

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

RECEIVED

FEB 10 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

**COMMENTS OF CABLE AND WIRELESS PLC
AND CABLE & WIRELESS, INC.**

I. Introduction

Cable and Wireless plc ("C&W") and Cable & Wireless, Inc. ("CWI") (collectively, the "C&W Companies"), by their attorneys and pursuant to 47 C.F.R. §1.429 and the Commission's January 20, 1998 Public Notice (Report No. 2249), submit these comments on the petitions filed by MCI Telecommunications Corporation ("MCI"), PanAmSat Corporation ("PanAmSat"), and Kokusai Denshin Denwa Co. Ltd. ("KDD") requesting reconsideration of the Commission's *Report and Order and Order on Reconsideration* (FCC 97-398), released on November 26, 1998 ("*Report and Order*"), in the above-captioned proceedings.

As discussed below, the C&W Companies oppose the petitions of MCI and PanAmSat. MCI fails to raise any grounds in its petition for reversing the FCC's decision not to apply the benchmark settlement rate condition to the switched resale authorizations of foreign-affiliated carriers. Similarly, PanAmSat presents no new or valid reasons in its petition for requiring dominant foreign-affiliated carriers to comply with lengthy tariff notice periods or obtain further Section 214 authority before adding or deleting circuits. As such, the Commission should deny these petitions.

The C&W Companies support the request of KDD to eliminate all competitive safeguards for foreign-affiliated carriers regulated as dominant by virtue of their foreign affiliation. The C&W Companies agree with KDD's assessment that the FCC cannot reconcile its dominant carrier safeguards with U.S. obligations under the WTO Basic Telecommunications Agreement and the General Agreement on Trade in Services ("GATS"). Thus, the Commission should grant KDD's petition and eliminate the dominant carrier safeguards for foreign-affiliated carriers. At a minimum, the FCC should eliminate all dominant carrier safeguards for foreign-affiliated carriers except structural separation, in light of prior precedent. Indeed, where the U.S. affiliate does not control nor is controlled by the foreign affiliate, the FCC should refrain altogether from imposing dominant carrier regulation.

II. Benchmark Condition on Resale Authorizations of Foreign-Affiliated Carriers

In the *Report and Order*, the Commission considered and rejected AT&T's proposal to apply the benchmark settlement rate condition to the switched resale authorizations of foreign-affiliated U.S. carriers. The FCC held that it is unnecessary and inappropriate to apply the benchmark condition to resellers, because the condition is designed to prevent carriers from engaging in a predatory price squeeze, and a switched reseller's provision of service to an affiliated market does not present a danger of anticompetitive effects. In making this finding, the Commission held that a switched resale carrier has less incentive than a facilities-based carrier to attempt a price squeeze.¹ While an integrated carrier might in theory consider attempting a predatory price squeeze if it has reason to believe that it

¹ *Report and Order* at ¶ 194.

could subsequently raise prices after precluding other existing and actual competitors from the markets, a switched reseller can neither force competitors to exit nor prevent subsequent entry, since the switched resale provider does not control the underlying international facilities over which it provides service.² The Commission also found that it is easier to detect a predatory price squeeze scheme that is attempted by a switched reseller than by a facilities-based carrier, since a significant portion of a switched resale provider's costs — the wholesale rate at which it takes service from the underlying facilities-based carrier — is known or readily identifiable by the Commission and the underlying carrier.³

The FCC should deny MCI's request that the FCC reconsider its decision not to impose the benchmark settlement rate condition on the switched resale authorizations of foreign-affiliated carriers. None of the arguments presented by MCI in its petition provide any valid basis for reconsideration.

MCI contends that allowing foreign-affiliated carriers to enter the U.S. market through resale before their foreign affiliates reduce their settlement rates to benchmark levels undermines the goal of the *Benchmark Settlement Rate Order*⁴ to reduce accounting rate levels.⁵ In making this argument, MCI ignores the fact that the benchmark settlement rate condition was not intended to be a mechanism for enforcing benchmarks; rather, it was intended to reduce the ability of U.S.-licensed carriers to engage in a predatory price

² *Report and Order* at ¶¶ 198-200.

³ *Report and Order* at ¶ 204.

