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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	DOCKET FILE COPY ORIGINAL
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Rules and Policies on Foreign Participation in the U.S. Telecommunications Market)	IB Docket No. 97-142
)	
Market Entry and regulation of Foreign-Affiliated Entities)	IB Docket No. 95-22

PETITION FOR RECONSIDERATION

PanAmSat Corporation ("PanAmSat"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby submits this petition for reconsideration of the report and order and order on reconsideration in the above-captioned proceeding, released November 26, 1997 (the "ECO Order").

INTRODUCTION AND BACKGROUND

PanAmSat generally supports the Commission's open-entry policies as they are reflected in the ECO Order. As the Commission itself has noted, however, open entry policies will promote competition in the U.S. telecommunications markets only if they are tempered by an appropriate set of regulatory safeguards.¹ Such safeguards are necessary to prevent dominant foreign-affiliated carriers from leveraging market power overseas to the detriment of their competitors and consumers in the U.S.

On that basis, PanAmSat requests reconsideration of two rules changes that the Commission made in its dominant carrier safeguards. First, pursuant to the ECO Order, carriers that are dominant due to a foreign affiliation will nonetheless be afforded streamlined tariff processing (*i.e.*, they will be permitted to file tariffs on one day's notice with a presumption of lawfulness). Second, dominant carriers no longer will be required to obtain prior approval for circuit additions or discontinuations. Both of these rule changes, however, create opportunities for competitive abuse without countervailing public interest justifications. PanAmSat requests, therefore, that the Commission reconsider these two aspects if the ECO Order.

¹ See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142, Order and Notice of Proposed Rulemaking (rel. June 4, 1997) ("ECO NPRM") ¶¶ 8, 80.

DISCUSSION

In the ECO NPRM, the Commission recognized that, "even in this new competitive environment, [it] must maintain safeguards against the potential for a foreign-affiliated U.S. carrier to leverage the market power of its foreign carrier affiliate to the detriment of unaffiliated U.S. carriers."² The Commission, nonetheless decided in the ECO Order to dilute two of the Commission's core regulatory safeguards applicable to foreign-affiliated dominant carriers: meaningful tariff review and the circuit reporting requirements. The Commission should take this opportunity to reconsider these two changes.

I. The Commission Should Retain A Meaningful Tariff Filing Requirement For Dominant Carriers.

Pursuant to the ECO Order, carriers regulated as dominant because of an affiliation with a foreign carrier now will be permitted to file tariffs on one day's notice (rather than fourteen) with a rebuttable presumption that such tariff changes are lawful. This rule change unnecessarily eliminates an important regulatory safeguard without providing concomitant public interest benefits and should, therefore, be reconsidered.

The tariff filing requirement is the cornerstone of common carrier regulation.³ Without tariffed rates, "it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, ... and virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates."⁴ Nonetheless, the Commission concluded in the ECO Order that it would reduce the notice period for tariffs filed by foreign-affiliated dominant carriers to a single day and allow such tariffs to be filed without cost support. These changes undermine the very purposes of the tariff filing requirement.

As the Commission implicitly concedes in the ECO Order, tariffs filed by foreign-affiliated dominant carriers now will serve primarily as a record of pricing changes.⁵ The practical ability for either the Commission or the public to meaningfully review filed tariffs prior to their taking effect will have vanished, and

² ECO NPRM ¶ 80.

³ Maislin Indus. U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 132 (1990).

⁴ Id.

⁵ See ECO Order ¶ 245.

along with it the Commission's ability to be pro-active in the tariff process.⁶ Rather than seeking to ensure that no rate takes effect that is not just, reasonable, and non-discriminatory, the Commission will be left taking remedial action after the fact if a carrier's rates are shown to be unjust, unreasonable, or discriminatory.

