548, ¶ 8 (1985) (Commission normally defers to judicial decisions regarding interpretation of contracts). We note that VAI argues that this Application is the wrong forum to resolve "a series of highly complex contractual issues regarding a cable landing station in India that have nothing to do with the United States." *See* Opposition at 7. VAI asks the Commission to "decline FLAG's invitation to embroil itself in the ongoing negotiations over the use of the FEA cable landing station in Mumbai." *See id.* at 13. VSNL and FLAG each allege that actions taken by the other party are inconsistent with contractual arrangements. *See, e.g.,* Opposition at 10-12 (contending that "FLAG unilaterally reassigned" capacity, which VAI terms an "unsavory practice" that "breeds confusion and business uncertainty, to say nothing of the disruption it causes to established relationships with the carriers whose capacity has been reassigned by FLAG against their wishes") and Reply at 12 (contending that "VSNL continues to refuse to activate capacity that FLAG has validly sold to its customers, demanding instead that the capacity be allocated to other carriers that are VSNL's international partners").

<sup>58</sup> We note that FLAG states that Indian policy requires VSNL to negotiate access and interconnection charges on a "fair and reasonable" basis, *see* Petition at i, 3-4, but that VSNL has failed to comply with India's telecommunications policies, *see id.* at 12-13. Further, FLAG states that "it is not even clear that WTO remedies are even available" because "India's schedule of commitments to the 1996 Agreement on Basic (continued....)

intervention of the Indian regulator, the Telecom Regulatory Authority of India, has led to progress in resolution of the dispute. We note a March 25, 2004 press release issued by the Indian regulator stating that it had facilitated a resolution of the immediate problem of cable landing station capacity activation.<sup>59</sup> We also take note of the July 6 Letter and attached press release, advising of recent progress in the reduction of cable landing station access charges.<sup>60</sup> It would appear that, in response to complaints from FLAG and service providers on the U.S.-India route, the Indian regulatory agency has acted affirmatively to resolve current access problems at the foreign end of the route.

19. In sum, we find that, on the record before us, the Application does not present concerns justifying denial, on competition grounds, of VAI's entry into the U.S. market for international services.<sup>61</sup> Our grant of authority is subject to the Commission's general competitive safeguards and, on the U.S.-India route, to the dominant carrier safeguards. As discussed below, we find that VSNL has sufficient market power to affect competition adversely in the U.S. market for international services on the U.S.-India route and, accordingly, we will regulate VAI as dominant on this route. We emphasize that the Commission reserves the right to review VAI's authorization and, if warranted, impose additional requirements in circumstances where it appears that harm to competition is occurring on one or more U.S. international routes.<sup>62</sup> Moreover, if the Commission were to find that VAI, or any other U.S. carrier, had received discriminatory access to VSNL's cable landing facilities or other exclusive arrangement necessary to provide basic telecommunications services on the U.S.-India route, in violation of the Commission's No Special Concessions rule, we would not hesitate to take appropriate corrective action.<sup>63</sup>

(Continued from previous page) \_\_\_\_\_

Telecommunications excludes long distance and international voice services and includes only modest market access commitments," *see id.* at 13. *See also* Reply at 6-7 (alleging VSNL's actions result in violations of contractual obligations, Indian governmental policy and Indian commitments to WTO). Moreover, FLAG errs in citing to paragraph 359 of the *Foreign Participation Order* for the proposition that the Commission should step in to provide the remedy of denying the Application here, absent a showing of a very high risk to competition in the U.S. market. *See* Petition at 13 n.41. Rather, paragraph 359 responded to arguments that the Commission should refrain from adopting its dominant carrier and other regulatory safeguards merely because WTO dispute settlement is available. *See Foreign Participation Order*, 12 FCC Rcd at 24047, ¶ 359.

<sup>59</sup> *See TRAI Facilitates Provision of Additional International Bandwidth on FLAG Cable by VSNL*, Press Release No. 24/2004, Telecom Regulatory Authority of India (dated Mar. 25, 2004) ("TRAI Press Release"), available at <http://www.trai.gov.in/press%20release-%2025th%20march%202004.htm> (visited Mar. 29, 2004).

<sup>60</sup> *See* July 6 Letter, *supra* note 8, at 1 (stating that VSNL and FLAG have amicably settled the issue of access to existing FEA capacity that is available for sale) and attached press release (stating that VSNL has reduced its landing station access charges per STM-1 by 25%). In a series of *ex parte* filings, FLAG and VSNL separately advise about their progress in reaching agreement to activate an additional 17 STM-1 circuits on the FEA cable. *See supra* note 8.

