

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Market Entry and Regulation of)
Foreign-affiliated Entities)

IB Docket No.)
RM-8355)
RM-8392)
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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REPLY COMMENTS OF BT NORTH AMERICA INC.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
) IB Docket No. 95-22
Market Entry and Regulation of) RM-8355
Foreign-affiliated Entities) RM-8392

To: The Commission

REPLY COMMENTS OF BT NORTH AMERICA INC.

BT North America Inc. ("BTNA"), by its attorneys, submits the following Reply Comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding. 1/

I. INTRODUCTION AND SUMMARY

In this proceeding the Commission proposes to adopt a policy governing foreign entry into the U.S. international telecommunications market. In its initial Comments in this proceeding, BTNA expressed its support for this initiative. BTNA urged that the Commission's proposed effective market access standard be clear, specific -- and pragmatic. "Effective market access" should mean

1/ Market Entry and Regulation of Foreign-affiliated Entities, IB Docket No. 95-22, RM-8355, RM 8392 (released February 17, 1995).

that the foreign administration in a market in which the foreign carrier is dominant has a fully implemented policy that requires the following elements:

- Competition should exist in the provision of basic as well as enhanced communications services, including both international and domestic simple resale and facilities-based competition.
- U.S. and other foreign nationals should be permitted to take significant investment stakes in, or control of, facilities-based and resale carriers.
- Cost allocation rules should be established to prevent cross-subsidization between regulated and unregulated services.
- Published, nondiscriminatory charges, terms and conditions for resale of and interconnection with the facilities of the dominant carriers should be established.
- Timely and nondiscriminatory disclosure by the dominant carriers of technical information necessary for such resale or interconnection should be required.
- Carrier and customer proprietary information should be protected.
- These safeguards should be enforced by an independent regulatory body with fair and transparent procedures. 2/

BTNA demonstrated that this standard should apply to foreign carriers dominant in their home markets that seek an investment of 10% or more in, or control of, facilities-based U.S. international carriers and that all such transactions should be subject to prior approval, not notification after the fact.

In these Reply Comments, BTNA focuses on three crucial aspects of the Commission's proposal. First, BTNA shows that prohibiting U.S. market entry

2/ Notice at ¶ 40.

by a foreign carrier unless American companies can control foreign international facilities would undermine the objectives of the proposed policy. Second, BTNA demonstrates that arrangements between AT&T, the dominant U.S. carrier and dominant and monopoly foreign service providers pose such a strong threat to nascent international competition that all such AT&T arrangements, whether or not exclusive, should be subject to the effective market access standard. Finally, BTNA shows that Swidler and Berlin's proposal to permit private line simple resellers to transit traffic via an ISR approved country, at least with respect to U.S. outbound traffic, will increase both retail competition and downward pressure on accounting rates, without harm to the U.S. settlements position.

II. PROHIBITING U.S. MARKET ENTRY BY A FOREIGN CARRIER UNLESS U.S. CARRIERS CAN CONTROL INTERNATIONAL FACILITIES IN THE FOREIGN COUNTRY WOULD UNDERMINE THE COMMISSION'S OBJECTIVES IN THIS PROCEEDING

A. Requiring Control Of Foreign International Facilities Would Not Be Pragmatic

In its Comments in this proceeding, BTNA emphasized the need for the Commission to employ a market entry standard that is pragmatic. If the Commission adopts a standard that will not be met, then the goal of opening foreign markets will not be achieved, and the U.S. market will itself be effectively closed to foreign participation. A questionable element of the Commission's proposed effective market access standard is the proposal that U.S. carriers "can offer in the

foreign country facilities-based services substantially similar to those the foreign carrier seeks to offer in the United States.” ^{3/} AT&T suggested this approach in its petition for rulemaking, and it is the only party supporting it in this proceeding. The goal is commendable: ending restrictions in the U.S. and foreign countries on foreign ownership and control of international facilities, combined with other competitive safeguards, would surely enhance competition. But in many countries there is little likelihood of immediately achieving that goal even if reciprocity would keep those foreign carriers out of the U.S. international marketplace.

