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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Rules and Policies on Foreign)
Participation in the U.S.)
Telecommunications Market)
)
Market Entry and Regulation of)
Foreign-Affiliated Entities)

IB Docket No. 97-142

IB Docket No. 95-22

**PETITION FOR RECONSIDERATION OF
KOKUSAI DENSHIN DENWA CO. LTD.**

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January 8, 1998

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SUMMARY

Kokusai Denshin Denwa Co. Ltd. ("KDD") hereby petitions the Commission to reconsider in part the Report and Order and Order on Reconsideration it released on November 26, 1997 in its proceedings on the entry and regulation of foreign-affiliated entities in the U.S. telecommunications market ("Report and Order"). In its Report and Order, the FCC modified its existing policies on foreign carrier entry and regulation to encourage carriers from World Trade Organization ("WTO") member countries to participate in the U.S. market. While the Commission has correctly sought to encourage foreign participation in the U.S. market, the FCC's actions do not go far enough. Accordingly, KDD recommends that the Commission modify the policies it adopted in its Report and Order in the following respects.

The Commission should modify its rebuttable presumption regarding the market power of a foreign carrier from a WTO member country to provide that such a carrier will be presumed non-dominant if it (1) does not control bottleneck local exchange facilities in the foreign country, and (2) is subject to competition from multiple facilities-based carriers that possess the ability to terminate international traffic and serve customers in the foreign market. The rule adopted in the *Report and Order* eliminates the presumption if the foreign carrier's market share is more than 50 percent in *any* market segment. As such, the rule as adopted fails to recognize that, as a practical matter, the only possible "bottleneck" international service providers in a WTO member country are those carriers that control local exchange facilities. A carrier that controls only international facilities is unlikely to possess "bottleneck" control, even if its current market share exceeds 50 percent, because of the ease with which competing carriers can establish alternative facilities.

Furthermore, where there are two or more facilities-based international carriers in the market, there is little or no concern about the availability of sufficient capacity to compete effectively. Modifying the presumption as proposed is consistent with the Commission's policy on alternative settlement arrangements with carriers from WTO member countries. In providing that the presumption in favor of such alternative arrangements with carriers from WTO member countries is rebuttable only by a showing that the foreign carrier is not subject to competition from multiple facilities-based carriers, the Commission recognized that foreign international service providers are not able to exercise market power in the face of multiple facilities-based entrants.

Should the Commission decide not to modify its presumption of non-dominance as proposed above, KDD asks that the Commission eliminate the dominant carrier safeguards that apply as a result of foreign affiliation. The principal impact of these requirements is to create entry barriers that apply only to foreign-affiliated U.S. carriers. As such, these safeguards violate the National Treatment principle in GATS Article XVII. Furthermore, the Commission's dominant carrier safeguards are completely unnecessary, since the Commission already imposes reporting requirements on all U.S. carriers to facilitate the detection of anticompetitive behavior, and any misconduct by a foreign-affiliated U.S. carrier is already proscribed by FCC rules or federal laws. Thus, the Commission's dominant carrier requirements cannot be considered "appropriate" regulatory measures within the meaning of the GATS Reference Paper.

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TO: The Commission

**PETITION FOR RECONSIDERATION OF
KOKUSAI DENSHIN DENWA CO. LTD.**

Kokusai Denshin Denwa Co. Ltd. ("KDD"), by its attorneys and pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429, hereby submits this petition for reconsideration of the Report and Order and Order on Reconsideration (FCC 97-398) [Report and Order], released on November 26, 1997 in the above-captioned proceedings. In this petition, KDD asks the FCC to establish a rebuttable presumption that a foreign carrier from a World Trade Organization ("WTO") member country lacks market power if the carrier does not control bottleneck local exchange facilities in the foreign country and if the carrier is subject to competition from multiple facilities-based carriers that possess the ability to terminate international traffic and serve customers in the foreign market. In the event the FCC does not adopt KDD's proposed presumption, KDD requests that the FCC remove the dominant carrier safeguards that apply to each U.S. carrier having an affiliation with a foreign carrier which is deemed to possess market power on the route; such safeguards are unnecessary and contrary to fundamental principles of the General Agreement on Trade in Services ("GATS") pursuant to the WTO Agreement.

