

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Market Entry and Regulation)
of Foreign-Affiliated)
Entities)

IB Docket No. 95-22
RM-8355
RM-8392

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OPPOSITION TO PETITIONS
FOR RECONSIDERATION

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SUMMARY

The Petitions for Reconsideration filed in this proceeding by BTNA, CWI, MCI, TLD and WorldCom fail to demonstrate that the changes they seek in the *Report and Order* would serve the public interest and should be denied. In the first instance, the further expansions in international private line authority sought by BTNA and WorldCom would disserve the public interest by removing protections against one-way settlements by-pass. BTNA urges the Commission to allow resellers in the U.S. to provide switched traffic over single-end interconnected private lines but shows neither that this would assist competition in foreign markets, as it contends, nor that the Commission's concern to limit the harms of one-way by-pass is mistaken. The exemption WorldCom seeks for non-dominant U.S. carriers from the prohibition on the offering of such services in correspondence with carriers in foreign markets owning the foreign half-circuit would also limit the Commission's one-way by-pass protections, which should apply to all carriers in foreign markets with the ability to set accounting rates.

Nor would the Commission's goals in this proceeding of promoting effective competition, preventing anticompetitive conduct and opening foreign markets be served by limiting the scope of the ECO test, as proposed by CWI and TLD. CWI seeks a grandfathering exemption for capacity expansions on already-authorized routes that would

provide a virtual exemption from the ECO test for foreign carriers already in the U.S. TLD would require foreign carrier interests in third country carriers to meet ECO requirements only when the third country carrier is affiliated with a U.S. carrier -- thus protecting foreign carriers wishing to expand their closed home markets to third countries. Both proposals run directly counter to the Commission's objectives.

Further, subjecting U.S. carriers investing in foreign markets to the ECO test, as advocated by BTNA and TLD, would be both unnecessary, as such carriers are subject to the Commission's jurisdiction, and counterproductive. The Commission's purpose is to increase foreign market opportunities for U.S. carriers, not to place new obstacles in their path.

Finally, any new filing requirements for non-equity business arrangements with foreign carriers, as advanced by BTNA and MCI, should be framed to address specific concerns and to minimize both the costs of administration by the Commission and the costs of compliance by U.S. carriers.

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OPPOSITION TO PETITIONS FOR RECONSIDERATION

AT&T Corp., ("AT&T"), pursuant to Section 1.429 of the Commission's Rules, submits this Opposition to the Petitions for Reconsideration submitted by BTNA, CWI, MCI, TLD and WorldCom in response to the Commission's Report and Order in the above-referenced matter.¹ As AT&T demonstrates below, the petitions seek to expand the provision of switched services over international private lines and to limit the scope of the Commission's new effective competitive opportunities ("ECO") test, but fail to demonstrate that these proposed changes to the Report and Order would benefit the public interest.

¹ *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, Report and Order (released Nov. 30, 1995) ("Report and Order"). See Petition For Reconsideration by BT North America, Inc. ("BTNA Petition"); Petition For Reconsideration by Cable & Wireless, Inc. ("CWI Petition"); Petition For Reconsideration by MCI Telecommunications, Corp. ("MCI Petition"); Petition For Reconsideration by Telefonica Larga Distancia de Puerto Rico, Inc. (TLD Petition"); Petition For Clarification Or, In The Alternative, For Reconsideration by WorldCom, Inc. ("WorldCom Petition").

I. **THE COMMISSION SHOULD NOT EXPAND FURTHER THE PROVISION OF SWITCHED SERVICES OVER PRIVATE LINES**

The Report and Order expands the scope of switched services provided over international private lines. Specifically, facilities-based carriers are now permitted to carry switched traffic between the U.S. and non-equivalent markets over private lines interconnected to the public switched network at one end only.² Although the Commission acknowledges the negative public interest effects of one-way by-pass,³ through this new policy the Commission seeks to balance that negative effect on the public interest by encouraging competition in foreign markets to bring about "downward price pressure on foreign monopoly facilities-based carriers, stimulating foreign outbound traffic and decreasing the incentive for the foreign carrier to maintain above-cost accounting rates."⁴

The Commission has also taken reasonable steps to mitigate the negative effects of one-way by-pass.⁵ First, at the U.S. end, the Commission restricts this new policy to

² *Report and Order, Appendix B (Final Rules), § 63.01 (k) (6) (i)*. The Commission also allows facilities-based and resale carriers to provide switched services to non-equivalent markets by switched hubbing through equivalent countries. No party has sought reconsideration of this aspect of the *Report and Order*.