<sup>61</sup> At the same time, we do not find credible evidence to support VAI's claim that FLAG filed its Petition merely as retaliation against VSNL's refusal to make certain commercial concessions. *See* Opposition at i (making claim); *but see* Reply at 16-18 (denying claim as unsupported by the facts).

<sup>62</sup> *See* 47 C.F.R. § 63.21(g). *See also Foreign Participation Order*, 12 FCC Rcd at 24023, ¶ 295 (remedies in the event of anti-competitive conduct).

<sup>63</sup> An intentional violation of the No Special Concessions rule might result not only in direct sanctions, but further might raise questions about a carrier's character qualifications with respect to future applications for Commission authority. *See supra* note 53.

20. *Regulatory Status.* A U.S. carrier that is, or has or acquires an affiliation with, a foreign carrier that is not a monopoly provider of communications services in a relevant market in a destination country and seeks to be regulated as non-dominant on that route bears the burden of providing information to demonstrate its foreign affiliate lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market.<sup>64</sup> VAI seeks to provide facilities-based and resale services to all international points. The Application states that VAI is not a foreign carrier, but is affiliated with foreign carriers in three markets: India, Nepal and Sri Lanka.<sup>65</sup> The Application further states that VSNL is a foreign carrier with market power in India, a WTO Member.<sup>66</sup> With respect to its foreign affiliates in Sri Lanka and Nepal, both WTO Members, VAI states that the two carriers have not yet commenced operations and consequently hold no market share.<sup>67</sup> Thus, VAI contends it is entitled to non-dominant carrier treatment on all routes except India, and states that it accepts dominant carrier treatment in its provision of service to India.<sup>68</sup>

21. We find that VSNL – the incumbent market-power provider of international telecommunications services in India – has sufficient market power to affect competition adversely in the U.S. international services market. Accordingly, we regulate VAI as dominant in its provision of telecommunications services on the U.S.-India route. As a dominant carrier, VAI must comply with the dominant carrier safeguards set forth in section 63.10(c) and (e) of the Commission’s rules as well as the Commission’s generally applicable safeguards for U.S. international carriers.<sup>69</sup> On all other routes, however, we regulate VAI as a non-dominant carrier, subject to the safeguards applicable to all

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<sup>64</sup> See 47 C.F.R. § 63.10(a)(3).

<sup>65</sup> See Application at Attachment 1, at 1. VAI certifies that it is a wholly-owned subsidiary of VSNL and under common control with: (1) United Telecom Limited (“UTL”), a Nepal corporation, 26.66% owned by VSNL and formed to provide basic telecommunications services in Nepal, that has not yet started commercial operations; and (2) VSNL Lanka Limited, a Sri Lanka entity wholly owned by VSNL and formed to provide gateway services for international communications in Sri Lanka, but not yet operational. See *id.* at Attachment 1, at 1-2; see also Letter from Robert J. Aamoth, Counsel for VAI, to Secretary, Federal Communications Commission, File No. ITC-214-20030728-00376 (filed Mar. 1, 2003). India and Sri Lanka are WTO Member countries. See [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (visited Mar. 8, 2004). VAI further states that in India it is under common control with VSNL Seamless Services Limited and TVC India Private Limited and may be affiliated with various Tata Group entities, including Idea Cellular, Tata Telecom, Tata Teleservices and Tata Internet Services. See Application at Attachment 1, at 1; see also Letter from Robert J. Aamoth, Counsel for VAI, to Secretary, Federal Communications Commission, File No. ITC-214-20030728-00376 (dated Apr. 28, 2004) (providing additional information on the ownership of VSNL).

<sup>66</sup> See Application at Attachment 1, at 1; see also *The 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 04-1584, (Int’l Bur. rel. May 28, 2004) (listing VSNL as a carrier that is presumed to possess market power in India).

<sup>67</sup> See Application at Attachment 1, at 2. Nepal became a WTO Member on April 23, 2004. See [http://www.wto.org/english/thewto\\_e/countries\\_e/nepal\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/nepal_e.htm) (visited Aug. 25, 2004).