Background and Introduction

In response to the recent WTO Basic Telecom Agreement, the Report and Order modified the FCC's market entry policies in ways that should contribute to increased foreign carrier participation in the U.S. international telecommunications market, thereby generating new services, more carrier choices, and lower collection rates for U.S. consumers. In particular, KDD agrees with the FCC's decision to remove the effective competitive opportunities ("ECO") test for WTO member countries. Report and Order at ¶¶ 30-43. KDD shares the FCC's belief that the WTO Agreement, by opening telecommunications markets to new entry, has obviated the ECO test for WTO member countries. Further, although the FCC expressed no opinion on the issue, KDD continues to believe that the ECO test is contrary to fundamental GATS principles.¹

While KDD approves of the FCC's decision to eliminate the ECO standard as a formal market entry policy, KDD remains concerned that the FCC has retained the discretion to deny foreign participation in the U.S. market by effectively re-introducing the ECO standard under the aegis of the vague "public interest" test. In particular, the FCC continues to regard a U.S. carrier's foreign affiliation, as well as the affiliate's market position in the foreign country, as relevant factors in the FCC's public interest analysis. Report and Order at ¶¶ 50-58. Moreover, the FCC did not define with specificity the standard it would use to determine when foreign entry could be denied for posing a "very

¹ See KDD Comments, filed July 9, 1997, at 3. KDD also continues to oppose the FCC's decision to condition the facilities-based Section 214 authorizations of foreign-affiliated U.S. carriers upon compliance with the FCC's settlement rate benchmark policies. E.g., KDD Comments, filed July 9, 1997, at 9. The FCC's settlement rate benchmark policies, including the Section 214 compliance condition, currently are on review before the U.S. Court of Appeals. See Cable and Wireless PLC v. FCC, Nos. 97-1612 et al. (D.C. Cir.).

high risk to competition" that cannot be addressed through regulatory measures short of market exclusion. Id. at ¶ 52. Lastly, the FCC stated that it would continue to defer to Executive Branch opinions on national security, law enforcement, foreign policy and trade policy in conducting the public interest analysis. Id. at ¶¶ 61-66.

KDD strongly believes that the FCC's new market entry policies constitute pre-entry restrictions which are contrary to the GATS framework, and that those policies are not objective and transparent domestic regulations as required by GATS Articles III and VI. KDD is particularly concerned about the FCC's policy of deference toward the Executive Branch; that policy does not comport with the GATS framework, including Article III transparency requirements, and in the past that policy has resulted in discrimination against the U.S. affiliates of KDD and other foreign carriers.² By contrast, Japan and other WTO member countries have implemented the fundamental GATS principles of Article III (Transparency); Article VI (Domestic Regulation); Article XVI (Market Access) and Article XVII (National Treatment) through open entry regimes which do not contain any pre-entry restrictions upon foreign entry. Given the FCC's express commitment to establish an open entry standard,³ the FCC should consider revisiting these policies based on the GATS framework, the GATS implementation regimes in other countries, and increased foreign participation in the U.S. market.

With respect to the processing of Section 214 applications by foreign-affiliated carriers, the FCC expanded the types of applications which may qualify for automatic grant within 35 days under streamlined processing, and the FCC said that it would act upon all

² See KDD Comments, filed July 9, 1997, at 5-7.