Further, the Commission's ability to take remedial action depends in large measure on the effectiveness of its complaint procedures. Under streamlined processing, however, tariffs filed by foreign-affiliated dominant carriers will be presumed lawful and filed without full cost support. Thus, if a competitor or customer attempts to challenge a tariff filed pursuant to the new streamlined procedures, the complaining party will be required to overcome a presumption of lawfulness, notwithstanding the fact that the cost information upon which the tariff purportedly is based will be entirely in the hands of the carrier that filed the tariff. Absent voluntary disclosure (of information against self-interest) by the carrier, it is not clear how the complaining party will be able to make out even a *prima facie* case of a rate violation.

In the ECO Order, the Commission dismisses these concerns without discussion. Instead, the Commission merely asserts that the benefits of additional pricing "flexibility outweigh the claims raised by PanAmSat."⁷ The Commission reasons that this increased flexibility will result from streamlined processing because the "fourteen-day notice period significantly inhibits a dominant foreign-affiliated carrier's incentive to reduce prices [by allowing] competitors [to] respond to proconsumer price and service changes before the tariff would become effective."⁸ Two necessary assumptions underlying this conclusion remain unexplored, however.

First, no basis is provided in the ECO Order for the Commission's assumption that a fourteen-day notice period leads dominant carriers to forego price or service competition. Indeed, there is no obvious reason that this would be true. If a dominant carrier can provide better service or lower prices to its customers than its competitors can, the dominant carrier stands to gain by doing so, even if it must wait two weeks before new services or rates become effective. If, on the other hand, the dominant carrier is content to allow its competitors to charge above-competitive prices (*i.e.*, it is

⁶ See *id.* ¶ 243 (existing tariff filing requirements help to "constrain the ability of a dominant foreign-affiliated carrier to engage in anticompetitive conduct").

⁷ *Id.* ¶ 244.

⁸ *Id.*

willing to engage in tacit price collusion) there is no reason to think that an abbreviated notice period will change that behavior.

Second, the Commission does not explain in the ECO Order why it regards competitive responses during a notice period as anticompetitive or contrary to the public interest. Presumably, consumers benefit when competitors lower their prices or expand their service offerings in response to a tariff filed by a dominant carrier. If the dominant carrier can itself respond to the new rates or offerings of its competitors, it will be required to do so or risk losing market share. The fact that there may be a fourteen-day notice period for subsequent changes does not alter that conclusion.

Thus, the underlying market incentives to compete remain the same, whether or not there is a fourteen-day notice period for tariffs filed by dominant carriers. The only change that will result from the Commission's new rule is that dominant carriers will be able to respond thirteen days more quickly to a competitive pressure. These thirteen days, however, are purchased at the expense of real tariff review. This is too high a price to pay.

II. The Commission Should Retain Its Existing Rules Governing The Addition Or Discontinuation Of Circuits.

PanAmSat also requests reconsideration of the Commission's decision to eliminate the prior approval requirement for circuit additions or discontinuations on routes on which a foreign-affiliated carrier is dominant.

The Commission concedes in the ECO Order that the Section 214 approval process allows it to monitor in advance traffic and circuit growth on particular routes and that the prior approval requirement is therefore helpful in preventing "anticompetitive behavior before it occurs."⁹ Nonetheless, the Commission concluded that quarterly circuit reports, "coupled with effective enforcement, will deter anticompetitive behavior."¹⁰ Once again, however, the Commission is looking to *post hoc* remedies to substitute for prior preventative regulation. The two simply are not equivalent.

In this context, the "remedies" available are wholly impractical or inadequate. Consumers or competitors may lose, in the aggregate, millions of dollars before the

⁹ *Id.* ¶ 249.

¹⁰ *Id.*

Commission is able to impose any "remedy" for abuse of a carrier's circuit loading on a dominant route. Although the Commission may punish the carrier at issue and/or order going forward relief for consumers, it is almost inconceivable that the Commission would be able remedy the past harm caused by the anticompetitive conduct. Indeed, it may be impossible to determine the "damages" caused by anticompetitive loading practices in any given case. The Commission should not, therefore, be quick to abandon regulatory safeguards such as the prior approval process which help to prevent anticompetitive behavior in the first instance.

CONCLUSION

PanAmSat requests, therefore, that the Commission reconsider its ECO Order as set forth above.

Respectfully submitted,

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