⁴ *International Settlement Rates*, Report and Order, IB Docket No. 96-261, FCC 97-280 (rel. Aug. 18, 1997) ("*Benchmark Settlement Rate Order*"), *appeal pending sub nom. Cable and Wireless plc v. FCC*, No. 97-1612 (D.C. Cir., filed Sept. 26, 1997).

⁵ Petition of MCI at 3.

squeeze, as discussed above.⁶ In any event, this is not a new argument; MCI raised this argument in its comments filed in this proceeding and the FCC expressly rejected it in the *Report and Order*.⁷

Despite MCI's assertions to the contrary, the FCC correctly concluded that the provision of switched resale services by a foreign-affiliated U.S. carrier to its foreign affiliate's home market does not present a significant danger of anticompetitive effects. MCI's argument — that a switched reseller has the same ability and incentive to engage in anticompetitive behavior as a facilities-based carrier because the foreign affiliate controls "an essential cost input in the downstream market"⁸ — ignores the mechanics of a price squeeze. As the Commission found in the *Report and Order*, without control of the underlying facilities in the U.S., resellers cannot realistically force other carriers to exit the market or prevent new carriers from entering, and thus cannot engage in an effective price squeeze, regardless of any relationship with affiliated foreign carriers.

MCI's arguments about difficulties in detecting anticompetitive behavior by resellers because of problems in determining wholesale costs⁹ are similarly without merit. It is frankly difficult to believe that MCI, as a provider of wholesale services in the U.S. market, does not have reasonably accurate information about wholesale costs on a rate-by-rate basis. Moreover, should the Commission believe that a carrier may be engaging in anticompetitive

⁶ See *Report and Order* at ¶ 192.

⁷ *Report and Order* at ¶ 196.

⁸ Petition of MCI at 4-5.

⁹ Petition of MCI at 5-8.

activities, it could readily obtain accurate information about wholesale costs simply by requiring the reseller and its underlying facilities-based provider to file the relevant contracts.

Recognizing the futility of its primary argument, MCI suggests a number of alternatives for the Commission to consider. First, MCI proposes that the Commission condition the switched resale authorizations of foreign-affiliated carriers on commitments to benchmark reductions within the transition schedule.¹⁰ It is difficult to address this proposal without being repetitious. Apart from the fact that 1) the benchmark condition was not intended to enforce the benchmarks, as noted previously, and 2) the Commission has already considered and rejected this argument,¹¹ the fact remains that the Commission has other, more direct means of enforcing the benchmark rates and that the Commission expressly refused in the *Benchmark Settlement Rate Order* to rely on a particular enforcement mechanism.¹² Furthermore, the Commission expressly rejected suggestions that carriers meet annual reduction targets in the *Benchmark Settlement Rate Order* as "unnecessarily restrictive."¹³

Second, MCI proposes that the Commission adopt new competitive safeguards. These suggestions are similarly without merit. MCI's suggestion that foreign-affiliated carriers be required to file copies of all contracts and arrangements with any other carrier relating to

¹⁰ Petition of MCI at 2, 9.

¹¹ *Report and Order* at ¶ 196.

¹² *Benchmark Settlement Rate Order* at ¶¶ 178, 185-189.

¹³ *Benchmark Settlement Rate Order* at ¶ 173. To the extent that MCI now insists that the Commission mandate proportionate annual reductions, its request is nothing more than a petition for reconsideration of the *Benchmark Settlement Rate Order* that is filed out of time.

services and traffic on the affiliated route¹⁴ has already been considered and rejected by the Commission.¹⁵ With respect to MCI's proposal to require the U.S. carrier to file data on the traffic and revenues of its foreign affiliate,¹⁶ MCI simply ignores the fact that the FCC has no jurisdiction to require a foreign carrier to disclose highly confidential information. Furthermore, there can be no assurance that the U.S. carrier will have access to the information or the ability to compel the foreign affiliate to produce it, since the U.S. carrier will not necessarily control its foreign affiliate. Finally, MCI's suggestion that the Commission condition individual authorizations on compliance with the benchmark condition where evidence of anticompetitive behavior is present¹⁷ simply reiterates the Commission's conclusions to this effect as stated in the *Report and Order*.¹⁸ MCI has shown no reason why new protections and procedures should be adopted.¹⁹

In sum, it is readily apparent that MCI presents no basis on which the Commission should reconsider its decision to refrain from imposing the benchmark settlement rate condition on the switched resale authorizations of foreign-affiliated U.S. carriers. Accordingly, the Commission should deny MCI's petition.

