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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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**FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
 ) IB Docket No. 95-22  
Market Entry and Regulation ) RM-8355  
of Foreign-Affiliated ) RM-8392  
Entities )

To: The Commission

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**REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION**

Cable & Wireless, International ("CWI"), pursuant to Section 1.429 of the Commission's rules, hereby submits its reply to AT&T Corp's ("AT&T") opposition to CWI's petition for reconsideration in the above-captioned proceeding. CWI demonstrated in its petition for reconsideration that applying the "effective competitive opportunities" ("ECO") test to applications by foreign-affiliated carriers for additional capacity on existing routes lessens competition in the provision of international telecommunications services. Despite this, AT&T urges the Commission to maintain its policy. This obviously serves AT&T's private interest because it would result in non-AT&T subscribers being required to either leave their existing carriers or have less options for new service requirements. While that obviously serves the best interests of AT&T, as demonstrated below, it clearly is not in the public's best interest.

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## I. Background

When the Commission instituted its Market Entry and Regulation of Foreign-affiliated Entities proceeding ("Market Entry Proceeding"),<sup>1</sup> it was concerned with determining under what circumstances it should allow foreign interests to enter the American telecommunications market and the appropriate regulatory scheme to apply to the foreign-affiliated carriers. Previously, if foreign-controlled or affiliated entities desired to participate in the U.S. market they filed for such authorization. When the FCC reviewed their Section 214 applications, it determined on an ad hoc basis what conditions, if any, were required to protect competition. If the FCC found that given all the considerations, including the imposition of any safeguards to protect against anticompetitive behavior, the additional competition in the U.S. market produced by such entry would advance the public interest, it granted the Section 214 application. Utilizing this process, foreign-controlled or affiliated carriers have served U.S. consumers for decades without detrimental effects.

Given the forward looking stance of the Market Entry Proceeding, as well as the long-settled business expectations of existing foreign-controlled or affiliated carriers, the Commission's Report and Order<sup>2</sup> in this proceeding specifically grandfathered existing foreign-affiliated carriers' operations.<sup>3</sup> The Commission noted that it already had imposed safeguards on the existing authorizations of foreign-affiliated carriers to protect against

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<sup>1</sup> Market Entry and Regulation of Foreign-affiliated Entities; Notice of Proposed Rulemaking, 10 FCC Rcd 4844 (1995).

<sup>2</sup> Market Entry and Regulation of Foreign-affiliated Entities; Report and Order, FCC 95-475, IB Docket No. 95-22 (rel. Nov. 30, 1995) ("Report and Order").

<sup>3</sup> Report and Order at ¶ 109.

anticompetitive conduct and, thus, it would be unnecessary -- as well as inequitable -- to subject existing authorizations to any further review. It also decided, however, without any discussion or explanation that requests by the grandfathered companies for additional capacity on existing routes would be treated as de novo entry requests subject to the ECO test.<sup>4</sup>

II. The Application of the ECO Standard to Foreign-affiliated Carrier Requests For Additional Capacity On Existing Routes Is Inconsistent With Other Portions Of The Decision And Will Harm American Consumers.

In its petition for reconsideration, CWI demonstrated that the FCC's decision to apply the ECO test to requests for additional capacity on existing routes was in violation of the Commission's obligations under the Administrative Procedure Act as well as contrary to the public interest.<sup>5</sup> Freezing a carrier's capacity levels makes it extremely difficult for that carrier to retain its subscribers, never mind attract new ones. Few consumers want to use a carrier that in the future might not be able to meet their requirements. Given this, the decision to apply the ECO test to foreign-affiliated carrier requests for additional capacity renders the act of grandfathering a nullity. Most importantly, however, such a policy results in the American public being denied the benefits of robust competition.

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<sup>4</sup> *Id.*

<sup>5</sup> CWI pointed out that there were serious legal questions as to the propriety of the FCC's action both in terms of how it came to the conclusions that form the basis for its new policy and with regard to the new policy's relationship to prior policies and the objectives of the Market Entry Proceeding. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied* 434 U.S. 829 (1977). *Office of Communications of the United Church of Christ v. FCC*, 779 F.2d 702, (D.C. Cir. 1985); *Mountain States Tel. and Tel. Co. v. FCC*, 939 F.2d 1021, 1035 (D.C.Cir. 1991).

AT&T is the only participant that has contested CWI's position. AT&T alleges that the Commission was more than fair in grandfathering the current capacity levels because of the "privileged position" that the foreign-affiliated carriers enjoy. Moreover, a grant of CWI's request, according to AT&T, would amount to a virtual exemption for such carriers from the policy because "[a]s a general matter, foreign carriers . . . have already obtained authorizations to serve all or most of their affiliated routes."<sup>6</sup>

AT&T's arguments simply will not withstand the slightest scrutiny. AT&T conveniently ignores the fact that the foreign-affiliated carriers that currently participate in the U.S. market are doing so only after the FCC has determined what safeguards, if any, are necessary to protect competition. AT&T fails to explain why those safeguards, often determined on a route-by-route basis, are not equally effective regardless of capacity levels.

AT&T's argument that the foreign-affiliated carriers already have the necessary authorizations to serve all or most of their routes, proves too much. If CWI had sufficient capacity to "serve" its routes, then its request is unnecessary and unobjectionable. If it is necessary, as CWI alleges, then in reality CWI cannot "serve" its customers needs and the public is harmed under the current policy.

Finally, AT&T's argument that CWI's request amounts to a "virtual exemption" from the policy is not only incorrect but irrelevant. The real issue is whether the public interest is served by granting the relief requested by CWI. That, it certainly is -- CWI has demonstrated in its Petition that the Commission's policy of applying the ECO test to existing routes serves no purpose other than to lessen competition. Thus, while the Commission's new policy clearly benefits AT&T, it is not in the public's best interest.

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<sup>6</sup> Market Entry and Regulation of Foreign-affiliated Entities; AT&T Corp.'s Opposition to Petition for Reconsideration (filed Feb. 29, 1996) at 7.

III. Conclusion

In view of the above, CWI respectfully requests that the Commission expeditiously grant the relief it has requested. The Commission's new policy of applying the ECO test to foreign-affiliated carriers' applications for additional capacity on existing routes serves no valid public policy purpose. Rather, it lessens competition in the market for international telecommunications services. With the effective removal of resale authorizations from carriers who today provide competitive service to U.S. customers, AT&T will reap an unfair competitive windfall. If the American public is to reap all the benefits to be offered by robust competition, the Commission must modify its Report and Order by granting the relief requested by CWI.

Respectfully submitted,  
**CABLE & WIRELESS, INC.**

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