³ The diversion of U.S. inbound traffic to private lines "would exacerbate the U.S. net settlements deficit and ultimately increase the burden on U.S. ratepayers through, for example, higher rates." *Id.*, ¶ 133.

⁴ *Id.* at ¶ 157.

⁵ *Id.*, ¶ 157.

facilities-based carriers.⁶ Second, the Commission prohibits the provision of such services "in correspondence with a carrier that directly or indirectly owns the private line facility in the foreign country at the other end of the private line."⁷ While BTNA seeks the removal of the first of these restrictions and WorldCom suggests a U.S. carrier exception to the second, neither party is able to demonstrate that their proposed expansions in private line authority would bring any benefit to the public interest.

1. **BTNA makes no showing that allowing U.S. resellers to offer these services would serve Commission objectives.**

BTNA claims that allowing U.S. resellers to participate at the U.S. end of a single-end interconnected private line arrangement would further Commission efforts to open foreign markets, lower accounting rates and expand international traffic.⁸ It fails, however, to show how these results would occur. BTNA puts forward no information indicating how the activities of resellers in the U.S. would accelerate the liberalization process in non-U.S. markets or achieve other Commission objectives.

Additionally, BTNA fails to demonstrate that the Commission's attempt to limit the harms of one-way by-pass was mistaken. The Commission reasoned that facilities-based

⁶ *Id.*, ¶ 158.

⁷ *Id.*, Appendix B (Final Rules), Sect. 63.01(h) (6) (1).

⁸ BTNA Petition at 3.

carriers should be permitted to recoup lost settlements revenues from this one-way diversion, but that the participation of resellers would defeat this goal.⁹ BTNA claims that any harm would be "de minimis" because facilities-based carriers will obtain revenues from supplying private line facilities to resellers.¹⁰ However, BTNA overlooks the minimal nature of those revenues compared to those received by facilities-based carriers from settlements or from the carriage of private line traffic. These potential losses to facilities-based carriers from the participation of resellers also take no account of the further harm they would likely suffer from the loss of domestic termination revenues.

BTNA therefore provides no basis for any finding that the public interest would be served by the removal of the Commission's restrictions on the provision of these services by U.S. resellers.

2. Worldcom's U.S. carrier exemption would further encourage one-way by-pass.

WorldCom seeks to exempt non-dominant U.S. carriers from the Commission's prohibition on U.S. carriers offering such services in correspondence with the foreign carrier owning the foreign half-circuit.¹¹ WorldCom

⁹ Report and Order, ¶ 158.

¹⁰ BTNA Petition at 3.

¹¹ WorldCom Petition at 5. MCI interprets the Commission's restriction as precluding U.S. facilities-based carriers from offering these services in correspondence with carriers with which they have any correspondent relationship. MCI Petition at 8-11.

contends that U.S. carriers wishing to originate these services in liberalized foreign markets will otherwise be required to lease capacity from incumbents "thereby foregoing the benefits of foreign market liberalization."¹² However, the adoption of WorldCom's exception would limit the Commission's protections against one-way settlements by-pass. The prohibition on carriers at the foreign end providing these services over their direct or indirectly owned facilities will restrict the use of these services for this purpose, but such restrictions should apply to all carriers in foreign markets with the ability to set accounting rates, including U.S. carriers entering such markets on a facilities basis. U.S. carriers entering foreign markets on a facilities basis would be able to provide facilities-based services through normal correspondent arrangements and should be encouraged to grant cost-based accounting rates. Certainly, such carriers