In this proceeding the Commission is addressing only now, more than 25 years into the process of developing a competitive U.S. marketplace, its policies and practices that have severely restricted opportunities for foreign entities to control U.S. international facilities. In many foreign countries, the opportunity to control international facilities will also be a later step in competitive policy development. A U.S. market entry standard that fails to recognize and accommodate these realities will effectively close U.S. markets to participation by foreign companies, without opening other, useful competitive avenues to American firms in foreign countries.

^{3/} Notice at ¶ 40.

B. Control Of International Facilities Is Not Essential For U.S. Carriers To Compete Effectively In Foreign Countries

AT&T argues in its Comments that unless U.S. carriers can build, own and operate international facilities in a foreign country, they will be: (1) "unable to offer all of the service features and functionalities desired by customers, i.e., the software defined network capabilities, that lie at the core of global seamless services" and (2) "unable to protect themselves from the anticompetitive conduct that may otherwise result." 4/ The ability to engage in simple resale of private line facilities provided on a competitive basis provides a viable and attractive alternative to facilities ownership, assuming effective competition among facilities-based carriers and an effective regulator. For this reason, BTNA has proposed, as an essential element of an effective market access standard, competition in the provision of basic and enhanced communication services including international and domestic simple resale and facilities-based services. So long as the Commission also institutes the competitive safeguards it has proposed, and those safeguards are enforced in the foreign country by an independent regulatory body with fair and transparent procedures, resellers would not "be at the mercy of the foreign carrier with respect to the price of underlying transport, the quality and type of interconnection, transmission performance, provisioning intervals and maintenance," as feared by AT&T. 5/

4/ AT&T Comments at 29-30.

5/ Id. at 30.

C. Basing The Industry Standard On Control Of Foreign International Facilities Ignores The Potential For Progress In Matters That Are Essential To A Competitive Environment

The emphasis on the ability of American companies to control foreign international facilities ignores the potential for progress on other matters that are essential to a competitive environment. The ability of U.S. companies to own foreign international facilities is only one small part of comprehensive competitive policy development. In most countries, including most of the major trading partners of the U.S., the changes required in telecommunications policies are more fundamental and of more immediate concern. Competition in basic and enhanced services and in both international and domestic facilities-based services and the availability of international and domestic simple resale, as well as other factors enumerated by the Commission -- competitive safeguards, the availability of published nondiscriminatory charges and terms for interconnection, protection of carriers and customer proprietary information, and an independent regulator to enforce the safeguards -- are essential to ensure that new entrants have a fair opportunity to compete in foreign markets. The Commission should focus the U.S. international market entry standard on these fundamental, attainable elements of competition. Emphasizing control of foreign international facilities risks sacrificing good in a feckless quest for perfection. 6/

6/ It would also be wasteful for the Commission to review prior Commission determinations under Section 214 and 310 clearing participation in U.S. international markets by foreign entities under competitive analyses similar to the proposal now under consideration. See e.g., BT North America Inc., File No. ITC-

[Footnote continued]

III. THE COMMISSION SHOULD PUBLICLY SCRUTINIZE ALL U.S.-FOREIGN CARRIER ALLIANCES, WHETHER THEY INVOLVE DIRECT EQUITY INVESTMENTS IN THE U.S. CARRIER OR A JOINT VENTURE COMPANY OR MARKETING AND OTHER ARRANGEMENTS THAT CREATE EXCLUSIONARY OR DISCRIMINATORY INCENTIVES

In its initial Comments BTNA urged the Commission not to exempt AT&T's WorldPartners Alliance (and similar so-called "co-marketing" agreements or other arrangements) from the same thorough public scrutiny that the Commission has imposed upon or proposed for the foreign carrier alliances of AT&T's principal US international competitors, MCI (with BT) and Sprint (with Deutsche Telekom and France Télécom) 7/. As the respective alliance participants' Comments make clear, 8/ all three partnerships were conceived for the same ostensible purpose -- to compete head-to-head worldwide with each other in offering seamless, end-to-end services to major multinational corporations and other large international telecommunications users. It would disserve the public interest and

[Footnote continued]

93-126, DA 95-120 (1995); BT North America Inc., 9 FCC Rcd 6851 (1994); MCI Telecommunications Corporation/BT Telecommunications plc, 9 FCC Rcd 3560 (1994). Moreover, retroactive application of a different standard, or application of a different standard with the effect of preventing growth in services previously authorized would raise substantial issues of fundamental fairness and due process. See Salzer v. FCC, 778 F.2d 869, 871-872 (D.C. Cir. 1985).