<sup>68</sup> See *id.*

<sup>69</sup> See 47 C.F.R. § 63.10(c) and (e); see also *infra* note 70 (generally applicable safeguards).

international facilities-based and resale carriers.<sup>70</sup>

22. On the U.S.-India route, the dominant carrier safeguards require that VAI: (1) provide services as an entity that is separate from its foreign carrier affiliate, maintaining separate books of account and not jointly owning transmission or switching facilities; (2) file quarterly reports on traffic and revenue consistent with section 43.61; (3) file quarterly reports on the provisioning and maintenance of all basic network facilities and services procured from VSNL or any allied foreign carrier; (4) file quarterly circuit status reports; and (5) refrain from initiating the provision of switched facilities-based service on the U.S.-India route unless and until the Commission determines that VSNL charges VAI and other U.S. international carriers rates to terminate traffic in India that are at or below the \$0.23 benchmark.<sup>71</sup>

### **B. National Security, Law Enforcement, Foreign Policy and Trade Policy Concerns**

23. When analyzing an application in which foreign investment is at issue, we also consider any national security, law enforcement, foreign policy, or trade policy concerns raised by the Executive Branch.<sup>72</sup> On December 9, 2003, the Executive Branch and VAI jointly asked the Commission to defer action in the proceeding pending resolution of potential national security, law enforcement, and public safety issues. The U.S. Department of Justice (“DOJ”), including the Federal Bureau of Investigation (“FBI”), and the U.S. Department of Homeland Security (“DHS”) now advise that they have no objection to grant of the Application provided that the Commission conditions the grant on compliance with the terms of an agreement between VAI and VSNL, on the one hand, and the DOJ, FBI, and DHS, on the other (the “VAI/Executive Branch Agreement”). Specifically, on June 7, 2004, the DOJ, FBI and DHS filed a Petition to Adopt Conditions to Authorizations and Licenses (“Petition to Adopt Conditions”) that attaches the VAI/Executive Branch Agreement.<sup>73</sup> The VAI/Executive Branch Agreement is intended to ensure that entities with responsibility for enforcing the law, protecting the national security and preserving public safety can proceed in a legal, secure and confidential manner to satisfy these responsibilities.<sup>74</sup> The Petition to Adopt Conditions advises that DOJ and DHS are authorized to state that VAI and VSNL do not object to the grant of the petition.<sup>75</sup>

24. In assessing the public interest, we take into account the record and afford the appropriate level of deference to Executive Branch expertise on national security and law enforcement issues.<sup>76</sup> As

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<sup>70</sup> See, e.g., 47 C.F.R. §§ 63.14 (No Special Concessions), 63.21 (conditions applicable to all international section 214 authorizations), 63.22 (facilities-based conditions), 63.23 (resale-based conditions).

<sup>71</sup> See 47 C.F.R. §§ 63.10(c)(1)-(5), 63.10(e), 43.61. See also *infra* ¶¶ 26-27.

<sup>72</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23918, ¶ 59.

<sup>73</sup> We include the VAI/Executive Branch Agreement as Attachment A to this Order.

<sup>74</sup> See Petition to Adopt Conditions at 3. See also *id.* at 2 (stating that transactions in which foreign entities will own or operate a part of the U.S. communications system, or in which foreign-located facilities will be used to provide domestic communications services to U.S. consumers, could significantly impair the ability of DOJ and DHS to satisfy their obligations to protect the national security, enforce the laws, and preserve the safety of the public).

<sup>75</sup> See Petition to Adopt Conditions at 4.

<sup>76</sup> See *Foreign Participation Order*, 12 FCC Rcd at 23919-21, ¶¶ 61-66.

the Commission stated in the *Foreign Participation Order*, foreign participation in the U.S. telecommunications market may implicate national security or law enforcement issues uniquely within the expertise of the Executive Branch.<sup>77</sup> In presuming that an application from a WTO Member applicant does not pose a risk of anti-competitive harm that would justify denial of the application, the Commission does not, however, presume that an application poses no national security, law enforcement, foreign policy, or trade concerns.<sup>78</sup> At the request of the Executive Branch and Applicant, we deferred action on the Application. The Executive Branch, after raising national security and law enforcement concerns, now has resolved these concerns through the negotiation of the VAI/Executive Branch Agreement. Therefore, on the record before us, we will not need to consider these particular concerns as a part of our own independent analysis of whether grant of the Application is in the public interest.<sup>79</sup> We recognize that, separate from our licensing process, VAI and VSNL have entered into the VAI/Executive Branch Agreement, and that the agreement expressly states that the DOJ, FBI, and DHS will not object to grant of the pending Application, provided that the Commission conditions grant of the Application on compliance with the VAI/Executive Branch Agreement.<sup>80</sup> The Executive Branch has not otherwise commented in this proceeding.

