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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)))	**IB Docket No. 97-142**

To: The Commission

COMMENTS OF CABLE & WIRELESS, PLC

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COMMENTS OF CABLE & WIRELESS, PLC

Cable & Wireless, plc ("C&W"), by its attorneys, hereby submits its comments in response to the Commission's June 4, 1997 *Notice of Proposed Rulemaking* ("*Notice*") in the above-captioned proceeding. The Commission's *Notice* proposes to establish, in light of the WTO Basic Telecom Agreement ("WTO Agreement"), a new regulatory framework for governing the entry and operation of foreign-affiliated carriers in the U.S. market.

I. Introduction

C&W agrees with the *Notice's* overall assessment that open entry in the U.S. market is not only consistent with the WTO Agreement, but will effectively serve the Commission's primary goal in this proceeding of promoting robust competition in the U.S. telecommunications market. C&W also agrees with the *Notice's* proposal to achieve this public interest objective by eliminating regulations currently imposed on foreign-affiliated carriers that are superfluous and prevent foreign-affiliated carriers from competing fully in the U.S. market.

C&W, in view of the above, opposes the *Notice's* decision to create a new and burdensome regulatory scheme for U.S. carriers affiliated with foreign carriers with "market power" in a foreign market. As explained below, the new regulatory scheme will undermine

the *Notice's* aims. The imposition of burdensome regulations on foreign-affiliated carriers will make it impossible for them to be full-fledged competitors in the U.S. marketplace. Moreover, adoption of such a regulatory program to address potential anticompetitive behavior places the U.S. in violation of its obligations under the General Agreement on Trade in Services ("GATS").

II. Elimination Of The ECO Test For Foreign-Affiliated Carriers In Favor Of Open Entry Is Appropriate In Light Of The WTO Agreement And The Commission's Paramount Goal In This Proceeding

The Commission's overarching objective in this proceeding, as it was in the *Foreign Carrier Entry Order*,[1/] is the promotion of competition. Specifically, the *Notice* seeks to:

- promote effective competition in the U.S. telecommunications services market, particularly the market for international services;
- prevent anticompetitive conduct in the provision of international services or facilities; and
- encourage foreign governments to open their communications markets to U.S. carriers.[2/]

Since adoption of the *Foreign Carrier Entry Order*, a fundamental part of the Commission's public interest analysis in considering whether to permit a foreign-affiliated carrier to enter the U.S. market has been the Effective Competitive Opportunities ("ECO") test. The ECO test is in effect a reciprocity test; it allows foreign carriers to enter the U.S. telecommunications market if U.S. carriers have equivalent opportunities to enter the foreign market. Adoption of the ECO test for foreign carrier entry was prompted by the

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[1/] Market Entry and Regulation of Foreign-Affiliated Entities, *Report and Order,* 11 FCC Rcd 3873 (1995) ("*Foreign Carrier Entry Order*").

[2/] *Notice* at ¶ 16.

Commission's belief that while the market for end-to-end international services was (and still is) growing, U.S. carriers were being denied access to a number of foreign markets. This, the Commission believed, placed U.S. carriers at a disadvantage *vis-a-vis* foreign-based competitors that were allowed to enter the U.S. market and provide service on an end-to-end basis.

The *Notice* recognizes that the WTO Agreement has fundamentally changed the international telecommunications environment. The WTO Agreement commits most of the world's major trading nations to allowing competition for basic telecommunications services and to regulating these services on an even-handed and procompetitive basis. Thus, as the *Notice* states, fulfillment of the commitments made pursuant to the WTO Agreement will substantially achieve the Commission's paramount goal in regulating foreign carrier entry: promoting effective competition in the U.S. international services market.

Given this, the *Notice* proposes to eliminate the ECO test and other regulations that are unnecessary in the new environment, and to embrace a policy of open entry for carriers affiliated with WTO Member countries. It does so in the belief that the absence of unnecessary entry requirements and burdensome regulations will encourage foreign-affiliated carriers to enter the U.S. market and allow them to become full competitors.