¹⁴ Petition of MCI at 2, 9.

¹⁵ *Report and Order* at ¶ 205.

¹⁶ Petition of MCI at 2, 9.

¹⁷ Petition of MCI at 8-9.

¹⁸ *Report and Order* at ¶ 214.

¹⁹ Moreover, as the Commission recognizes in the *Report and Order*, not every change in traffic patterns results in harm to competition and consumers in the U.S. market. See *Report and Order* at ¶ 208.

III. Dominant Carrier Safeguards

In the *Report and Order*, the Commission modified the tariff filing requirements for dominant foreign-affiliated carriers by shortening the notice period from 14 days to one. In taking this action, the FCC concluded that retaining the fourteen-day notice period significantly inhibits a dominant foreign-affiliated carrier's incentive to reduce prices, because competitors can respond to price and service changes before the tariff becomes effective, and found that a one-day notice period would give carriers additional flexibility to respond to customer demands.²⁰ The Commission also replaced the prior approval requirement for circuit additions and discontinuances with quarterly notifications of circuit additions on the dominant route in the *Report and Order*. The FCC based this action on its finding that such action would allow the Commission to monitor conduct while permitting carriers to respond promptly to developments in the global telecommunications market.²¹

PanAmSat argues in its petition that the Commission should reverse its decision and reinstate both the fourteen-day notice period for tariff filings as well as the requirement for follow-on authority for circuit additions and deletions.²² Neither suggestion has merit. PanAmSat's contention that a short notice period is unsatisfactory — allegedly because it leaves the FCC and the public with no practical ability to engage in a meaningful review of tariffs²³ — is one that PanAmSat has already raised and the Commission has rejected in this

²⁰ *Report and Order* at ¶ 244.

²¹ *Report and Order* at ¶ 249.

²² Petition of PanAmSat at 1.

²³ Petition of PanAmSat at 2-3.

proceeding.²⁴ PanAmSat fails to demonstrate in its petition that the Commission's conclusion on this issue was erroneous.

Similarly, the Commission has previously rejected PanAmSat's argument that additional authority should be required for circuit additions and deletions by dominant foreign-affiliated carriers because "after-the-fact" remedies cannot adequately address competitive harm arising from abuse of circuit loadings. As CWI indicated in its petition for reconsideration of the *Market Entry Order*,²⁵ restricting the ability of carriers to add capacity on their previously authorized networks undercuts the Commission's objective of promoting effective competition in the U.S. market for international telecommunications services, since it constrains carriers in addressing the needs of existing customers and attracting new business. More importantly, restrictions on the ability of carriers to add capacity on previously authorized routes can impose direct and unwarranted costs on consumers, including possibly a temporary loss of service, if those customers are forced to

²⁴ Furthermore, the Commission has repeatedly recognized that advance notice of tariff changes stifles price competition and marketing innovation. *See, e.g., 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*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142, ¶ 88 (rel. Apr. 18, 1997) ("LEC Regulatory Treatment Order"), *citing Policy and Rules Concerning the Interexchange Marketplace, Implementation of Section 251(g) of the Communications Act of 1934*, CC Docket No. 96-61, Second Report and Order, FCC 96-424, ¶ 53 (rel. Oct. 31, 1996).

²⁵ Petition for Reconsideration of CWI, filed Jan. 29, 1996, in *Market Entry and Regulation of Foreign-affiliated Entities*, IB Docket 95-22, Report and Order, 11 FCC Rcd 3873 (1995) ("Market Entry Petition"). Because of the Commission's requirement that dominant foreign-affiliated carriers obtain additional authority to add capacity, CWI has had in the past to seek special temporary authority to add circuits on previously authorized routes. *See* Letter from Charles J. Gibney, CWI to Troy Tanner, International Bureau, requesting special temporary authority to resell additional private line channels on the U.S.-Bermuda and U.S.-Hong Kong route, File No. TAO-2586, filed June 13, 1997 and granted June 20, 1997. Additional capacity was required to satisfy demand from existing customers for increased bandwidth on the affected routes.

migrate to other carriers. Finally, requiring foreign-affiliated carriers to obtain additional authority to add capacity is not necessary to prevent anticompetitive conduct, since a multitude of Commission requirements assure fair competition by foreign-affiliated carriers, including the "no special concessions" obligation and detailed reporting requirements. In light of these facts, the Commission should deny PanAmSat's petition for reconsideration.

