

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Rules and Policies on Foreign Participation
in the U.S. Telecommunications Market

IB Docket No. 97-142

REPLY

NYNEX Long Distance Company ("NYNEX LD") hereby replies to the comments filed in the above-captioned rulemaking. NYNEX LD filed limited comments in this proceeding to support the Federal Communications Commission's ("Commission" or "FCC") rules on flexible settlement arrangements¹ and the FCC's proposal to extend the availability of such arrangements to include World Trade Organization ("WTO") Member countries.² This reply is limited to opposing AT&T's position that (1) the rebuttable presumption in favor of alternative

¹ *Regulation of International Accounting Rates*, FCC 96-459 (Dec. 3, 1996) ("*Flexibility Order*").

² NYNEX LD fully supports the Commission's goal of fostering the growth of a competitive market in international telecommunications. For this reason, NYNEX LD's opening round comments, NYNEX LD Comments, IB Docket No. 97-142 at 4 (filed July 9, 1997), suggested that the FCC clarify that the proposals in this docket regarding "special concessions" were not intended to undermine the agency's pro-competitive *Flexibility Order* policies, including the competitive safeguards adopted in that order. These safeguards require that where more than 25 percent of the traffic on a particular route is involved, carriers entering into alternative settlement arrangements must demonstrate that such arrangements are not unreasonably discriminatory. NYNEX LD notes that SBC Communications Inc. took a similar position. SBC Communications Inc. Comments, IB Docket No. 97-142 at 2-4 (filed July 9, 1997).

arrangements with WTO Member countries proposed by the Commission should not be adopted and (2) that the proponent of any alternative settlement arrangement should have to bear the burden of proving that the effective competitive opportunities (“ECO”) test has been met by the country in question.

The *Flexibility Order* policies properly were designed to encourage pro-competitive agreements between U.S. and foreign carriers that would lower accounting rates and benefit U.S. consumers. As initially adopted, these policies would allow such arrangements with carriers from countries that met the ECO test or where the arrangements could otherwise be shown to promote competition. At the same time, the flexible settlement policy recognized that some alternative arrangements could distort competition and should be examined more closely. Accordingly, the FCC wisely adopted safeguards requiring carriers entering into such arrangements involving more than 25 percent of the traffic on the particular route to file copies of the proposed flexible settlement arrangements and to demonstrate that the arrangement is not unreasonably discriminatory and, thus, that it would promote, not retard, competition in international telecommunications.³

In this docket, the FCC has recognized that the environment has changed substantially as a result of the signing of the WTO’s Group on Basic Telecommunications (“GBT”) agreement. In particular, the Commission determined that continuing to require that the ECO test be met is no longer appropriate.⁴ Consistent with the deletion of that test from other aspects of the

³ *Flexibility Order*, ¶¶ 36, 45.

⁴ The Commission proposes to retain the ECO test for non-WTO countries. NYNEX LD does not address that proposal.

agency's rules, the FCC proposed instead that U.S. carriers be permitted to negotiate alternate arrangements with carriers serving any WTO Member country. NYNEX LD specifically supports this proposal.

AT&T, on the other hand, would retain the ECO test threshold for flexible arrangements and require the proponent of any arrangement to bear the burden of proving the threshold is met. Neither of AT&T's suggestions should be adopted.

Retention of an ECO threshold for alternative settlement arrangements is inappropriate in a global market being reshaped by the GBT Agreement. WTO Member nations have committed to opening their markets to competition and adopting pro-competitive regulatory principles. Compliance with those commitments will substantially reduce any possibility of abuse of market power and discrimination.⁵ Accordingly, eliminating the ECO test for WTO Members is an entirely appropriate step to take under the new regime. Indeed, extending flexibility to WTO Member countries will stimulate the development of alternative settlement arrangements such that flexibility will be more the rule than the exception. This can contribute significantly to the transformation of the traditional accounting rate regime.

Moreover, AT&T's request to impose a "neutral" burden of proof on the settlement arrangement's proponent would diminish the effectiveness of the flexibility policy. The rebuttable presumption proposed by the Commission correctly balances the interest of the Commission in encouraging the implementation of innovative settlement arrangements against any concern about market power in a particular market. Those who would advance the progressive changes in settlement arrangements contemplated by the Commission's policies

⁵ Where necessary, compliance can be secured through the WTO dispute resolution process.

should not have to overcome the barriers to competitive entry AT&T would interpose.⁶

Correspondingly, those contending that a particular WTO Member country is not complying with its obligations under the GBT agreement should bear the burden of rebutting the Commission's presumption.

The FCC's alternative settlement policies are already prompting lower rates for international services. AT&T's proposals in this docket would choke this competitive entry, and tangible consumer benefit, in its infancy. It would be a step backward and result in less competition, less innovation, and higher prices for consumers. The Commission should reject AT&T's proposed modifications and adopt the policies proposed in the *NPRM*, subject to the clarification proposed by NYNEX LD in the opening round.

Respectfully submitted,

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⁶ AT&T requests in footnote 85 of its comments that the Commission clarify where the burden of proof would lie for arrangements affecting more than 25% of the traffic on a given route. AT&T's suggestion would vitiate the FCC's carefully constructed distinction between carriers with the ability to distort the market and other carriers presumed to bring competitive benefits. As such, AT&T's comments in this docket represent a collateral attack on the FCC's Flexibility Order, which is already the subject of an AT&T request for reconsideration, and should be rejected in the instant proceeding.