7/ BTNA Comments at 13-15.

8/ AT&T Comments at 8-9; MCI Comments at 2-3; Sprint Comments at 2; Deutsche Telekom Comments at 2; and France Télécom Comments at 3.

skew the marketplace if the alliance formed by the dominant U.S. international carrier (AT&T) should be subject to far less effective regulation than the alliances of its smaller rivals. Indeed, because of AT&T's unique status as dominant U.S. carrier and equipment manufacturer/supplier for many foreign carriers, foreign alliances formed by it will often deserve greater regulatory scrutiny.

As BTNA explained, U.S. / foreign carrier alliances which do not involve foreign investments directly in the U.S. carrier -- such as mutual investments of money or property in joint ventures, or cooperative marketing arrangements -- may nonetheless present the same serious public policy concerns (e.g., potential discrimination and anticompetitive leveraging) that dominant foreign carriers' equity investments in U.S. carriers present. Moreover, when AT&T is the U.S. ally of a foreign carrier -- such as in its WorldPartners and Uniworld ventures -- these policy concerns are heightened. AT&T's tremendous market power as the largest supplier of U.S.-originated calls to foreign destinations and as one of the leading telecommunications equipment and software suppliers to foreign carriers gives those foreign carriers strong reasons to curry AT&T's favor and avoid incurring its wrath. As a consequence, BTNA urges the Commission to make any AT&T alliance, joint venture, or marketing arrangement with dominant foreign carriers subject to the effective market access test.

A. Dominant Foreign Carrier Investments Of Equity Or Intellectual Property In A Joint Venture With A U.S. Carrier May Create Anticompetitive Incentives Warranting Commission Scrutiny Under The Effective Market Access Standard

If a U.S. carrier and a dominant foreign carrier were to invest together in a third party joint venture that does business with each of the parents, each would have the incentive to favor that venture over the venture's competitors in those business dealings so as to enhance the value of their respective investments. That is precisely what has occurred in the formation of Uniworld by AT&T and Unisource ^{9/} and in the equity investments by AT&T, KDD, Singapore Telecom, and Unisource in the WorldPartners Company. ^{10/} As a result of these

^{9/} On December 13, 1994, AT&T announced the formation of a new company (Uniworld) to be owned 60% by Unisource and 40% by AT&T, with initial assets of \$200 million and over 2000 employees in 17 countries. AT&T will contribute its AT&T Business Communications Services Europe and AT&T EasyLink Services groups and Unisource will contribute its business networks, satellite, and voice divisions to Uniworld. Uniworld will become the distributor for WorldSource services in Europe and will offer customers in Europe improved access to North America and Asia. See "Unisource and AT&T Announce New Communications Company for Europe," AT&T/Unisource joint press release, Amsterdam, the Netherlands, December 13, 1994. The European Commission recently launched an in-depth investigation of the proposed Unisource alliance with AT&T and the proposed inclusion of Telefonica de Espana in Unisource. See "Commission Begins Inquiry Into Proposed Telecom Deals," Wall Street Journal Europe, March 23, 1995.

^{10/} AT&T's December 1994 Form S-3 for the secondary offering of BT's shares of AT&T received as a result of the McCaw transaction stated that WorldPartners Company is "an equity partnership" formed in 1993 by AT&T, KDD, and Singapore Telecom. AT&T's Form 8-K dated December 13, 1994 said that "[i]n September 1994 Unisource joined the WorldPartners Company as an equity owner." It further stated that "[a] company formed by AT&T and Unisource [Uniworld] will become in place of Unisource, a WorldPartners equity owner." This equity partnership is distinct from a larger membership group, WorldPartners Association, with nine

[Footnote continued]

transactions, the Unisource companies, KDD, Singapore Telecom, and AT&T have strong financial reasons to promote the common enterprise and to discriminate, where possible, against the competitors of such an enterprise.