25. We note that the VAI/Executive Branch Agreement contains certain provisions relevant to this transaction that, if broadly applied, would have significant consequences for the telecommunications industry. These provisions, if viewed as precedent for other service providers and potential investors, would warrant further inquiry on our part, and we will consider any subsequent agreements on a case-by-case basis. Notwithstanding these concerns about the broader implications of the VAI/Executive Branch Agreement, we see no reason to modify or disturb the agreement of the parties on these matters. Therefore, in accordance with the request of the DOJ, FBI and DHS, in the absence of any objection from the Applicant, and given the discussion above, we condition our grant of the Application on compliance with the VAI/Executive Branch Agreement.<sup>81</sup>

### C. Benchmarks Issue

26. In its *Benchmarks Order*, the Commission established benchmarks that govern the international settlement rates that U.S. carriers may pay foreign carriers to terminate international traffic

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<sup>77</sup> See *id.* at 23919, ¶ 62.

<sup>78</sup> See *id.* at 23920-21, ¶ 65.

<sup>79</sup> See *id.* at 23919, ¶ 62.

<sup>80</sup> See VAI/Executive Branch Agreement at Art. 7.1.

<sup>81</sup> We note that the VAI/Executive Branch Agreement provides first for informal resolution of any dispute. See VAI/Executive Branch Agreement at Art. 4.1. If any of the parties to the agreement should determine that further negotiation is fruitless, Article 4.1 authorizes the party to resort to the remedies of Article 4.2 to enforce the agreement. See *id.* Article 4.2 includes the right of a party to bring action for appropriate judicial relief and expressly does not limit the right of a U.S. government agency, among other things, to request the Commission to modify, condition, revoke, cancel or render null and void any license, permit, or other authorization granted or given by the Commission to VAI, or request the Commission to impose other appropriate sanction such as a forfeiture. See *id.* at Art. 4.2.

originating in the United States.<sup>82</sup> A carrier that is classified under section 63.10 of the Commission's rules as dominant for the provision of facilities-based services on a particular route, and that is affiliated with a carrier that collects settlement payments for terminating U.S. international switched traffic at the foreign end of that route, may not provide switched facilities-based service on that route unless the current rates the affiliate charges U.S. international carriers to terminate traffic are at or below the Commission's relevant benchmark.<sup>83</sup> The benchmark settlement rate for the U.S.-India route, effective January 1, 2002, is \$0.23.<sup>84</sup>

27. The record is not clear in this proceeding as to whether the U.S.-India route is benchmark-compliant.<sup>85</sup> Therefore, before VAI may provide facilities-based service between the United States and India, the Commission must determine that the U.S.-India route is benchmark-compliant.<sup>86</sup>

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<sup>82</sup> See *International Settlement Rates*, Report and Order, IB Docket No. 96-261, FCC 97-280, 12 FCC Rcd 19806 (1997) ("*Benchmarks Order*"), *aff'd sub. nom., Cable and Wireless PLC v. F.C.C.*, 166 F.3d 1224 (D.C. Cir. 1999). Earlier this year, the Commission observed that 173 of 203 U.S. international routes are in compliance with the benchmark rates and lifted the requirements of the Commission's international settlements policy from all U.S. international routes on which U.S. carriers have negotiated benchmark-compliant rates. See *International Settlement Policy Reform, International Settlement Rates*, First Report and Order, IB Docket Nos. 02-324 and 96-261, FCC 04-53, 19 FCC Rcd 5709, 5714, ¶ 11, 5723, ¶ 27 (2004). The First Report and Order listed the U.S.-India route among the 30 routes for which U.S. carriers have not yet negotiated benchmark rates. See *id.* at 5773, Appendix F.

<sup>83</sup> 47 C.F.R. § 63.10(e). The facilities-based condition substantially reduces above-cost settlement rates that could be used to execute a predatory price squeeze against unaffiliated competitors on affiliated routes. See *International Settlement Rates*, Report and Order on Reconsideration and Order Lifting Stay ("*Benchmarks Reconsideration Order*"), IB Docket No. 96-261, FCC 99-124, 14 FCC Rcd 9256, 9266, ¶ 27 (1999).

<sup>84</sup> See *Benchmarks Order*, 12 FCC Rcd at 19860, ¶ 111 (benchmarks), 19965, Appendix C (countries).