³ E.g., Report and Order at ¶ 9 ("[w]ith this Order, we remove the ECO test and replace it with an open entry standard for applicants from WTO Member countries").

other applications normally within 90 days. Id. at ¶¶ 322, 328. This new policy is a marked improvement over the FCC's previous policies, which, in KDD's view, did not provide foreign-affiliated carriers with the "certainty and predictability" that the FCC agrees are essential for telecommunications businesses. Id. at ¶ 53. At the same time, KDD is concerned that the FCC reserved the right to extend the processing period beyond 90 days in cases of "extraordinary complexity." Id. at ¶ 328. In order to promote business certainty and eliminate unnecessary delays, the FCC should act as soon as possible to remove its discretion to extend the processing period beyond 90 days in cases deemed to be extraordinarily complex.⁴ Moreover, as the FCC gains experience with its new policies in the post-WTO environment, KDD requests that the FCC consider reducing the 35- and 90-day processing periods as well.⁵ In Japan, there is no policy permitting delayed processing for applications deemed to present extraordinarily complex issues. Rather, the Ministry of Posts and Telecommunications ("MPT") will grant all applications by Japanese and foreign carriers to become Type II international carriers within 15 days, and MPT will approve Type I applications normally within two months.

KDD believes there are two issues which the FCC should address on reconsideration in these proceedings because they will have a direct and immediate effect on

⁴ While KDD believes that few if any Section 214 applications would present "extraordinarily complex" issues requiring more than 90 days to resolve, KDD would note that the FCC's International Bureau previously justified its refusal to process Section 214 applications of KDD America, Inc. in a timely manner based upon unspecified "extraordinary circumstances." See Letter from D. Cornell, FCC, to H. Hirai, KDD America (Mar. 7, 1997).

⁵ In addition, in cases where Section 214 applications are removed from streamlined processing because a petition to deny is filed, KDD would urge the FCC to consider restoring such applications to streamlined status promptly where the petitions to deny are baseless or otherwise frivolous.

the conditions under which foreign carriers may enter the U.S. market, and in one case on the arrangements they may negotiate with U.S. carriers. *First*, in the Report and Order (at ¶¶ 143-49 & 161-62), the FCC established a rebuttable presumption that a foreign carrier lacks market power if its market share is less than 50% in each of three foreign market segments: (i) international transport facilities or services; (ii) inter-city facilities or services; and (iii) local access facilities or services. In its comments, KDD had proposed that the FCC establish a presumption that a carrier lacks foreign market power if it faces multiple facilities-based competitors and does not control bottleneck local exchange facilities in the foreign country.⁶ The FCC rejected that proposal, stating that "[w]e are not persuaded by KDD's claim that, in examining foreign market power, we should consider only the control of *local exchange* facilities." Report and Order at ¶ 145 (emphasis in original). However, contrary to the FCC's statement, KDD's proposal focused upon control over bottleneck local exchange facilities as one of two critical factors in determining the market power of a foreign provider of international services, the other factor being multiple facilities-based international competitors. This petition requests that the FCC reconsider KDD's proposed standard for a presumption of non-dominant regulatory status, which KDD has modified here to apply only to carriers in WTO member countries.

Second, the FCC adopted certain dominant carrier safeguards for each U.S. carrier having an affiliation with a carrier possessing market power at the foreign end of the route. Those safeguards consist of burdensome reporting and structural separation requirements which do not apply to other U.S. carriers. Report and Order at ¶¶ 246-286.

⁶ See KDD Comments, filed July 9, 1997, at 13-14; KDD Reply Comments, filed August 12, 1997, at 7. KDD also urged the FCC to grant expeditiously the long-pending petition for reconsideration filed by KDD America, Inc. in File No. ITC-95-481 by clarifying that KDD America, Inc. is not a dominant U.S. carrier on any route.

Therefore, in the event the FCC does not adopt KDD's proposed presumption, this petition asks that the FCC remove those safeguards as being unnecessary, inconsistent with the GATS framework, and a barrier to new entry into the U.S. international telecommunications market.

Argument

I. THE PRESUMPTION OF NON-DOMINANT REGULATORY STATUS

This petition asks the FCC to establish a rebuttable presumption that a foreign carrier lacks market power if (i) the carrier does not control bottleneck local exchange facilities in the foreign country; (ii) the carrier is subject to competition from multiple facilities-based carriers that possess the ability to terminate international traffic and serve customers in the foreign market; and (iii) the carrier is from a WTO member country. KDD submits that virtually every carrier which satisfies those three criteria will not possess foreign market power. As such, this proposed presumption satisfies the FCC's criterion that "[a]ny presumption should only identify a category of foreign carriers that, as a general matter, lack the ability to leverage foreign market power into the U.S. market." Report and Order at ¶ 160.