The incentive to favor one's affiliates exists as well where a foreign carrier has conveyed intellectual property in return for royalty payments or where the carrier has gained (directly or through an affiliate) access to other valuable intellectual property. There is ample reason to believe the Uniworld and WorldPartners arrangements have benefited from just such a pooling of resources and consequent exchange of incentives for mutual support. 11/

[Footnote continued]

members. Id. The additional members of the Association are Telecom New Zealand International, Telstra of Australia, Hong Kong Telecom, Unitel of Canada, and Korea Telecom. AT&T/Unisource press release, December 1994. Reportedly, WorldPartners Company startup capital of \$100 million was committed by the founding partners who received these shares in the Company: AT&T (50%), KDD (30%), and Singapore Telecom (20%). See "Moving to Extend WorldPartners' Reach to Europe, AT&T Unveils Services Pact with Unisource Group," Telecommunications Reports, June 27, 1994, at 20.

11/ AT&T and Unisource intend to merge a number of European business units and unknown amounts of intellectual property and cash into Uniworld. See the preceding footnote. A paper entitled "Briefing Memorandum on Negotiations between AT&T and Unisource," supplied by AT&T and/or Unisource to European officials in December 1994, described WorldPartners Company then as a U.S. partnership with these functions: "The WorldPartners Company licenses to the partners and members a package of intellectual property rights, including know-how, marks, and software systems and processes enabling them to provide WorldSource services. * * * It also acts as a clearinghouse for traffic/usage and billing information, invoicing and collection among the members, and for account inquiries to allow and facilitate application of one-stop-shopping and one-stop-billing principles." See Attachment A to this Reply.

In sum, participation by foreign carriers with AT&T in WorldPartners, Uniworld, and comparable ventures, inevitably gives those foreign carriers strong incentives to prefer their own AT&T venture over rival ventures of other U.S. carriers. Discriminatory and anticompetitive treatment, whether involving basic or enhanced services, can appear in numerous contexts, viz.: (i) pricing and conditions for interconnection and access; (ii) provisioning, maintenance, and restoration of leased private lines and interconnection; (iii) cross-subsidization and predatory pricing; (iv) access to network change information; (v) use of information about monopoly service subscribers; (vi) misuse of interconnecting or leasing carrier/customer's proprietary information; (vii) bundling of monopoly and competitive services; (viii) and all the other types of behavior which AT&T has cited in opposing the BT-MCI and Sprint-DT-FT alliances. 12/

B. Co-Marketing Arrangements May Foster Exclusionary Or Discriminatory Conduct By The Dominant Foreign Carrier

The Notice proposed that "co-marketing agreements," whether exclusive or not, should be filed with the Commission under Section 43.51 of the Rules. 13/ BTNA and other commenters 14/ agreed with that minimal step, and AT&T grudgingly offered to "support" such a requirement "if applied uniformly to

12/ See AT&T Comments at 10-18.

13/ Notice at ¶ 63.

14/ BTNA Comments at 13; Swidler & Berlin Comments at 18, n.30; Telefonica Larga Distancia Comments at 54, n.123.

all U.S. carriers.” 15/ But, as BTNA pointed out, just requiring the agreements to be filed is not enough. 16/ The Commission should publish the filings, entertain comments from interested parties, and conduct more detailed scrutiny where warranted.

Such public proceedings regarding purported co-marketing agreements are essential for several reasons. First, the Notice implicitly proposed to treat any co-marketing agreement that is exclusive “in theory” or “in practice” as warranting application of the effective market access test 17/. For those agreements that are oral in whole or in part or where the written terms are potentially ambiguous, public comment will help the Commission determine whether the agreements are “in theory” exclusive. More important, commenters will be able to offer evidence from their own experiences as to whether a facially non-exclusive agreement has operated de facto to exclude them 18/, either through explicit refusals to deal

15/ AT&T Comments at 20.

16/ BTNA Comments at 13-14.

17/ See Notice at ¶ 63.

18/ AT&T apparently claims that the WorldPartners arrangement does not create incentives to deal exclusively because WorldPartners co-founder Singapore Telecom has also agreed to deliver services of Concert (the BT-MCI joint venture) in Singapore (AT&T Comments at 20). The fact that such an arrangement was eventually reached, does not prove that contrary incentives were completely absent from Singapore Telecom’s WorldPartners arrangement or that such incentives will not influence ongoing operations. Moreover, would AT&T concede that the absence of such a Concert distribution agreement in other WorldPartners affiliates’ countries is proof that the overall arrangement does create exclusionary or discriminatory incentives?

because of the agreement or through a declared unwillingness to deal except pursuant to discriminatory conditions. Second, public comment may be helpful in determining whether the arrangement is limited to co-marketing or whether it has some additional features that create further incentives for the foreign carrier to treat the overall arrangement as exclusive or to discriminate against other U.S. carriers. Third, if the agreement is exclusive on its face, or contains penalties or incentives that promote exclusionary or discriminatory behavior, or in practice is exclusive, the Commission would benefit from comments as to whether the problem is significant or de minimis (in the way that an under-the-threshold equity investment would be considered insignificant).