<sup>85</sup> See Letter from James L. Ball, Chief, Policy Division, International Bureau to Robert Aamoth, Counsel for VAI, File No. ITC-214-20030728-00376 (dated Aug. 14, 2003) (requesting that VAI confirm that it will not provide switched facilities-based service on the U.S.-India route unless VSNL settles with U.S. carriers at benchmark-compliant rates). See also 47 C.F.R. §§ 43.51 (international settlement arrangements), 64.1001 (modification requests). FLAG contends that VSNL "continues to refuse to settle with U.S. carriers at benchmark compliant rates," see Petition at 3 n.8, and "continues to charge rates considerably above the benchmark rates established by the Commission," see *id.* at 4. See also Reply at 14-15 and 15 n.30 (stating that, to extent that VSNL has entered into unreported settlement rate agreements with U.S. carriers that comply with benchmark settlement rates, such agreements are not publicly available in Commission records); *but see* Opposition at 3 (stating that, "In the last several years, VSNL has negotiated termination rates for international switched telephone calls with all major U.S. carriers that are well below the Commission's benchmark settlement rates").

<sup>86</sup> Applicant acknowledges that it understands this requirement. See Letter from Robert J. Aamoth, Counsel for VAI, to James L. Ball, Chief, Policy Division, International Bureau, Federal Communications Commission, File No. ITC-214-20030728-00376 (filed Aug. 18, 2003) (confirming that "VAI does not plan to, and will not, provide switched facilities-based telecommunications service on the U.S.-India route until such time as its ultimate parent company, VSNL, settles with U.S. carriers at benchmark-compliant rates"). We note that VSNL has filed a request in a separate proceeding that the Commission find the U.S.-India route to be benchmark-compliant and except it from the Commission's International Settlements Policy. See Letter from Robert J. Aamoth, Counsel for VSNL, to Secretary, Federal Communications Commission, IB Docket Nos. 02-324 and 96-261 (filed June 28, 2004).

#### IV. CONCLUSION

28. We conclude that the public convenience and necessity will be served by granting VAI's application. FLAG has not demonstrated, on the record before us, that VAI's entry, as a dominant carrier on the U.S.-India route and as a non-dominant carrier on all other routes, presents a very high risk to competition in the U.S. telecommunications market. Any national security and law enforcement issues of concern to the Executive Branch are addressed by the VAI/Executive Branch network security agreement. Finally, VAI is prohibited from initiating switched facilities-based service on the U.S.-India route unless and until the Commission determines that the U.S.-India route is benchmark-compliant.

#### V. ORDERING CLAUSES

29. Accordingly, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant of the Application, and IT IS HEREBY ORDERED that the Application in File No. ITC-214-20030728-00376 IS GRANTED and VAI is authorized, pursuant to section 63.18(e)(1) and (e)(2), 47 C.F.R. § 63.18(e)(1), (e)(2), to provide facilities-based and resale services between the United States and all permissible international points SUBJECT TO all current and future Commission regulations and the conditions set out below.

30. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j) and 214(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 214(a), the authorization granted herein IS SUBJECT TO COMPLIANCE WITH the provisions of the VAI/Executive Branch Agreement attached hereto between VAI and VSNL, on the one hand, and the DOJ, FBI, and DHS, on the other, dated June 7, 2004, effective immediately, which VAI/Executive Branch Agreement is designed to address national security, law enforcement, and public safety concerns of the DOJ, FBI, and DHS regarding the authority granted herein. Nothing in the VAI/Executive Branch Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, section 222(a) and (c)(1) of the Communications Act, 47 U.S.C. § 222(a) and (c)(1), and the Commission's implementing regulations.

31. IT IS FURTHER ORDERED that, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and section 63.10 of the Commission's rules, 47 C.F.R. § 63.10, VAI SHALL BE CLASSIFIED as a dominant carrier in its provision of services on the U.S.-India route, and SHALL COMPLY with the dominant carrier safeguards in section 63.10 of the rules, including the safeguard in section 63.10(e), 47 C.F.R. § 63.10(e), that prohibits VAI from providing international facilities-based switched services between the United States and India until the rates that VSNL charges U.S. international carriers to terminate traffic in India are at or below the benchmark rate adopted by the Commission in IB Docket No. 96-261, FCC 97-380, 12 FCC Rcd 19806 (1997). VAI SHALL NOT PROVIDE facilities-based service between the United States and India UNLESS AND UNTIL the Commission determines that the U.S.-India route is benchmark-compliant.

32. IT IS FURTHER ORDERED that the petition to deny filed by FLAG IS DENIED for the reasons stated herein.



33. 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), 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson, Chief  
International Bureau

**ATTACHMENT A**  
**VAI/EXECUTIVE BRANCH AGREEMENT**