MCI's broad interpretation of the restriction would severely limit the number of U.S. carriers able to provide these services while allowing foreign facilities-based carriers to use them to by-pass accounting rates provided they act in cooperation with a carrier on the U.S.-end with whom they do not have a correspondence relationship. AT&T believes that the restriction is properly read more narrowly, and requires that the U.S. carrier must offer these services in correspondence with a carrier at the foreign end that resells rather than owns the underlying private line. See Report and Order ¶ 159; see also, *id.*, Appendix B (Final Rules), § 63.01 (k) (6) (i). This more narrow interpretation restricts foreign carriers from using these services for one-way bypass and precludes foreign monopoly carriers from doing so at all. Commission's objective of "creat[ing] . . . competition to the foreign facilities-based carrier" will also be achieved to a much greater extent under this more narrow interpretation. *Id.*, ¶ 159.

¹² WorldCom Petition at 3.

should be granted no greater opportunities to profit from one-way settlements by-pass than any other participant, or they would thereby receive an incentive to keep accounting rates high.

Thus, neither BTNA nor WorldCom make a persuasive showing of any benefit to the public interest from the changes they seek. Their requests for further expansions in the provision of switched services over private lines should be denied.

II. THE COMMISSION SHOULD REJECT EFFORTS TO LIMIT THE SCOPE OF THE ECO TEST

Two parties would restrict the application of the ECO test. CWI proposes an extended grandfathering exception for capacity expansions on already-authorized affiliated routes, which would largely exempt foreign carriers already in the U.S. from the requirements of the ECO test.¹³ TLD seeks an exception for foreign carriers' controlling interests in third country carriers, thus protecting the ability of its monopoly parent to expand its closed home market to third countries.¹⁴ As both proposals would obstruct the achievement of the Commission's goals in this proceeding of promoting effective competition, preventing anticompetitive conduct and opening foreign markets, both should be rejected.

¹³ CWI Petition at 1-12.

¹⁴ TLD Petition at 2-11.

Contrary to the contentions of BTNA and TLD, subjecting U.S. carrier investments in foreign markets to the ECO test is unnecessary because, unlike foreign carriers, U.S. carriers are subject to Commission jurisdiction.¹⁵ Any such regulation would also be counterproductive. The purpose of the ECO test is to encourage, rather than to impede, U.S. carriers' foreign market opportunities.

1. **The Commission should not expand the grandfathering of previously authorized foreign carrier affiliates.**

U.S. affiliates of foreign carriers that have already received Section 214 authorizations to serve U.S. routes to closed markets now occupy a privileged position. Because of their affiliated foreign carriers' protected status in their home markets, such carriers have significant competitive advantages over other U.S. carriers.¹⁶ Notwithstanding those advantages, the Commission has given precedence to equitable considerations and has grandfathered all existing Section 214 authorizations.¹⁷

CWI's proposal that grandfathering be extended to cover *all capacity expansions* on authorized routes goes far beyond the requirements of equitable treatment.¹⁸ As a

¹⁵ See BTNA Petition at 4-5; TLD Petition at 11-23.

¹⁶ See Report and Order, ¶ 15.

¹⁷ Id. at ¶ 109.

¹⁸ CWI Petition at 3.

general matter, foreign carriers that have entered the U.S. have already obtained authorizations to serve all or most of their affiliated routes. Under the *Report and Order*, such carriers' home and third country markets will be subject to the ECO test only if they wish to expand capacity in the future. By allowing unlimited expansions of capacity on all authorized routes, CWI's proposal would provide a virtual exemption for such carriers.

Under the *Report and Order*, any difficulties experienced by grandfathered carriers wishing to obtain additional circuits on affiliated routes without meeting ECO test requirements will be no different from those faced by foreign monopolists who now seek first-time entry to the U.S. market. However, any competitive harm to grandfathered carriers from enforcement of the Commission's requirements will also be counterbalanced by their inherent advantage over all other competitors -- being able to offer end-to-end service to their closed home markets.