In any event, public filing and opportunity for comment regarding these co-marketing and other alliance arrangements will not be sufficient to protect the public interest without further Commission action. The Commission rightly recognizes that an equity investment above a specified threshold in a U.S. carrier will give the foreign carrier an incentive to favor the U.S. carrier over its competitors in the exchange of basic telecommunications services and will, absent counterbalancing public interest factors, justify prohibiting the investment or imposing stringent safeguards. ^{19/} The Commission's logic is unassailable, but it does not go far enough. Incentives for discriminatorily preferential treatment are not solely a function of equity investment in the U.S. carrier (or in a joint venture

^{19/} See Notice at ¶¶ 45, 56.

company). Where those incentives exist -- as with co-marketing agreements between US and dominant foreign carriers -- the Commission should analyze the agreements, including particularly any features bearing on exclusivity or discrimination, and impose appropriate safeguards or disapprove the arrangements.

The Notice presumes that AT&T WorldPartners Company is a “co-marketing arrangement,” and ostensibly a non-exclusive one. 20/ But as BTNA pointed out previously, 21/ the Commission has never formally reviewed the relevant agreements pertaining to WorldPartners. Certainly there has been no opportunity for the public to examine and comment upon those agreements. The Notice did not define what it meant by “co-marketing arrangement” or why it thought WorldPartners was such an arrangement. As indicated elsewhere in these Reply Comments, 22/ however, WorldPartners Company is an equity partnership that licenses intellectual property rights to partners and other members. Presumably one or more of the partners has licensed or otherwise authorized the Company to engage in such practices. Nothing is known about the terms of such licensing, e.g., price, conditions, etc. The Company also performs usage measuring, billing, collecting, and other tasks. Nothing has been revealed about the

20/ Notice at ¶ 63.

21/ BTNA Comments at 14.

22/ See supra footnotes 10 and 11 and Attachment A.

contractual terms for such functions, e.g., price, conditions, etc. We do not know what economic considerations tie the partners and members to the WorldPartners Association either. It sounds like much more than a simple “co-marketing arrangement.” In any event, there is ample reason for the Commission to invoke a public process to determine the nature and effect of AT&T’s participation in these arrangements, whatever they are.

C. The Commission Should Recognize That AT&T’s Role As Equipment Manufacturer/Supplier And Its Dominance Of The U.S. International Service Market Will Increase Its Foreign Partners’ Exclusionary And Discriminatory Incentives

AT&T says that “WorldPartners merely provides a set of service standards by which the individual members can meet the needs of their customers.” ^{23/} But there is far more to the arrangement than that. AT&T is supplying much of the equipment and software not just to meet some ideal “service standards,” but so that the foreign carrier members will be locked into AT&T’s “standards” and technology. The foreign carrier’s dependence on AT&T for technology, upgrading, prompt provisioning of technical help and supplemental equipment, discounts, etc. will naturally give birth to an incentive to keep AT&T happy, i.e., to prefer AT&T and their common enterprise and to disfavor AT&T’s and WorldPartners’ rivals.

In analyzing whether the WorldPartners arrangements between AT&T

^{23/} AT&T Comments at 20.

and foreign carriers are likely to promote discrimination and other anticompetitive actions, the Commission necessarily must require disclosure about the software and equipment/supply relationship between AT&T, WorldPartners Company, and the other carriers. A crucial consideration would be whether the reliance on particular equipment and technology will tend to "lock out" in a technical (if not a business) sense any other service distribution alliance that is based on other manufacturers' equipment or software.

If a WorldPartners affiliate obtains AT&T equipment, software, technical help, etc., at discounted prices or on a priority basis simply because of the WorldPartners arrangement, the foreign carrier is going to be reluctant to do anything that might upset the close relationship with AT&T. Consequently, the Commission needs to know whether the foreign carrier has such beneficial relationships with AT&T as equipment and software supplier and whether those relationships are to any extent attributable to, or otherwise linked with, the carrier's participation in WorldPartners or some other AT&T alliance.