This proposed presumption recognizes that, for all practical purposes, there can be no "bottleneck" international service providers in a market environment characterized by open entry and pro-competitive regulations pursuant to the WTO Agreement, except to the extent such providers control bottleneck local exchange facilities. As KDD demonstrated in its comments, many domestic and global carriers have ready access to the capital and other resources necessary to establish their own international gateway capabilities when they enter

a new foreign market on a facilities basis.⁷ Also, many global carriers already own end-to-end transmission capacity, and the installation of a switch with associated backhaul and transport facilities is readily achievable within a reasonable time frame. By limiting its proposed presumption to carriers in WTO member countries, KDD seeks to minimize any possible concerns the FCC may have about the foreign country's commitment to market liberalization and pro-competitive laws and policies.⁸ To the extent there may be international gateway bottlenecks in today's environment, those bottlenecks will be eroded quickly and irreparably by multiple new facilities-based entrants in WTO member countries.⁹ Carriers which control bottleneck local exchange facilities are the only carriers who may be able to retain market power for some period of time under an open entry regime due to the greater difficulty, time and cost involved in establishing competitive local services. Therefore, as regards the FCC's post-entry regulations governing U.S. international carriers, the FCC's presumption of market power should extend at most to U.S. carriers having an affiliation with foreign carriers which control bottleneck local exchange facilities, or which have a foreign market share in excess of 50% without facing multiple facilities-based competitors.

⁷ See KDD Comments, filed July 9, 1997, at 14.

⁸ E.g., Report and Order at ¶ 33 ("[t]he WTO commitments of our trading partners require that they open their markets to competition and promote the introduction of procompetitive regulatory principles"); id. at ¶ 148 ("[a]s countries fulfill their commitments to the WTO Basic Telecom Agreement, new entrants will make inroads into formerly monopolized markets and consumers will benefit from innovative services and price competition").

⁹ The FCC repeatedly has recognized the key role played by facilities-based entry in developing competitive foreign markets. E.g., Foreign Carrier Entry Order, 11 FCC Rcd 3873, 3880 (1995) ("full facilities-based competition on the foreign end of a U.S. international route is ultimately the most potent safeguard against anticompetitive effects from the entry of a foreign carrier in the U.S. international services market").

The FCC itself has recognized that foreign international service providers will not be able to exercise market power in the face of multiple facilities-based entrants. In modifying its policies governing alternative settlement arrangements, the FCC established a rebuttable presumption that such arrangements are permitted with carriers in WTO member countries. Report and Order at ¶ 302. Further, the FCC established "a straightforward, objective standard" for rebutting the presumption in favor of flexible arrangements for WTO member countries. Id. at ¶ 307. The FCC stated:

"[I]n order to rebut the presumption in favor of permitting flexibility, a party must demonstrate that the foreign carrier is not subject to competition in its home market from multiple (more than one) facilities-based carriers that possess the ability to terminate international traffic and serve existing customers in the foreign market." Id.

The FCC justified that policy by noting that "the existence of actual competition from multiple facilities-based carriers serves as a good indicator of whether market conditions are conducive to allowing U.S. carriers to enter market-oriented arrangements." Id. The FCC's confidence in the ability of multiple facilities-based entrants to erode foreign market power is well-placed, and it supports adopting KDD's proposal.

The only reservation expressed by the FCC in the Report and Order (at ¶ 157) is that "competing carriers on the foreign end" might not have "sufficient capacity" to compete effectively against an entrenched foreign carrier. However, in a foreign market characterized by two or more *facilities-based* new entrants who possess the ability to terminate international traffic and serve customers in the foreign market, it is highly unlikely that there are capacity restrictions or that any restrictions that might possibly exist are

competitively significant.¹⁰ The availability of adequate transmission capacity normally is a prerequisite to the establishment of facilities-based operations in a foreign country. Given that many global carriers already own significant foreign half-circuit capacity on major routes, and in light of the increasingly dynamic third-country routing configurations in today's telecommunications marketplace, it will be a rare case where a foreign carrier who lacks control over bottleneck local exchange facilities can manipulate capacity restrictions to retain market power in the face of multiple facilities-based competitors. Certainly, the opportunity to rebut KDD's proposed presumption gives other parties and the FCC sufficient flexibility to deal with any such rare cases.