Because U.S. routes are critical to many customers, capacity expansions required by carriers to serve those customers may indeed provide the same market-opening leverage as initial authorizations. CWI's speculative contention to the contrary provides no basis for the Commission to give up its only significant remaining lever for opening closed markets once the carriers controlling those markets have already entered the U.S.¹⁹ CWI's

¹⁹ CWI Petition at 10-11.

proposal would merely disadvantage U.S. carriers and consumers by entrenching those existing monopolies and limiting future market-opening opportunities.²⁰

2. Foreign carrier controlling interests in third country carriers are properly subject to the ECO test

TLD contends that foreign carrier interests in third countries should be subject to the ECO test only where the third country carrier independently meets the Commission's affiliation standard.²¹ According to TLD, applying the ECO test to a third country where the foreign carrier affiliate of a U.S. carrier controls a carrier with market power will unfairly penalize foreign carriers that protect their investments with "a period of exclusivity."²² Yet the Commission's objective here is not to encourage foreign monopoly carriers to export their closed home markets to other countries. Foreign carriers willing to pay substantial premiums to enjoy monopolies in third countries, even for a limited period, directly threaten the Commission's market-opening and pro-competitive goals and hardly merit an exemption from the ECO test.

By applying the ECO test only to foreign carriers' controlling interests in third country carriers, rather than

²⁰ The Commission's decision to apply ECO requirements to capacity expansions is thus directly related to its underlying goals in this proceeding and the *Report and Order* provides the reasoned analysis that is required. See CWI Petition at 5, n.8.

²¹ TLD Petition at 3.

²² *Id.* at 8.

to foreign carrier interests meeting the over 25 percent standard, the Commission limits the test to those circumstances under which anticompetitive conduct is most likely to occur.²³ Control is the relevant standard here because it addresses those situations in which one foreign carrier has the ability to require the other to engage in anticompetitive behavior.

For the Commission to seek to prevent anticompetitive conduct by applying the ECO test in this way is a legitimate and reasonable exercise of its authority. Just as the Commission has no jurisdiction over a foreign carrier that engages in anticompetitive behavior in its home market, so the Commission also has no jurisdiction over a foreign carrier's activities in other foreign markets.²⁴ Effective competition in third markets, no less than in foreign carriers' home markets, is dependent upon "the ability of U.S. carriers to participate in a competitive market on the foreign end."²⁵

**3. U.S. carriers should not be subject
to the same standard.**

Because U.S. carriers are subject to Commission jurisdiction, it is unnecessary to apply the ECO test to address potential anticompetitive behavior by U.S. carriers

²³ *Report and Order*, ¶ 87.

²⁴ *Id.*, ¶ 79.

²⁵ *Id.*, ¶¶ 15, 225.

with controlling interests in foreign carriers.²⁶ BTNA's claim that greater potential discrimination can occur in such circumstances is unfounded because the U.S. carrier, as the controlling entity, has the ability to prevent such behavior.²⁷ Equally misplaced is TLD's assertion that the Commission's jurisdiction over the U.S. affiliate of a foreign carrier provides the Commission with the same ability to address such behavior.²⁸ Unlike a U.S. carrier with a controlling interest in a foreign carrier, the U.S. affiliate of a foreign carrier has no controlling interest and therefore no ability to control the actions of the foreign carrier.

Any application of the ECO test to U.S. carrier investments in foreign carriers would also be counter to the Commission's goals in this proceeding. The purpose here is to encourage the entry of U.S. carriers into foreign markets, not to raise new impediments to such entry.²⁹

The Commission's different treatment of U.S. and foreign carrier investments in foreign markets is therefore fully justified and provides no grounds for challenge under

²⁶ *Id.*, ¶ 106.

²⁷ BTNA Petition at 5.

²⁸ TLD Petition at 19.

²⁹ *Report and Order*, ¶ 105. TLD acknowledges that "[t]he Commission must also consider the effect of its rule on U.S. companies seeking investments abroad" even while also recommending the establishment of a major new barrier to such investments in the form of the ECO test. TLD Petition at 11.

the Equal Protection Clause, even assuming that foreign carriers or their investors had any such rights to assert, which they assuredly do not. Indeed, the most recent U.S. Supreme Court decision cited by TLD emphasizes the Court's absolute and longstanding rejection of any such notion. In *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990), the Court makes clear that aliens outside the United States -- such as the existing or potential alien investors TLD identifies as a "suspect class", or foreign corporations -- have no rights under the Fifth Amendment.³⁰ There is no merit to TLD's claim that the U.S. Constitution requires the

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The Court noted that "our rejection of extraterritorial application of the Fifth Amendment [in *Johnson v. Eisentrager*, 339 U.S. 763 (1950)] was emphatic:

'Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of the Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.'