The Commission also should keep at the forefront of its analysis of AT&T's foreign carrier alliances that AT&T is the dominant U.S. international carrier. 24/ As Sprint notes, foreign carriers have had far longer working relationships with AT&T than with other U.S. carriers and are much more likely to

24/ See 1993 Section 43.61 Telecommunications Data, Table E1 (Nov. 1994).

allow those relationships to affect how AT&T is treated. 25/ Moreover, the foreign carriers know full well that AT&T, with the lion's share of U.S. outbound traffic, has the ability to reward or punish foreign carriers in myriad subtle and not so subtle ways for how they treat their WorldPartners, Uniworld, and other alliances with AT&T.

For example, AT&T could expressly or impliedly threaten to, inter alia: (i) enter any non-reserved telecommunications niches or push for facilities-based or international resale rights in the foreign carrier's home territory; (ii) exclude that carrier's country as a destination from any popular AT&T international promotional offering; (iii) redirect transiting traffic to another hub rather than that country; (iv) slow down or relocate siting of submarine cable landing facilities in that country; (v) slow provisioning of matching international half-circuits; and (vi) interfere with that carrier's efforts to participate in, or change its participation in, submarine cable facilities.

To curry AT&T's favor, the foreign carrier might, inter alia: (i) deny, discriminate in the terms of, or move more slowly in negotiating, correspondence agreements with new U.S. carriers; (ii) provide AT&T subtle advantages over its U.S. competitors in proportionate returns; (iii) skew the accounting rate regime by creating special services for which only AT&T has an operating agreement; or (iv) refile AT&T's traffic at special rates not available to AT&T's competitors.

25/ Sprint Comments at 30-31.

In sum, AT&T's surpassing dominance in the U.S. international telecommunications service business and its unique status as the only vertically integrated U.S. equipment manufacturer and service supplier, make it essential that the Commission carefully and thoroughly scrutinize in a public setting, with full opportunity for participation by other affected parties, any alliance, joint venture, or co-marketing agreement between AT&T and a foreign carrier. The Commission should not only subject AT&T's arrangements to the same safeguards imposed on BT-MCI but should also require full compliance with the effective market access standard. 26/

26/ When the dominant foreign carrier's marketing arrangement is with another U.S. carrier besides AT&T, the relevant agreements should be submitted to the Commission. But it should not be necessary to satisfy the effective market access test as such. Full compliance with that test should be required only of AT&T/dominant foreign carrier arrangements, because of AT&T's ability as dominant U.S. carrier and equipment manufacturer/supplier to reward or retaliate against the foreign carrier. This reward/retaliation potential gives the foreign carrier a particular incentive that it otherwise might not have to discriminate against AT&T's competitors.

Exclusive agreements with nondominant foreign carriers including resellers not affiliated with dominant foreign carriers do not raise competitive issues and should not be subject to the effective market access test or the no special concessions prohibition. See BTNA Comments at 12, n.22.

IV. CARRIERS AUTHORIZED TO ENGAGE IN SIMPLE RESALE OF PRIVATE LINES BETWEEN THE U.S. AND A FOREIGN COUNTRY SHOULD BE PERMITTED TO FORWARD U.S. OUTBOUND TRAFFIC THROUGH THE FOREIGN COUNTRY TO OTHER POINTS BY RESELLING MESSAGE TELEPHONE SERVICE FROM THE FOREIGN COUNTRY

In the Notice, the Commission requested comments on AT&T's call for a prohibition on transiting of traffic without permission of originating and terminating carriers. 27/ Swidler and Berlin, on behalf of several international private line simple resellers, opposes this position and requests the Commission to permit such resellers to transit traffic via a country approved for international simple resale ("ISR") to and from other countries. While the Commission generally permits the type of transiting the AT&T proposal would foreclose, transiting of traffic carried on ISR circuits is now specifically prohibited. 28/ BTNA endorses Swidler & Berlin's request to the extent that it applies to traffic originating in the U.S. that would be forwarded via an authorized ISR country to other countries by reselling international message telephone service ("IMTS") from the authorized ISR country. Transiting of such U.S. outbound traffic would serve the public interest by increasing both retail competition and competitive pressure on accounting rates without harming the U.S. settlement position.

