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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)	IB Docket No. 97-142
in the U.S. Telecommunications Market)	
)	
Market Entry and Regulation of)	IB Docket No. 95-22
Foreign-Affiliated Entities)	

PETITION FOR CLARIFICATION AND RECONSIDERATION

BellSouth Corporation, pursuant to 47 C.F.R. § 1.429 of the Commission's Rules, by counsel, files its Petition for Clarification and Reconsideration of the Order in this docket.¹

In this *Order*, the Commission adopts "an open entry standard for WTO Member country applicants" seeking to enter U.S. telecommunications markets.² The Commission adopts that standard because the "market-opening commitments made by" WTO signatories and the Commission's "improved regulatory framework" allowed the Commission to conclude that entry by foreign carriers into U.S. markets would serve the public interest despite any market power they may possess in their home markets.³ The

¹ Report and Order and Order on Reconsideration, Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Dkt. No. 97-142, Market Entry and Regulation of Foreign-Affiliated Entities, IB Dkt. No. 95-22, FCC No. 97-398 (rel. Nov. 26, 1997)("Order").

² *Order* at ¶ 2.

³ *Id.* (emphasis added)

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Commission determined that the presence of any actual competition in the foreign market or an examination to determine whether any practical barriers to entry remained there was unnecessary to protect U.S. consumers. BellSouth argued in its Comments that the Commission should apply this same standard and presumptions regarding open markets to Bell Operating Company (“BOC”) entry into the U.S. long distance market. In its *Order*, the Commission rejected this argument, and concluded that some undefined different public interest standard and presumptions should apply to BOC entry. The Commission’s reasoning on this issue is specious, and its conclusion is wrong. The Commission must reconsider and revise its *Order* to the extent it depends upon its distinction of BOC from foreign carrier entry and upon the application of different standards to these two groups of carriers. The Commission should clarify that the same public interest standard that applies to foreign carrier entry applies to BOC entry, and the same presumptions based on open markets regarding the public interest benefits of entry apply.

Prior to adopting this *Order*, the Commission applied an Equal Competitive Opportunities (“ECO”) test to determine if foreign carrier entry into U.S. markets was in the public interest.⁴ That test was the result of Commission concerns that foreign carriers often had monopoly control of their home country’s telecommunications systems, and were often legally protected monopolists. The Commission recognized that foreign carriers with market power in their home markets could leverage that market power upon entry into the U.S. to threaten anticompetitive harm to U.S. consumers.⁵ Under the ECO

⁴ *Order* at ¶ 30.

⁵ *See, e.g., Merger of MCI Communications Corporation and British Telecommunications, plc*, GN Dkt. No. 96-245. FCC 97-302 ¶¶ 156-161.

test, the Commission examined the foreign market to determine if there were any legal or any practical barriers to competition from U.S. firms.⁶ If no such barriers existed, then U.S. entry by the foreign carrier was deemed to be in the public interest.

This *Order* replaces the ECO test and its detailed examination of legal and practical barriers to competition with “an open entry standard” for firms in WTO member countries based on commitments to open markets and pro-competitive regulatory policies rather than the absence of legal and/or practical barriers to competition.⁷

We find that the commitments made in the context of WTO Basic Telecom Agreement, an increasingly competitive environment and our improved regulatory tools enable us to adopt a deregulatory approach that presumes entry is in the public interest.... Instead of undertaking an in-depth review of the competitiveness of each foreign market in order to preclude potential anticompetitive conduct, we address such concerns with safeguards, while allowing more open competitive entry. We find that our own enhanced safeguards, together with those introduced by our trading partners, pursuant to their commitments to procompetitive regulatory principles, should be sufficient to reduce the danger of anticompetitive conduct resulting from foreign entry into the U.S. market.

Order at ¶ 9. The Commission rejected arguments that “effective competition” sufficient to limit the foreign carrier’s ability to exercise market power must exist, concluding that legally open markets were sufficient.⁸

The market opening “commitments” that the Commission is relying on here are just commitments, and are not as broad, complete or detailed as those contained in the Telecommunications Act of 1996. The commitments are generally just that, commitments

⁶ *Order* at ¶ 5; *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873 (1995).

⁷ *Order* at ¶¶ 9, 33.

⁸ *Order* at ¶ 36 (rejecting arguments of AT&T).

to develop and apply market-opening measures to home country telecommunications markets. In fact, reports indicate that as of mid-December, 20 countries had failed to send even official confirmation to the WTO that they had taken steps to ratify or otherwise implement the agreement.⁹ It is unlikely that these measures, when implemented, would mirror the extensive market-opening measures of the Telecommunications Act of 1996. Thus, the regulatory scheme in the U.K., often held up as a model, does not provide for the use of unbundled network elements or mandatory discounts for resellers, as does the Telecommunications Act.¹⁰

In its Comments, BellSouth pointed out that the public interest standard and presumptions that the Commission adopts in this proceeding should apply equally to BOC applications to enter the U.S. long distance market in their regions.¹¹ Entry by firms controlling local facilities, whether foreign or domestic, is entry, and brings the same consumer benefits. If the Commission can rely on foreign governmental commitments to open markets and Commission safeguard authority, then it must logically rely on the U.S. government's broader, in place and operating market-opening measures and the Commission's broader domestic safeguard authority to presume that BOC long distance entry is in the public interest.¹² Thus, Section 271's public interest test governing BOC

⁹ TR Daily - December 19, 1997.