C&W agrees with this overall thrust of the *Notice*. The ECO test and other burdensome regulations discourage, delay and restrict the operations of foreign-affiliated carriers. Elimination of these requirements will prompt foreign-affiliated carriers to participate more fully in the U.S. market, thereby promoting competition and its intended benefits. As such, elimination of the ECO test and associated rules for foreign-affiliated carriers in favor of a policy of open entry certainly serves the public interest.

III. The Commission's Proposed Regulatory Scheme For Addressing Potential Anticompetitive Conduct By Foreign Affiliated Carriers Would Hinder Development Of Competition, Thereby Frustrating Achievement Of The Commission's Goals

While plainly the overall intent of the Commission as expressed in the *Notice* is to encourage competition, C&W is convinced that the Commission's proposed rules will do the exact opposite: they will deny the U.S. public the benefits of competition. Despite its determination that the WTO commitments, when fulfilled, will open virtually all major telecommunications markets to actual competition, the Commission contends that it must still maintain safeguards "to address the remaining potential for [foreign-affiliated carriers to engage in] anticompetitive behavior." Accordingly, the *Notice* proposes to create a regulatory scheme designed solely for foreign carriers. For the reasons discussed below, C&W strongly opposes the imposition of such regulations. They are unnecessary, would lessen competition by hindering foreign carriers' ability to compete with U.S. carriers, and are inconsistent with GATS.

A. The *Notice* Does Not Demonstrate Any Need For The Regulatory Safeguards

The *Notice's* proposed safeguards are intended to prevent a carrier, that has market power on the foreign end of a U.S. international route, from increasing the costs to unaffiliated U.S. carriers.[3/] The fear is that, among other things, a carrier in such a position could manipulate the type or amount of return traffic or settlements payments to favor its U.S. affiliate, or could undercharge the U.S. affiliate (or overcharge the affiliate's competitors) for use of the same facilities in the destination market.[4/]

[3/] *Notice* at ¶ 89.

[4/] *Notice* at ¶ 90.

Significantly, the *Notice* points to no past experience that suggests that these fears are realistic and hence that these safeguards are necessary. Although foreign-affiliated carriers have provided service in the U.S. for many years, to the best of C&W's knowledge and belief, the FCC has never found any foreign-affiliated carrier to have engaged in the type of anticompetitive behavior feared.

Even more significant, the conduct that the *Notice's* proposed regulations are supposed to deter is extremely unlikely to occur. If a foreign carrier were to route excessive return traffic to its affiliated carrier as suggested, the behavior of the foreign carrier would be totally obvious to everyone on the route. That alone would deter such conduct. In any event, such misconduct would be brought to the attention of the Commission, and the FCC could be remedied quickly. At that point, it might be appropriate for the Commission to adopt measures to prevent such misconduct from reoccurring.

Finally, C&W notes that the Reference Paper on Pro-Competitive Regulatory Principles obligates governments that have adopted it as part of their schedules of commitments to maintain measures to prevent, among other things, anticompetitive conduct and ensure fair, nondiscriminatory and cost-oriented interconnection.[5/] These provisions also will help ensure that no competitive problems develop. Significantly, C&W is not aware of any country that has concluded that the draconian and anticipatory safeguards proposed by the *Notice* are necessary safeguards to address the ramifications of market power on the foreign end.

The Commission's concerns about the ability of foreign carriers with market power to engage in anticompetitive behavior to the detriment of unaffiliated U.S. carriers

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[5/] *Notice* at ¶ 9.

appears to stem from studies done by the Economic Strategy Institute on "price squeezes."[6] A "price squeeze" occurs when a strong firm or group of firms in one industry acts to squeeze the price of a major product in that industry, primarily with the intent of making it difficult for a rival to compete. A firm can create a price squeeze by raising the cost of an intermediate product or service so that the price that a rival charges does not provide for as much profit as the rival might have obtained without such high charges.[7] While the *Cohen Study* describes several case studies of price squeezes, only one concerns the telecommunications industry, and that is in the domestic arena. In the international sphere, safeguards to prevent carriers from engaging in price squeezes make no sense.[8] First, there is no history or evidence of foreign carriers with market power engaging in price squeezes to disadvantage unaffiliated U.S. competitors. Second, accounting rates have declined in the past years and no one predicts they will rise.