Lastly, KDD's proposed presumption would implement the FCC's objective of adopting targeted regulations that are no more burdensome than necessary, a policy preference that reflects the regulatory principles in GATS Article VI and the WTO Reference Paper. Report and Order at ¶ 143. There is no empirical basis to presume that foreign carriers in a WTO member country have market power even though they face multiple facilities-based competitors and do not control bottleneck local exchange facilities, and it would impose needless burdens and delays upon such carriers to require them to vindicate their non-dominant regulatory status by filing a petition for declaratory ruling with the FCC.

¹⁰ The FCC itself recently recognized for the U.S.-U.K. route that "the recent reduction in regulatory barriers to entry, combined with a decrease in the cost of constructing new transoceanic cables, should lead to the more rapid construction of cable capacity, which would tend to make the exercise of market power . . . more difficult." Merger of MCI Communications Corp. and British Telecommunications plc, GN Docket No. 96-245, FCC 97-302, rel. Sept. 24, 1997, at ¶ 140. The FCC also recognized that "because of reductions in the cost of fiber optic cable and improvements in compression technology, the cost of capacity has fallen dramatically in recent years." Id. at ¶ 141. For these reasons, available cable capacity is unlikely to be a significant competitive factor in WTO member countries.

II. THE DOMINANT CARRIER SAFEGUARDS

In the event the FCC does not grant KDD's request to modify the presumption of non-dominant regulatory status, KDD requests that the FCC remove the dominant carrier safeguards that apply to each U.S. carrier having an affiliation with a carrier which possesses foreign market power on the route. In making this request, KDD does not concede that it has market power in any segment of the Japanese telecommunications market or that its U.S. affiliate, KDD America, Inc., should be regulated as a dominant carrier. However, the International Bureau has found that KDD possesses market power in Japan, and KDD is compelled to object to the dominant carrier safeguards until such time as the FCC changes that finding, which is the subject of the pending petition for reconsideration submitted by KDD America, Inc. in File No. ITC-95-481.

The FCC's dominant carrier safeguards apply only to foreign-affiliated U.S. carriers, thereby violating the National Treatment principle in GATS Article XVII. While it is a legitimate regulatory measure to impose reporting requirements upon international carriers, such requirements must apply to *all* authorized carriers. For example, MPT in Japan recently announced that international simple resale ("ISR") will be permitted on all routes with WTO and non-WTO countries, and MPT adopted reporting requirements applicable to all ISR providers, not just those providers affiliated with foreign carriers. Further, the FCC's structural separation requirement constitutes a pre-entry restriction upon participation in the U.S. market by foreign carriers which is inconsistent with the GATS framework.

In addition, the FCC's dominant carrier safeguards are completely unnecessary. The FCC already imposes annual traffic and revenue reporting requirements upon all U.S. carriers; there is no empirical basis upon which to conclude that such

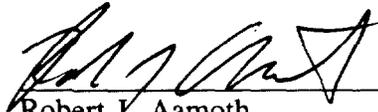
requirements are inadequate to protect legitimate U.S. interests. Moreover, any misconduct by a foreign-affiliated U.S. carrier already is proscribed by FCC rules or federal laws. The principal impact of the FCC's dominant carrier safeguards will be to erect entry barriers, thereby inhibiting competition in the U.S. market contrary to the purpose and design of the WTO Agreement. As a result, those requirements do not constitute "appropriate" regulatory measures within the meaning of the GATS Reference Paper.

Conclusion

For the foregoing reasons, KDD requests that the FCC reconsider the Report and Order as stated herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marlene Borack, hereby certify that copies of the foregoing "Petition for Reconsideration of Kokusai Denshin Denwa Co. Ltd." were served via hand delivery this 8th day of January, 1998, on the following:

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