KDD in its petition contends that the FCC should eliminate all of the dominant carrier safeguards. KDD argues that the safeguards violate GATS requirements regarding national treatment, because they create barriers to entry that apply only to foreign-affiliated U.S. carriers. KDD also argues that the dominant carrier safeguards are not "appropriate" within the meaning of the GATS Reference Paper, since the reporting requirements imposed on all U.S. carriers and the prohibitions on anticompetitive conduct already contained in the FCC's rules make additional measures unnecessary.²⁶

CWI agrees with KDD's assessment and joins KDD in urging the Commission to eliminate the dominant carrier safeguards altogether for carriers regulated as dominant solely because of their foreign affiliations. At a minimum, the FCC should eliminate all of the safeguards for any foreign-affiliated carrier that complies with the structural separation requirement. The FCC has consistently held through the years that where there is structural separation between a carrier with market power and an affiliated carrier offering competitive services, non-dominant regulation is appropriate for the affiliated carrier.²⁷ In light of these

²⁶ Petition of KDD at 10-11.

²⁷ See, e.g., *LEC Regulatory Treatment Order* at ¶¶ 7-8 (LEC interexchange affiliates regulated as nondominant in provision of in-region interstate and international services); *Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, CC Docket No. 96-21, Report and Order, 11 FCC Rcd. 18564, 18575 (1996); *Atlantic Tele-Network Co.*, 4 FCC Rcd. 8302, 8382-8303 (1989); *Policies and Rules Concerning Rates for* (continued...)

facts, it would be difficult for the FCC to impose competitive safeguards in addition to the structural separation requirement and comply with the U.S. obligations under GATS regarding national treatment and appropriate safeguards. Indeed, the Commission should eliminate all dominant carrier safeguards, including the structural separation requirement, if the U.S. carrier does not control and is not controlled by the foreign affiliate. In the absence of control, the threat of anticompetitive behavior is quite remote as a practical matter, such that the costs of competitive safeguards greatly outweigh any realistic benefit.

IV. Conclusion

For the reasons stated herein, the Commission should deny the petitions for reconsideration filed by MCI and PanAmSat, and grant KDD's request to eliminate the dominant carrier safeguards for foreign-affiliated carriers.

Respectfully submitted,

CABLE AND WIRELESS PLC AND
CABLE & WIRELESS, INC.

By: 
Philip V. Permut
Robert J. Aamo
Joan M. Griffin
KELLEY DRYE & WARREN LLP
1200-19th Street, N.W.
Suite 500
Washington, D.C. 20036

Their Attorneys

February 10, 1998

²⁷(...continued)

Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191, 1198 (1984).

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Comments of Cable & Wireless, plc, and Cable & Wireless, Inc., were served upon the parties listed below by United States mail, postage prepaid, this 10th day of February, 1998.

Henry Goldberg
Joseph A. Godles
W. Kenneth Ferree
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, DC 20036
Counsel for PanAmSat Corporation

Sanford C. Reback
Scott A. Shefferman
Larry A. Blosser
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006
Counsel for MCI

J. Gregory Sidak
11th Floor
1150 Seventeenth Street, N.W.
Washington, DC 20036
individually

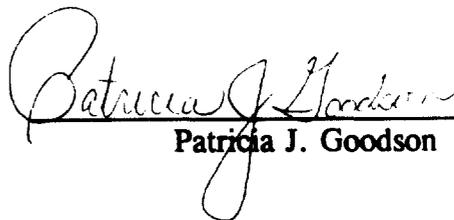
William B. Barfield
David G. Richards
Jonathan B. Banks
BELLSOUTH CORPORATION
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

John L. Bartlett
Carl R. Frank
Jennifer D. Wheatley
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006-2304
Counsel for Aeronautical Radio, Inc.

James D. Ellis
Robert M. Lynch
SBC COMMUNICATIONS, INC.
175 East Houston, Room 1254
San Antonio, TX 78205

Stanley J. Moore
5850 W. Las Positas Boulevard
Pleasanton, CA 94588
Counsel for SBC Communications, Inc.

Robert J. Aamo
Kelley Drye & Warren, LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036
Counsel for Kokusai Denshin Denwa Co. Ltd.


Patricia J. Goodson