Under these circumstances, it is difficult to see how the public is benefited by the Commission's proposed safeguards. As the Courts have made clear, a regulation perfectly

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[6] *See* Robert B. Cohen, *Competition in International Message Telephone Service, Economic Strategy Institute, February, 1997 ("Cohen Study")*; Erik R. Olbeter, *Reforming the Accounting Rate Regime: An Analysis of the Economic Benefits of Reform and Dangers of Delay*, Economic Strategy Institute, February, 1997 ("*Olbeter Study*").

[7] *Cohen Study* at 19.

[8] C&W notes in this regard that the FCC's most recent study of the international area has found that settlement receipts per minute continued to decline while U.S. retained revenue per minute increased. *See Trends in the U.S. International Telecommunications Industry*, Industry Analysis Division, Common Carrier Bureau, FCC (June 1997). This "trend" appears to demonstrate that the FCC's major problem is allowing U.S. consumers to benefit fully from the declining costs in the international environment.

reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.[9]

B. The Commission's Proposed Regulatory Scheme For Addressing Potential Anticompetitive Behavior Is Burdensome And Will Have A Deleterious Effect On Competition In The Market

The *Notice's* suggested safeguards, if adopted, would seriously hinder the further development of competition in the U.S. market. The requirement to obtain Section 214 authority[10] each time there is a need to add circuits on routes where the U.S. carrier is regulated as dominant by virtue of its affiliation with a foreign carrier makes it extremely difficult for carriers to respond promptly to the demands of customers for new and expanded services on the applicable route. It in essence would insulate U.S. carriers on that route

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[9] *See, e.g. ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C.Cir. 1988); *Century Communications Corp. v. FCC*, 835 F.2d 292, 300 (D.C. Cir. 1987), *cert. denied, Office of Communications of United Church of Christ v. FCC*, 486 U.S. 1032 (1988); *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 36 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977).

[10] The Commission's proposal to condition Section 214 authorizations on compliance with benchmark settlement rates is not only poor public policy but also fatally undermined by the FCC's lack of jurisdiction, *see, e.g.*, Hispanic-American Association of Research Centers & Telecommunications Companies ("AHCIET") Comments at 2-3; Caribbean Association of National Telecommunication Organizations ("CANTO") Comments at 1; C&W Comments at 2-15; Chunghwa Telecom Comments at 2; COMTELCA Comments at 13-15; Cooperation Council for the Arab States of the Gulf Comments at 1-2; DGT, Taiwan Comments at 1-2; Deutsche Telecom Comments at 5-9; GTE Comments at 10-15; Government of Japan Comments at 1-2; HKTI Comments at 21-26; Indosat Comments at 1; International Digital Communications at 2; International Telecom Japan Comments at 3-12; KDD Comments at 2-7; P&T China Comments at 1-2; Panama Comments at 17-21; RPOAs of the Republic of Korea Comments at 2, 4; Singapore Telecom Comments at 2-3; Solomon Islands Comments at 1; Telecom Vanuatu Comments at 1; Telefónica del Perú Comments at 6-9; Telintar Comments at 11-30; Telmex Comments at 18-20, as well as an insufficient record to support the benchmarks. *See, e.g.*, Deutsche Telekom Comments at 10-11; DGT Taiwan Comments at 2; France Telecom Comments at 10-12; GTE Comments at 23; HKTI Comments at 26-28; KDD Comments at 13-14; MCI Comments at 2-4; Pacific Bell Comments at 5; Sprint Comments at 13-15, 19. As such, there is no way a condition premised on compliance with benchmark settlement rates can be found reasonable.

from competition.[11] Equally true, requiring dominant foreign-affiliated carriers to file public reports or summaries on the provisioning and maintenance of facilities and services obtained from the foreign affiliate or on other agreements or activities would have a deleterious impact on competition. Competitors who receive this information would inevitably use it for their own competitive purposes.