U.S. v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (citations omitted) quoting *Eisentrager*, 339 U.S. at 784. See also, *id.* at 273; *American Bar Ass'n, Inc. v. Christopher*, 43 F. 3d 1422, 1428 (11th Cir. 1995); *Barrera-Echavarria v. Rison*, 44 F. 3d 1441, 1450 (9th Cir. 1995).

TLD also quotes from the Court's discussion of cases in which it held that certain aliens do enjoy constitutional rights. In that discussion, however, the Court emphasized that "These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 271. See also, TLD Petition at 14, n.32. TLD shows neither that the alien corporations and investors to which it refers are within U.S. territory nor that they have any substantial connections with this country.

Commission to apply the same test to U.S. and foreign carriers.

III. THE COMMISSION SHOULD NOT IMPOSE OVERBROAD FILING AND REPORTING REQUIREMENTS

BTNA and MCI challenge the Commission's decision not to require the filing of co-marketing agreements.³¹ Both carriers would require the filing of all non-equity business arrangements with foreign carriers. MCI would also impose extensive reporting and record-keeping obligations, including the filing of semi-annual circuit status reports and quarterly revenue and traffic reports.³²

While AT&T has no objection to filing any agreements or information that the Commission may require in the exercise of its authority over U.S. international services, any new filing requirements should be properly framed and applied on an even-handed basis. Despite existing requirements for the filing of exclusive non-equity business arrangements, the Commission did not require MCI to file details of a recent arrangement with Stentor of Canada, although AT&T submitted evidence of its exclusive nature.³³ In contrast, the WorldPartners and not yet consummated Unisource arrangements to which BTNA refers are entirely

³¹ BTNA Petition at 5-7; MCI Petition at 3-7.

³² *Id.* at 6.

³³ AT&T informed the Commission that Stentor had refused to pursue arrangements with AT&T because of this exclusive agreement with MCI.

non-exclusive.³⁴ Moreover, all agreements for the exchange of common carrier services between AT&T and its WorldPartner members have been filed with the Commission, as Section 43.51 requires.

A further consideration is that any expansion of current filing requirements as requested by BTNA and MCI would certainly include a wide variety of arrangements with no potential impact on competition. Joint logo marketing arrangements with foreign carriers for USADirect[®] and other country direct services, customer loyalty program arrangements (e.g., True Rewards[®]) and even single-end private line billing arrangements with foreign carriers are just a few examples of the large number of "non-equity business arrangements" that would be covered by the BTNA-MCI proposal.³⁵ U.S. carriers can also be expected to enter into such relationships in ever-increasing numbers in the future with the spread of liberalization in foreign markets and the proliferation of potential business opportunities with new competitors. Consequently, any new filing or reporting requirements should be framed to address specific concerns and to minimize both the administrative burden on the Commission and the costs of compliance for U.S. carriers.

³⁴ BTNA Petition at 6-7.

³⁵ *Id.* at 7; MCI Petition at 6.

CONCLUSION

For the above-mentioned reasons, the Petitions for Reconsideration by BTNA, CWI, MCI, TLD and WorldCom in response to the Commission's Report and Order in this matter should be denied.

Respectfully submitted,

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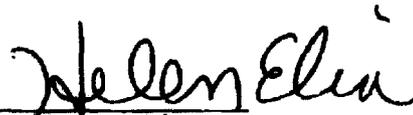
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CERTIFICATE OF SERVICE

I, Helen Elia, do hereby certify that on this 29th day of February, 1996, a copy of the foregoing "Opposition to Petitions for Reconsideration" was mailed by U.S. first class mail, postage prepaid, upon the parties on the attached service list.


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