¹⁰ Compare 47 U.S.C. §§ 251, 252 with Statement Issued by the Director General of Telecommunications, OFTEL's Policy on Indirect Access, Equal Access and Direct Connection to the Access Network Annex A ¶ 1 (July 1996) <<http://www.oftel.gov.uk>>.

¹¹ Comments of BellSouth Corporation, *Rules & Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Dkt. No. 97-142 (FCC filed Jul. 9, 1997).

¹² That U.S. local markets are legally open is beyond dispute. 47 U.S.C. § 253. Those markets are also open in a practical sense, and far more open than those of the other WTO Members. For example, as of November, 1997, over 1,500 local

entry into the in-region long distance business must be the same public interest test governing foreign carrier entry into the U.S. and both should yield the same result.

In contrast to this common-sense notion, the Commission seems to take the position that it will apply “different standards to foreign applicants seeking to enter the U.S. market than we apply to Bell Operating Companies (BOCs) seeking to enter the domestic in-region interLATA services market.”¹³ (Although it is worth noting that the preceding paragraph in the *Order*, responding to an argument by a U.S. interexchange carrier, says “foreign carriers are subject to the same public interest standard as U.S. carriers.” *Order* at ¶ 57.) The Commission purports to “find nothing irrational about applying different entry standards” for two reasons, both specious.¹⁴

First, the Commission purports to distinguish BOC entry into in-region long distance from foreign carrier entry because BOCs are likely to become “significant” market participants in the long distance market while foreign carriers, apparently, are unlikely to become significant participants in the international calling markets from the

interconnection agreements have been finalized; over 280 companies were providing competitive local exchange service of some description; competitive local carriers had installed over 500 switches; and, local competitors served hundreds of thousands of local lines, a number that has been increasing rapidly. Peter Huber, *Local Exchange Competition under the 1996 Telecom Act: Redlining the Local Residential Customer*, (November 1996) at i-ii.

In addition, the Commission has implemented extremely broad safeguards regarding BOC entry into long distance. *See, e.g., First Report and Order and Further Notice of Proposed Rulemaking*, In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Dkt. No. 96-149 (rel. Dec. 24, 1996).

¹³ *Order* at ¶ 58.

¹⁴ *Id.*

U.S. to their home country.¹⁵ Although BOCs are likely to become “significant” long distance competitors in their regions, even assuming that foreign carriers will not be significant participants, this is a distinction without a difference because the Commission has already concluded that BOCs are unlikely ever to become “dominant” long distance providers or threaten harm to the long distance market.¹⁶ Thus, the Commission has concluded that BOCs, upon entry, should be regulated as non-dominant. Although they may gain a “significant” share because customers find their offerings attractive, the Commission found that BOCs could not drive other long distance carriers from the market and that existing safeguards precluded the BOCs from misallocating costs, engaging in predation or price squeezes, or otherwise anticompetitively discriminating against long distance carriers.¹⁷ Distinguishing the size of the market share below the threshold where that share allows some inference of market power is a meaningless exercise, and provides no reasoned basis for decisionmaking.

Second, the Commission purports to distinguish BOC from foreign entry because different statutes apply.

the BOCs are subject to a detailed statutory regime that governs their entry into in-region interLATA service under Section 271 of the Act. In considering entry by a foreign applicant into the U.S. international services market, on the other hand, the Commission is required to ensure that such entry is consistent with the public convenience and necessity.

¹⁵ *Id.*

¹⁶ Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate Interexchange Marketplace, FCC No. 97-142 (rel. Apr. 18, 1997)(“BOC Non-Dominance Order”).

¹⁷ BOC Non-Dominance Order at ¶¶ 105, 108, 111-119, 128-129.

Order at ¶ 58 (footnotes omitted). Again, this is a distinction without a difference. Section 271, the statutory provision concerning BOC entry, contains a public interest requirement just like that the Commission is applying to assess foreign carrier entry, and the Commission is required to ensure that BOC entry is consistent with the public interest just like it must do for foreign carriers.¹⁸ Entry into in-region long distance markets under Section 271 obviously requires that all its various requirements be met. However, BellSouth has argued here simply that the public interest test in Section 271 should be same as the public interest test that the Commission applies in this *Order*. The Commission's pointing to other requirements of Section 271 does not distinguish the fact that the public interest is the public interest.

CONCLUSION

For the reasons set out above, the Commission should reconsider its *Order* and clarify that the same public interest test and presumptions about the efficacy of open

¹⁸ Compare Section 271(d)(3)(C)(requested authorization must be "consistent with the public interest, convenience and necessity") with Section 214(a)(requested authorization must be "consistent with the public convenience and necessity"). There is no distinction between these different formulations of the public interest test.

markets and the Commission's regulatory safeguards apply to both BOCs seeking to enter in-region long distance markets and to foreign carriers seeking to enter U.S. markets.

Respectfully submitted,

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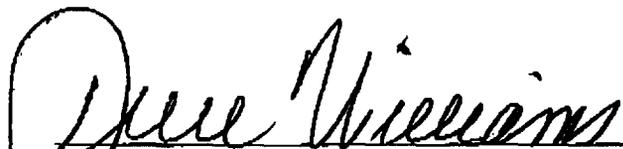
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CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of January, 1998 served the following parties to this action with a copy of the foregoing PETITION FOR CLARIFICATION AND RECONSIDERATION by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties at the addresses shown on the attached list.


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