27/ Notice at ¶ 91.

28/ ACC Global Corp. and Alanna Inc., 9 FCC Rcd 6240 (1994).

A. Transiting Of U.S. Outbound Traffic By Private Line Simple Resellers Would Serve The Public Interest By Increasing Both Competition and Downward Pressure on Accounting Rates

The Commission has recognized the important role resale should play in increasing retail competition and placing downward pressure on accounting rates. 29/ Operating experience has shown that the prohibition of transiting by private line simple resellers reduces their efficiency, limiting their competitive impact. Because ISR circuits today may be used only for traffic between the U.S. and ISR-approved countries, U.S. outbound traffic destined for countries not approved for ISR must be separated from traffic permitted on ISR circuits and, instead, sent over IMTS networks operated by U.S. facilities-based carriers. This burdensome routing requirement restricts the amount of traffic carried on ISR circuits, limiting the extent to which ISR providers may capture economies of scale. Modifying the prohibition to permit transiting by private line simple resellers of U.S. outbound traffic would permit more efficient loading of circuits, thereby lowering the cost of serving customers. The ability of private line simple resellers to compete with facilities-based carriers in the retail market would be enhanced. It would also place private line resellers on a better competitive footing with their facilities-based competitors who are now permitted to transit traffic, maximizing

29/ Regulation of International Accounting Rates, 7 FCC Rcd 559, 561, ¶ 16 (1991).

economies in circuit usage and allowing use of the most cost-effective routing. 30/ Transiting of U.S. outbound traffic by private line simple resellers to countries not approved for ISR thus benefits the public interest by increasing competition.

Transiting, like ISR, places downward pressure on accounting rates. The ability to transit offers carriers the opportunity to carry traffic to a country by an alternative routing, possibly paying a lower accounting rate. A private line simple reseller with the ability to transit U.S. outbound traffic can impact accounting rates in two ways -- through direct pressure on the accounting rate on the ISR route, and by offering an alternative routing via an approved ISR country to a third country destination. Transiting of U.S. outbound traffic by international simple resellers will serve the Commission's objective to lower accounting rates.

B. Transiting of U.S. Outbound Traffic Via Approved ISR Countries Will Not Harm The U.S. Settlements Position

The prohibition on transiting international private line simple resellers reflects primarily concern that U.S. inbound traffic from countries not approved for ISR will bypass accounting rate payments to facilities-based carriers. 31/ Transiting U.S. outbound traffic via an approved ISR country will not

30/ Rather than see this same benefit extended to its ISR competitors, AT&T would give it up by having the Commission prohibit all transiting unless the originating and terminating carriers specifically authorize it. Transiting is also a competitive alternative for small U.S. carriers who could otherwise reach international points only by reselling IMTS offered by U.S. facilities-based carriers.

31/ fONOROLA Corp., 7 FCC Rcd 7312, 7316, ¶ 15 (1992); recon., 9 FCC Rcd 4066, 4071, ¶¶ 21-22 (1994).

harm the U.S. settlements position. Nor would U.S. outbound ISR transiting permit any discrimination against other U.S. carriers on the part of the transiting or terminating entities. Under the BTNA proposal, the private line simple reseller would be required to forward the traffic from approved ISR country to the destination country by taking at published rates and reselling, the IMTS service of a facilities-based international carrier in the transiting country. There could be no realistic possibility or practical incentive for the terminating country to discriminate in favor of ISR transited traffic because such traffic would be included within the broad IMTS traffic stream.

Swidler and Berlin advocates transiting of U.S. inbound traffic on an ISR basis via an ISR-approved country. This aspect of their proposal theoretically implicates concerns about the U.S. settlement position. Because ISR transiting has been prohibited from the inception of ISR operations, there is no empirical data to support that theory. BTNA would support a Commission ruling in favor of ISR transiting of U.S. inbound traffic coupled with a requirement that ISR carriers file quarterly reports detailing number of minutes transited from each point of origination. Based on this data, the Commission could decide at a future date whether traffic flows warrant any change in policy.

V. CONCLUSION

The Commission should adopt a policy permitting foreign participation in the U.S. market pursuant to an effective market access standard. The standard should emphasize the availability in the foreign country of competition in the