Of greatest concern to C&W is the Commission's proposed supplemental safeguard prohibiting exclusive arrangements with affiliated foreign carriers for joint marketing. The realities of the market are that multinational customers demand one-stop shopping for international services. In the provision of end-to-end international services having high-level features and functions that are available worldwide, no single carrier has the resources, global marketing capability, or technical expertise to go it alone. The network platforms needed to provide these services require such a commitment of capital and other resources that no carrier is going to take such risks unless it is assured that its partners are similarly committed. Furthermore, customers for these types of services expect and require joint marketing. They recognize that the services are provided on a joint basis; thus, they want to see how the carriers function on a joint basis, and they want the efficiency of a joint presentation.

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[11] *See* Cable & Wireless, Inc. Petition for Reconsideration of the *Foreign Carrier Entry Order* (filed Jan. 29, 1996). In discussing possible elimination of the requirement as a basic safeguard, the Commission observes that such action would enable "a foreign carrier that obtained authority to serve a non-WTO Member country prior to adoption of the ECO test . . . to add circuits to non-WTO Member countries that have eliminated legal barriers to entry and licensed multiple new international facilities-based competitors, unless we otherwise prohibited these circuit additions by rule," and requests comment "on whether such a rule is necessary to achieve the goals in this proceeding." In light of the facts set forth above, it is clear that any restrictions placed on the ability of a foreign-affiliated carrier to add circuits on a particular route would hinder, not enhance, achievement of the Commission's goals in this proceeding.

Simply put, if the Commission wants U.S.-based multinational customers to reap the benefits of having seamless, feature-rich, state-of-the-art services, then it must recognize that exclusive arrangements between carriers with respect to these services must exist; that affiliated or allied carriers are going to steer customers to each other; and that these services are going to be marketed on a joint basis. C&W submits that as long as a dominant foreign carrier makes fundamental network components and services available to all on a fair, reasonable and nondiscriminatory basis -- which indeed must be the case on major traffic routes in light of the WTO Agreement -- the existence of exclusive arrangements with respect to other facilities and services should not be a concern.[12/]

C. The Commission's Proposed Regulatory Scheme Appears to Violate U.S. Obligations under the GATS

C&W believes that the Commission's "regulatory tools" for addressing potential anticompetitive behavior is an academic exercise if the requirements proposed are effectively prohibited as a result of U.S. obligations under the GATS. Article VI of the GATS prohibits WTO Member countries from imposing regulations that "constitute unnecessary barriers to trade." As discussed above, the Commission's proposed safeguards are unwarranted and will hinder foreign-affiliated carriers in their efforts to compete in the U.S. market. Thus, these safeguards would constitute unnecessary barriers to trade in violation of Article VI of the GATS if adopted. As a general matter, C&W believes that the proposed safeguards will inevitably raise questions for foreign governments about the true extent to which the U.S. is committed to the GATS.

[12/] For these same reasons, C&W believes it would be fundamentally wrong for the Commission to view exclusive arrangements of this nature as a violation of the prohibition on special concessions.

IV. Conclusion

For the reasons set forth herein, the Commission should eliminate those superfluous regulations currently imposed on foreign-affiliated carriers that hinder the participation of these carriers in the U.S. market. In addition, the Commission should refrain from imposing new and unwarranted regulatory requirements on foreign-affiliated carriers that will put these carriers at a competitive disadvantage in the U.S.. As demonstrated herein, such action is necessary to promote competition and hence to ensure achievement of the Commission's goals in this proceeding.

Respectfully submitted,

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Dated: July 9, 1997

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing **Comments of Cable & Wireless, plc**, this 9th day of July, 1997, upon the following parties by hand delivery:

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